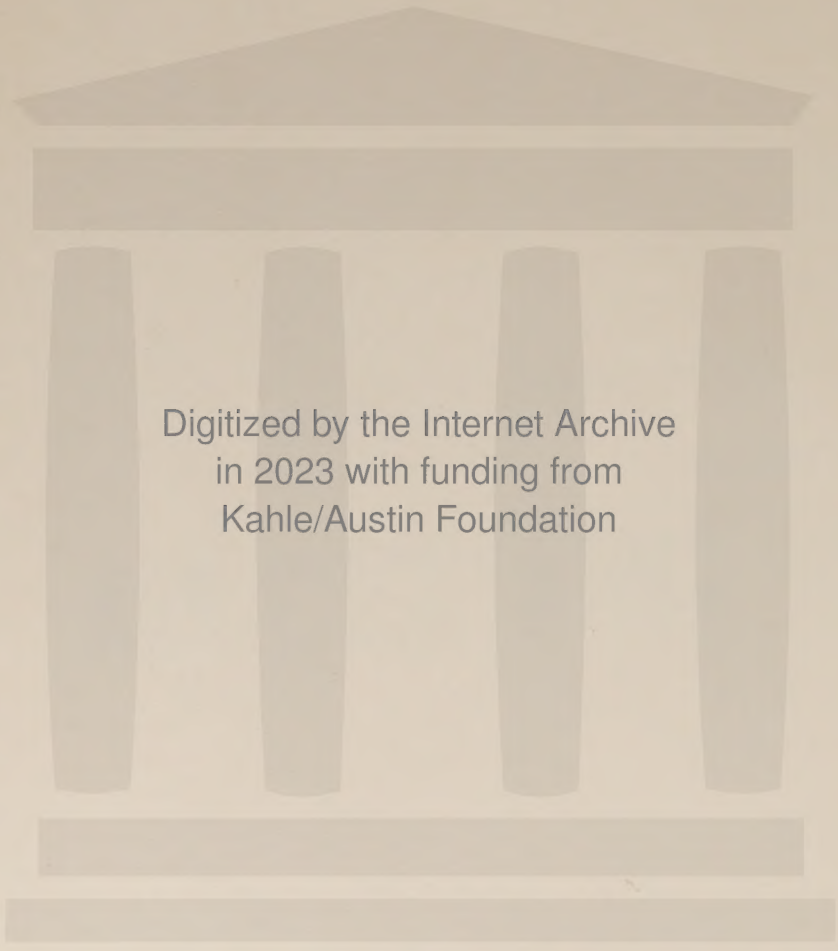
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CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES



109 P.2d – 110 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

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Pacific Reporter, Second Series, Vol. 109, Nos. 1-4;
Vol. 110, Nos. 1-4.

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CAL.REP.109-110 P.2d
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[1] Appointed Feb. 14, 1941.

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SECOND SERIES

16 Cal.2d 793

In re WATKINS' ESTATE.

WATKINS et al. v. KEELE.

L. A. 17331.

Supreme Court of California.

Jan. 23, 1941.

Courts ⇐92

To extent that there might be any apparent conflict between language used by way of dictum in prior opinion concerning question presented in subsequent opinion, and language used in the subsequent opinion, the views expressed in the subsequent opinion would prevail.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles C. Burnell, Judge.

On petition for rehearing.

Petition denied.

For original opinion of Supreme Court, see 108 P.2d 417. For prior opinion of the District Court of Appeal, see 104 P.2d 389.

Simpson & Simpson, of Los Angeles, for appellants.

Faries & McDowell, of Los Angeles, amici curiae for appellant.

Stimson & Edwards, Noel Edwards, and Louis Thomsen, all of Los Angeles, for respondent.

Salisbury, Robinson & Himrod, Freston & Files, Bailie, Turner & Lake, Frank P. Doherty, Gerald E. Kerrin, Frank J. Barry, Girard F. Baker, MacFarlane, Schaefer, Haun & Mulford, John E. McCall, Howard C. Velpmen, Schell & Delamer, all of Los Angeles, DeLancey C. Smith, of San Francisco, and George J. Ford, of Los Angeles (Charles A. Loring and Gordon L. Files, both of Los Angeles, of counsel), amici curiae for respondent.

PER CURIAM.

In the petition for rehearing it is claimed that the decision "overrules without mentioning an identical case involving a mutual will, the Estate of Learned, 156 Cal. 309, 104 P. 315". The Learned case was not called to our attention prior to this petition for a rehearing. A reading of the opinion in Estate of Learned shows that that case did not involve the question presented in the present case and that any language used in that case which may appear to be in conflict with the language used in the opinion herein was not necessary to that decision. The Learned case was correctly decided on the facts before the court and is not overruled by the present case. To the extent that there may be any apparent conflict between the language used in opinion herein and the language used by way of dictum in the Learned case, the views expressed in our opinion in this matter must prevail.

The petition for a rehearing is denied.



17 Cal.2d 43

MORRIS v. RECLAMATION DIST. NO. 108 et al.

Sac. 5345.

Supreme Court of California.

Jan. 17, 1941.

1. Drains ⇐82(5)
Levees and flood control ⇐25

A reclamation district bondholder, being a "person interested" within statute conferring on person interested right to object to any assessment or reapportionment of such assessment, had right to maintain action to secure annulment of reapportionment. Pol. Code, § 3462.

See Words and Phrases, Permanent Edition, for all other definitions of "Person Interested".

2. Drains ⇐79, 88
Levees and flood control ⇐25, 27

The statute relating to subdivision and reapportionment of assessment against tract of land in reclamation district, as such statute read in 1925, permitted reclamation district to subdivide lands purchased by district for delinquent assessments, and to reapportion assessment thereon preparatory to selling the tract in smaller units, as against contention that statute only recognized right of landowner to subdivide and secure a reapportionment, and only permitted a reapportionment when owner had sold or transferred a portion of his tract to a third person and a bona fide partition had taken place. Pol. Code, § 3460, as amended by St.1917, p. 1204.

3. Drains ⇐79
Levees and flood control ⇐25

The statute relating to subdivision and reapportionment of assessment against tract of land in reclamation district must be given a reasonable interpretation. Pol.Code, § 3460.

4. Drains ⇐79, 88
Levees and flood control ⇐25, 28

A county treasurer purchasing tract of land in reclamation district for delinquent assessment becomes owner as "trustee" for holders of reclamation district bonds and for reclamation district, and county treasurer as such trustee has obligation to manage tract and to sell tract for benefit of bondholders and for benefit of district, and if tract is so large that it cannot be readily or at all sold as a single unit, treasurer can subdivide and reapportion assessment and sell tract in smaller parcels. Pol.Code, §§ 3460, 3466a.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

5. Drains ⇐67
Levees and flood control ⇐2

The statute providing that any parcel of land in reclamation district purchased by county treasurer for delinquent assessment may be sold by treasurer to any person paying treasurer the amount for which such parcel was bid in at the delinquent sale, while contemplating that parcel purchased shall be the same parcel sold, can be reconciled with statute relating to subdivision of tract of land in reclamation district and reapportionment of assessment against such tract, in view of provision in the latter statute to the effect that the reapportionment shall have the same effect as an original assessment, so that upon reapportionment the smaller parcel of land becomes the "parcel" referred to in the first statute. Pol.Code, §§ 3460, 3480.

See Words and Phrases, Permanent Edition, for all other definitions of "Parcel".

6. Drains ⇐18
Levees and flood control ⇐34

The statute, as it read in 1925, permitting reclamation district to subdivide lands purchased by district for delinquent assessments and to reapportion assessment thereon preparatory to selling the tract in smaller units became part of contract of holders of bonds of reclamation district. Pol.Code, § 3460, as amended by St.1917, p. 1204.

7. Drains ⇐67
Levees and flood control ⇐2

The 1931 amendment to statute relating to subdivision of tract of land in reclamation district and reapportionment of assessment against such tract did not confer on the county treasurer, as trustee for district, the power to subdivide land purchased by treasurer for delinquent assessments and to secure a reapportionment thereon preparatory to selling the tract in smaller units, but merely clarified such power, which existed under the statute prior to the amendment. Pol. Code, § 3460.

8. Constitutional law ⇐143
Drains ⇐67
Levees and flood control ⇐2

The 1931 amendment to statute relating to subdivision of tract of land in reclamation district and reapportionment of assessment against such tract did not "impair obligation of contract" of holder of bonds of district, even if amendment conferred on county treasurer as trustee for district the theretofore unpossessed power to subdivide land purchased by treasurer for delinquent assessments and to secure a reapportionment preparatory to selling the tract in smaller units, since land was security for bondholders, and security was the same whether land was sold in one large tract or several smaller tracts, in view of statutory requirement that smaller tracts could only be sold for fair market value. Pol.Code, §§ 3460, 3466a.

See Words and Phrases, Permanent Edition, for all other definitions of "Impair Obligation of Contract".

9. Drains ⇐88
Levees and flood control ⇐28

Where land is subdivided and a reapportionment is had under statute relating

to subdivision of tract of land in reclamation district and reapportionment of assessment against such tract, each of the smaller parcels can only be sold for its fair market value. Pol.Code, §§ 3460, 3466a.

10. Drains ⇐82(5)
Levees and flood control ⇐25

A reapportionment of subdivided tract of land in reclamation district passing by purchase at delinquent assessment sale into ownership of county treasurer as trustee for district, preparatory to selling tract in smaller units, would not be annulled for failure to file map complying with requirements of Subdivision Map Act, where statute relating to subdivision and reapportionment did not require filing of any map, and Subdivision Map Act did not apply to subdivisions of land by a public agency or public officer authorized by law, and Subdivision Map Act was aimed at state sales of subdivided tracts, and hence was inapplicable. Pol.Code, § 3460; St.1937, p. 1863.

11. Drains ⇐79, 88
Levees and flood control ⇐25, 28

Under statute relating to subdivision of tract of land in reclamation district and reapportionment of assessment against such tract, a map need not be filed. Pol.Code, § 3460.

12. Drains ⇐88
Levees and flood control ⇐28
Vendor and purchaser ⇐39

The Subdivision Map Act requiring filing of map prior to sale of any part of subdivision does not apply to subdivisions of land by reclamation district or to subdivisions authorized by law by any public agency or public officer. St.1937, p. 1863; Pol. Code, § 3460.

13. Vendor and purchaser ⇐39

The word "subdivider" in Subdivision Map Act requiring filing of map prior to sale of subdivision or any part thereof does not include public agency or public officer authorized by law to make subdivisions. St. 1937, p. 1865, § 2(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Subdivider".

14. Drains ⇐79, 88
Levees and flood control ⇐25, 27

The failure to include certain highways in reapportionment, by reclamation district trustees, of delinquent assessment of tract of land in district, did not invalidate reapportionment, where highways were old highways which were in existence at time of levy of original assessment and had been dedicated as county roads prior to levy of assessment, and such highways were not assessable under the law as it then existed. Pol. Code, §§ 3456c, 3460.

15. Drains ⇐79, 88
Levees and flood control ⇐25, 27

A reapportionment by reclamation district trustees of delinquent assessment of tract of land in district was not invalidated by the description by name in the reapportionment list of excepted roadways, where the excepted roadways were permanent and their courses appeared on official maps of county. Pol.Code, § 3460.

16. Appeal and error ⇐1178(1)

Where reversal of judgment was required, the failure, on reapportionment by reclamation district trustees of delinquent assessment on tract of land in district, to reapportion penalties and interest on assessment calls subsequent to April 1, 1930, did not invalidate entire reapportionment, since amount of such installments and penalties and interest was a matter of mere mathematical calculation from information in the record, and the trial court could modify reapportionment and correct such defect on the trial. Pol.Code, §§ 3456, 3460.

Appeal from Superior Court, Colusa County; Arthur Coats, Judge.

Action by Mary E. Morris against Reclamation District No. 108 and others for annulment of reapportionment of assessment on parcel of land within the district. From a judgment for the plaintiff, the defendants appeal.

Reversed.

Horace B. Wulff, of Sacramento, Rutledge & Rutledge, of Colusa, and Huston, Huston & Huston, of Woodland, for appellants.

Clark, Nichols & Eltse, of Berkeley, for respondent.

PETERS, Justice pro tem.

The defendants appeal from a judgment of the trial court annulling the approval of the Board of Supervisors of Colusa County of a reapportionment by the trustees of Reclamation District No. 108 of a delinquent assessment on a particularly described parcel of land within such district. The main

question presented on this appeal can be stated as follows: After a tract of reclamation district land has passed by purchase at a delinquent assessment sale into the ownership of the county treasurer, as trustee for the district, may the tract be subdivided and the assessment on such tract reapportioned, so that the tract may be sold in parcels instead of a unit, against the protest of a bondholder?

Reclamation District No. 108 is located in Yolo and Colusa Counties and embraces about 57,000 acres of land. In 1923 an assessment, known as Assessment No. 5, was properly levied upon the lands within the district. In 1925, pursuant to proceedings had under section 3480 of the Political Code, bonds were issued upon the unpaid portion of this assessment totaling over $3,000,000. Plaintiff and respondent herein, Mary E. Morris, is the owner of about $100,000 of these bonds. All semi-annual calls upon Assessment No. 5 were made within their due dates without substantial delinquencies until about 1929 or 1930. At that time many of the landowners within the district were unable to pay such calls, together with other taxes. As a result, over 23,000 acres of the lands within the district became delinquent, and, as a result, this acreage was purchased at delinquent assessment sales by the county treasurer as trustee of the district. (For a full statement of the financial condition of the district see Morris v. Gibson, 30 Cal.App.2d 684, 87 P.2d 37.) Among the 23,000 acres plus so purchased was Parcel No. 109, containing 3,120 acres, which had been assessed for $197,538.63. This is the parcel involved on this and on a prior appeal. Morris v. Poundstone, 9 Cal. 2d 485, 71 P.2d 262.

The trustees of the district who, under section 3466a of the Political Code, are entrusted with the duty to manage, liquidate and sell the lands bought in at delinquent sale, came to the conclusion that it would be to the best interests of all concerned if the large parcels so bought in were cut up into smaller parcels. The theory of this was that it was very difficult, if not impossible, to secure purchasers for large tracts, but that purchasers for smaller parcels could be secured.

The first attempt of this district to carry this policy into effect resulted in the litigation involved in Morris v. Poundstone, supra. Pursuant to the above-mentioned plan, the trustees, purporting to act under section 3466a of the Political Code, in 1935, offered for public sale, in three separate parcels, 280 acres of the 3,120 acres of Parcel No. 109, after first purchasing the title of the state to these parcels. The tax title of both the state and district were offered for sale at that public auction. Prior to the sale the trustees of the district purported to fix the full market value of the three parcels included within the 280 acres at $10,399.42. At the sale these three parcels were purchased as a unit by Marion Poundstone et al., to whom the county treasurer issued two deeds, one purporting to convey the state title, and the other purporting to convey the district title.

After this sale the purchasers purporting to act under section 3460 of the Political Code, petitioned the trustees of the district to have the balance of the uncalled portion of Assessment No. 5 reapportioned. Mary E. Morris, a bondholder, objected to the reapportionment proceeding. The trial court annulled the reapportionment, and this decision was affirmed by this court. Morris v. Poundstone, supra.

After this decision had become final, the trustees of the district then adopted the procedure leading to the present litigation. Instead of first subdividing, selling, and then reapportioning the assessment, they decided that they would first subdivide, then reapportion, and then sell. Parcel No. 109 was divided into ten parcels of a size which the trustees and the treasurer of the county believed could be readily sold. The board conferred with the state controller, inasmuch as such lands had been sold to the state for delinquent county and state taxes. A subdivision map was filed. The county treasurer then filed a petition with the board of trustees asking them to reapportion the assessment on the subdivided parcel. The trustees thereupon reapportioned the original assessment, with penalty and interest, but not including subsequent calls with interest and penalty. In making the reapportionment the board applied and used the same factors, the same calculations and information that were used in levying the original assessment against Parcel No. 109. Thereafter the board of supervisors, over the objections of respondent, approved the reapportionment. Respondent thereupon filed the present action to secure an annulment of the reapportionment. The trial court entered its judgment granting the relief prayed for. It is from this judgment that this appeal is prosecuted.

[1] There can be no doubt that respondent bondholder has the legal right to main-

tain this action. In Morris v. Poundstone, supra, 9 Cal.2d at page 492, 71 P.2d 262, it was held that a bondholder is a "person interested" within the meaning of section 3462 of the Political Code, which confers on a person interested the right to object to any assessment or reapportionment of such assessment.

The Political Code provides in detail for the issuing of bonds by a reclamation district, and for the powers of the trustees after purchase by the district of delinquent lands. The pertinent sections are fully discussed in River Farms Co. v. Gibson, 4 Cal. App.2d 731, 42 P.2d 95, and Morris v. Poundstone, supra. So far as pertinent here, section 3480, as it read in 1925, the year the bonds involved herein were issued, and substantially as it still reads except for one amendment hereafter referred to, provided that after the formation of a reclamation district and the levy of an assessment which is wholly or in part unpaid, the district may, and on petition of the owners of one-half of the district lands must, order a special election to submit to the landowners the question of the issuance of bonds in an amount equal to the unpaid assessments. The procedure there outlined was followed in the present case. After bonds are issued, it is provided that the county treasurer shall collect the assessments and place the money in a fund for the repayment of the bonds. It is further provided that the lien of any unpaid assessment continues until all of the original bonds and any refunding bond issues have been paid in full. If any assessment installment becomes delinquent, the county treasurer, after due proceedings, offers the land covered by the assessment for sale to the highest bidder, provided his bid at least equals the aggregate sum due on the delinquent installment, with interest and penalty. If no sufficient bid is made, the treasurer is required to bid in and sell the parcel to himself as purchaser, as trustee for the district. Any person interested in the property may redeem it within one year after the date of sale by paying to the treasurer a sum equal to price paid for its purchase, with interest to date of redemption. If no redemption is made the treasurer executes to himself as trustee of the district a deed to the property, free and clear of all encumbrances except state, county and municipal taxes, and any portion of any reclamation assessment remaining unpaid at the date of the sale.

As section 3480 read in 1925, after land had thus passed at the expiration of the period of redemption into the ownership of the county treasurer as trustee of the district, it could be sold by him only upon the purchaser paying the amount for which the treasurer had purchased it at the delinquent sale, with 7 per cent interest from date thereof, together with the amount of all subsequent delinquent installments, with accrued interest and penalties thereon. However, it was also provided that the treasurer, after the collection of the final installment, could sell at public auction to the highest bidder for cash.

The above-outlined plan apparently worked reasonably well until the beginning of the depression. Then, as a result of the recession of real estate values, it frequently happened that the price fixed in section 3480 for the purchase of these lands at the expiration of the period of redemption (full amount paid at delinquent sale, 7 per cent interest, plus amount of all subsequent delinquent installments with accrued interest and penalties) exceeded the fair market value of the property, so that the lands could not be sold.

In order to meet this situation, the Legislature, in 1931, amended section 3480 to further provide that after the lapse of one year from and after the expiration of the period of redemption, such parcel may be sold as provided in section 3466a of the Political Code. As part of the same reform section 3466a was added to that Code. Stats. of 1931, p. 773. It provided that after the lapse of one year from and after the period of redemption of any land sold to the district, or county treasurer as trustee of the district, pursuant to sections 3466, 3480 or 3480a of the Political Code, the county treasurer, when and as directed by the board of trustees of the district, may "sell any land remaining unsold, to the highest bidder for cash. * * * The trustees of the district shall have the right to reject any and all bids and no bid shall be accepted for an amount less than such price as shall be approved by them. No parcel shall be sold for an amount less than the fair market value thereof as such value shall be ascertained by the board of trustees. * * *" The constitutionality of section 3466a of the Political Code was upheld in River Farms Co. v. Gibson, supra.

In Morris v. Poundstone, supra, this court analyzed section 3480 of the Political Code as it read in 1925, and as amended in 1931, and section 3466a, as added to that Code in 1931, and held that those sections

did not permit *the sale* by the treasurer of a part of a tract without first reapportioning the delinquent assessment. The court in that opinion, after holding that the procedure there adopted was improper, specifically refrained from passing on the question as to whether a tract purchased by the treasurer for a delinquent assessment may be first subdivided and the assessment then reapportioned. In that connection, at page 492 of 9 Cal.2d, at page 265 of 71 P.2d, it was stated: "It is true that section 3460 of the Political Code permits a reapportionment of the assessment under some circumstances. We do not need to decide now, the point not being involved, whether the board of trustees and the county treasurer, after a purchase of a tract for a delinquent assessment, but before a resale, such as is provided for by section 3466a, could subdivide the tract and secure a reapportionment. Here the reapportionment was not sought until after the sale. For the reasons already stated, such sale must be held to have been invalid, which necessarily determines that the reapportionment, predicated thereon, was likewise void and was properly annulled."

The specific question presented in this case is whether section 3460 of the Political Code, as it read when the bonds were issued, permitted the district to subdivide lands purchased by it for delinquent assessments, and to reapportion the assessment thereon preparatory to selling the tract in smaller units. If the law did not permit such a procedure, the next question presented is whether a 1931 amendment to that section permitted such reapportionment, and, if so, whether such 1931 amendment is constitutional.

A reading of section 3460 of the Political Code, as it read in 1925, when the bonds here involved were issued, indicates that it conferred on the district as owner of the tract, power to subdivide and reapportion the assessment. After providing that the commissioners appointed by the board of supervisors have power to amend and correct any errors in the assessment list, the section then provided (Stats.1917, p. 1204): "When *any tract of land* upon which an assessment or assessments shall have been made shall be *subdivided into smaller parcels, the board of trustees of the district shall reapportion the assessment* or assessments upon such tract in such manner as will charge each of said smaller parcels with a just proportion of assessment or assessments previously made upon said tract so subdivided. Said board of trustees shall file with the clerk of the board of supervisors of the county a list or lists of the charges assessed against each of said parcels. Said reapportionment shall be approved by the board of supervisors in the manner provided in section three thousand four hundred sixty-two of this code. Said lists after such approval shall be filed with the county treasurer of the county *and shall have the same effect as an original assessment.*" (Italics added.)

[2, 3] Respondent urges that this section only recognized the right of a landowner to subdivide and secure a reapportionment, and did not recognize the right of the trustee of the district, after purchase for a delinquent assessment, to subdivide and reapportion. It is also urged by respondent that the section as it then read, and now reads, only permitted a reapportionment when the owner had sold or transferred a portion of his tract to a third person, and a bona fide partition took place. She urges that the law at no time has recognized the right of any owner to subdivide before he has sold or transferred a portion of the larger tract, or, as she puts it, the law has never permitted a "mere paper subdivision". These contentions seem to us to be unsound. We must give the section a reasonable interpretation. It would be a most peculiar arrangement if the owner of a tract was required to sell a portion thereof before he could secure the reapportionment of the assessment. That would effectively prevent him from ever selling. That was what the trustee, as an owner, attempted to do in the case of Morris v. Poundstone, supra. That is exactly the procedure that was held in that case to be invalid. In that connection the court stated (9 Cal.2d at page 491, 71 P.2d at page 265): "A prospective purchaser knows that he must take the land subject to a proportional part of the uncalled portion of the $197,000 assessment levied on the entire tract. Nothing is done by the board of trustees to ascertain the amount of such reapportionment prior to the sale. Until the reapportionment is had, it is impossible for a prospective purchaser to know what even the approximate amount of the reapportionment of the parcels offered for sale will be. How can a prospective purchaser intelligently bid at such a sale?"

[4] The section, it will be noted, does not limit the right of reapportionment to

any particular person or to any particular lands. It states "When any tract of land" is subdivided the board of trustees shall reapportion the assessment. After lands are purchased by the county treasurer for a delinquent assessment the county treasurer becomes the owner as trustee for the bondholders and for the district. One of the obligations of the county treasurer as such trustee is to manage, and, if possible, to sell the lands for the benefit of the bondholders and for the benefit of the district. If the parcel so purchased is so large that it cannot be readily or at all sold as a single unit, section 3460 recognizes that the treasurer should subdivide and reapportion the assessment and sell the land in smaller parcels.

[5] It must be conceded that there is language in section 3480 of the Political Code that is hard to reconcile with this interpretation of section 3460. Section 3480, as pointed out in Morris v. Poundstone, supra, provides that any "parcel" purchased by the county treasurer for a delinquent assessment may be sold by him to any person paying him the amount "for which said parcel" was bid in at the delinquent sale. This contemplates that the parcel purchased shall be the same parcel sold. But this language can be reconciled with section 3460 in view of the provision in the latter section to the effect that the reapportionment "shall have the same effect as on original assessment". Upon the reapportionment the smaller parcel of land becomes the "parcel" referred to in section 3480.

[6] If this construction of section 3460, as it read in 1925, is correct, and we think it is, obviously it became part of the contract of the bondholders. Any other construction would lead to absurd results. Admittedly, a landowner before a sale of his land for a delinquent assessment could subdivide and secure a reapportionment of the assessment. The bondholders took their bonds subject to that condition. When the land is purchased by the county treasurer as trustee there is even greater need for such power. The duty of the trustee is to sell the lands, if possible. If the parcel is so large that it cannot be sold, it is imperative that it be cut up in smaller parcels that are more readily saleable. From a practical standpoint this is a benefit to the bondholders. Each smaller parcel must be sold for its full and fair market value. A greater price will normally be secured for a large tract if sold in small parcels than if sold as an entirety.

[7-9] Whatever doubt existed as to whether section 3460, as it read in 1925, permitted the county treasurer to subdivide and reapportion the assessment, that doubt was set at rest by a 1931 amendment to that section. Stats. of 1931, p. 757. By that amendment the following sentence was added to the section: "Assessments and delinquencies thereon on tracts of land which have become delinquent and which have been sold for delinquency pursuant to the provisions of section 3466 or section 3480 of this code, and which have been subdivided, shall be reapportioned in the same manner and with the same effect as if such tract had not been so sold". We do not think that this amendment added anything to the statute. We think this power existed under the original statute. But even if this section as then amended conferred upon the trustee a power he did not theretofore possess, we do not believe that such change in the law would impair the obligations of the bondholder's contract, as urged by respondent. As already pointed out in River Farms Co. v. Gibson, 4 Cal.App.2d 731, 42 P.2d 95, the Appellate Court upheld the constitutionality of section 3466a of the Political Code, added in 1931, which gives the county treasurer the right to sell the delinquent land at its fair market value, even though under section 3480 of that Code, as it read at the time the bonds were issued, the treasurer could only sell for the amount of the delinquencies. The case was relied upon in Morris v. Poundstone, supra, and cited with approval in Morris v. Gibson, 30 Cal.App.2d 684, 87 P.2d 37. The reasoning employed in that case is conclusive on this issue. When land is subdivided and a reapportionment had under section 3460, then under section 3466a each of the smaller parcels can only be sold for its fair market value. The security for the bondholders is the land. The security is the same security whether it is one large tract, or ten small tracts. There is no alteration in the security accomplished by this amendment.

From what has been said, it is clear that under section 3460 the treasurer, as trustee, has the lawful power to subdivide lands purchased by him for delinquent assessments, and to secure a reapportionment thereon.

[10-13] Respondent contends that even if such power existed, the reapportionment

here was properly annulled because the procedure prescribed by law was not followed. It is first urged that the map that was filed in connection with the proceeding leading up to the reapportionment did not comply with the Subdivision Map Act, Stats. of 1937, p. 1863, in many respects. It is pointed out that the map that was filed was not signed by the county treasurer, as owner; that the state was a part owner of the tract; and that the state controller had no power to join in making the subdivision; that the certificate of the state controller dedicating certain roadways was not acknowledged. The complete answer to these contentions is that section 3460 of the Political Code does not require the filing of a map at all, and that the so-called Map Act, supra, does not apply to subdivisions of land by a reclamation district, or in fact to subdivisions by any public agency or public officer, where such subdivisions are authorized by law. The definition of subdivider in sub. (h) of section 2 of the Map Act does not include such persons or agencies. A reading of the other sections of the act demonstrates that it was never intended and could not be practically applied to such public agencies. Moreover, as sections 4 and 29 of the act demonstrate, its provisions are aimed at *sales* of a subdivided tract. In this proceeding no question as to validity of any sale is presented. This case involves simply the validity of the reapportionment on the divided tract. The making and recording of the type of map here involved is permitted under the decision of Colton L. & W. Co. v. Swartz, 99 Cal. 278, 33 P. 878.

[14] It is next urged that the reapportionment was void because certain roadways were not included within the reapportionment, and that the bondholders were therefore deprived unlawfully of this portion of their security. The record shows that two roads designated as "Poundstone Road" and "College City Road" were dedicated as public roads and excluded from the reapportionment. The evidence shows that these are not new roads but are old roads which were in existence at the time of the levy of the original assessment, and had been dedicated as county roads prior to the levy of the assessment. Under the law as it then existed such roads were not assessable. Section 3456c of the Political Code; Reclamation Dist., etc. v. East Bay, etc., Dist., 91 Cal.App. 143, 266 P. 969.

[15] It is also urged that the roadways are not properly described in the reapportionment list. The excepted roadways are permanent and their courses appear on the official maps of the county. The description was sufficient.

[16] The last major contention urged is that the reapportionment was void in that penalties and interest on assessment calls subsequent to April 1, 1930, were not reapportioned. We think that section 3460 requires that they be included. But this defect in the reapportionment proceedings did not warrant the trial court in declaring the entire reapportionment void. The amount of such subsequent installments, together with penalties and interest, is a matter of a mere mathematical calculation from information in the record. The trial court possesses full power to modify the list under such circumstances. Sections 3456, 3460 of the Political Code; Reclamation Dist. No. 673 v. Diepenbrock, 168 Cal. 577, 143 P. 763. Inasmuch as a reversal of the judgment is called for, this and any other such minor defects may be corrected on the retrial.

The judgment appealed from is reversed.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.; CARTER, J.; EDMONDS, J.; WARD, J., pro tem.



42 Cal.App.2d 449

O'BRIEN et al., Prison Directors, v. OLSON, Governor.

Civ. 6508.

District Court of Appeal, Third District, California.

Jan. 15, 1941.

Rehearing Denied Feb. 14, 1941.

Hearing Denied March 13, 1941.

1. Prisons ⇐7

In investigating charges of misconduct and neglect of duty by prison directors, the governor acted as an "officer exercising judicial functions" within terms of statute authorizing grant of writ of review where such officer exceeds jurisdiction, and governor was not merely executing executive and min-

isterial authority so as to preclude issuance of certiorari. Code Civ.Proc. § 1068; Const. art. 10, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Officer Exercising Judicial Functions".

2. Prisons ⇐7

The constitutional provision empowering governor to remove prison directors confers upon governor, as an officer, authority to hear and determine written charges of incompetency in a "judicial" capacity, as distinguished from his executive power. Const. art. 10, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial".

3. Certiorari ⇐24

In statute providing for writ of review "when an inferior tribunal, board, or officer, exercising judicial functions" has exceeded jurisdiction, the word "inferior" qualifies only the word "tribunal" and not "officer", and hence certiorari may issue to review proceedings of governor. Code Civ.Proc. § 1068.

See Words and Phrases, Permanent Edition, for all other definitions of "Inferior".

4. Mandamus ⇐71

Mandamus will lie to compel a governor to perform acts which are purely ministerial in nature and may properly be imposed on other persons or officers.

5. Certiorari ⇐21

The trial and determination of charges against a public officer are "judicial" in nature, entirely separate from governor's ordinary executive duties, and hence certiorari will issue for review of such acts. Code Civ. Proc. § 1068.

6. Mandamus ⇐64

Mandamus or any other appropriate writ may issue against the governor under proper circumstances. Code Civ.Proc. § 1068.

7. Prisons ⇐7

A certiorari proceeding to review acts of governor in removing prison directors from office is governed by the same rules which apply to ordinary proceedings for writ of certiorari. Code Civ.Proc. § 1068; Const. art. 10, § 1.

8. United States ⇐28

All officers are amenable to the law, and not even the President of the United States may arbitrarily remove a public officer, unless he holds his tenure at the will of the Chief Executive.

9. Judgment ⇐585(3)

A judgment against petitioners in prohibition proceeding brought to prevent governor from investigating charges against prison directors or removing directors from office was not "res judicata" of issues in subsequent certiorari proceeding to review governor's removal of directors. Code Civ.Proc. § 1068; Const. art. 10, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

10. Prohibition ⇐1

The writ of "prohibition" will lie only to prevent an inferior tribunal or officer from performing an act not authorized by law, and the writ supplies a preventive remedy to restrain the commission of a future act, not to review an act which has been performed.

See Words and Phrases, Permanent Edition, for all other definitions of "Prohibition".

11. Certiorari ⇐1

"Certiorari" is the remedy for reviewing record of an inferior tribunal or officer to determine whether acts were done in excess of or without jurisdiction. Code Civ. Proc. § 1068.

See Words and Phrases, Permanent Edition, for all other definitions of "Certiorari".

12. Prohibition ⇐1

A writ of prohibition may not be converted into a writ of certiorari in absence of adequate pleadings and a complete record of the inferior tribunal or officer, including the evidence upon which the acts are actually performed. Code Civ.Proc. § 1068.

13. Prisons ⇐7

In certiorari proceeding to review governor's removal of prison directors, evidence before the governor on directors' failure to prevent illegal corporal punishment of prisoners *held* not to show that governor exceeded his jurisdiction in finding directors guilty on that ground. Pen.Code, § 681; Code Civ. Proc. § 1068; Const. art. 10, § 1.

14. Prisons ⇐7

In certiorari proceeding to review governor's removal of prison directors, evidence *held* not to support charges of negligence of directors in employing warden, or in purchasing or supplying food for prisoners, nor of warden's incompetency. Pen.Code, § 681; Code Civ.Proc. § 1068; Const. art. 10, § 1.

15. Prisons ⇐7

In certiorari proceeding to review governor's removal of prison directors, governor could not be deemed to have exceeded his jurisdiction if a single material count of charges on which removal was based was supported by substantial evidence. Pen.Code, § 681; Code Civ.Proc. § 1068; Const. art. 10, § 1.

16. Constitutional law ⇐70(3)

In certiorari proceeding to review governor's removal of prison directors, court may not question wisdom of statute prohibiting corporal, cruel, or unusual punishment of prisoners, for violation of which the directors were removed. Pen.Code, § 681; Code Civ.Proc. § 1068; Const. art. 10, § 1.

17. Prisons ⇐13

The use of rubber hose or other weapon to suppress a threatened riot or to prevent prisoner from doing bodily harm to an officer or another inmate is distinguishable from deliberate infliction of corporal punishment for past offenses, and is not within inhibitions of statute prohibiting "corporal punishment", but is justifiable. Pen.Code, § 681.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporal Punishment".

18. Prisons ⇐7

It was the sole province of governor, sitting in capacity of a judicial officer in proceeding for removal of prison directors, to determine whether prisoners were flogged under circumstances constituting corporal punishment in violation of statute, or merely for purpose of necessary control of inmates, where there was evidence to support either conclusion. Pen.Code, § 681; Const. art. 10, § 1.

19. Prisons ⇐7

In proceeding before governor for removal of prison directors, prisoners testifying concerning illegal corporal punishment, who were incarcerated for felonies, were subject to the ordinary rule of impeachment. Pen. Code, § 681; Const. art. 10, § 1.

20. Officers ⇐72(1, 2)

In investigations of charges against officers whose removal is sought, the judicial tribunal or officer, like a trial jury, has exclusive province of determining credibility of witnesses and weight and sufficiency of their evidence, and reviewing court may not interfere with that province. Pen.Code, § 681; Const. art. 10, § 1.

21. Certiorari ⇐68

A reviewing court may annul a finding of an inferior judicial officer or tribunal on certiorari, only when there is no evidence to sustain a charge. Code Civ.Proc. § 1068.

22. Prisons ⇐7

Where illegal floggings of prisoners occurred frequently for more than a year, it might be assumed that prison directors in exercise of reasonable diligence should have discovered the practice, and were chargeable with constructive knowledge of the practice, as found by governor in removal proceedings. Pen.Code, §§ 681, 1573, 1576, 1578; Const. art. 10, §§ 1, 2, 5.

23. Officers ⇐72(2)

Courts are very reluctant to interfere with governor's action in removing a public officer where there is any evidence to support the charges, either by direct testimony or from reasonable inferences which may be drawn from the evidence adduced. Const. art. 10, § 1.

24. Officers ⇐72(2)

Courts may not question the motive of a governor in removing a public officer, in absence of clear proof of ulterior purpose of governor. Const. art. 10, § 1.

25. Prisons ⇐13

The constitutional and statutory provisions concerning prisons must be read together, as showing that prison directors have authority and duty to see that guards or prison employees do not violate statute against corporal punishment, when directors have either actual or constructive knowledge of such unlawful practice. Pen.Code, §§ 681, 1573, 1576, 1578; Const. art. 10, §§ 1, 2, 5.

26. Officers ⇐66, 118

The rule that public officer is not responsible for acts or omissions of subordinates properly employed by or under him, not in his private service, but as servants of the government, unless he has directed such acts to be done, or has personally cooperated therein, is well established but ap-

plicable to liability for torts rather than to liability to removal for permitting violation of statute by subordinates.

27. Officers ⇐118

The doctrine of "respondeat superior" has no application as between a public officer and his subordinates, who are likewise in the public service, unless public officer has directed or countenanced the tortious acts or has cooperated therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

28. Officers ⇐66

When superior officers countenance tortious acts by permitting subordinate officers to violate repeatedly a statute specifically prohibiting such acts, whether knowledge of such practice is actual or constructive, such conduct may furnish grounds for removal of superior officers for unfitness or neglect of duty, even though they might not be personally liable for damages for injuries sustained.

29. Prisons ⇐7

In proceeding for certiorari to review governor's removal of prison directors, court had no discretion except to determine whether governor, acting in a quasi-judicial capacity, exceeded his jurisdiction in determining that any one of the charges was supported by some substantial evidence. Code Civ.Proc. § 1068; Const. art. 10, § 1.

Petition for certiorari by A. R. O'Brien and others, members of the State Board of Prison Directors, against Culbert L. Olson, Governor of the State of California, to review and annul proceedings which resulted in petitioners' removal from office.

Affirmed.

Hearing denied; GIBSON, C. J., not participating.

John L. McNab, of San Francisco, for petitioners.

George G. Olshausen and Edward P. Murphy, both of San Francisco (Samuel J. Jones, of San Francisco, of counsel), for respondent.

PER CURIAM.

By means of certiorari, A. R. O'Brien and other duly appointed and qualified prison directors, seek to review and annul the proceedings instituted under article X, section 1, of the Constitution of California, which resulted in their removal from office by the governor. The respondent moved to quash this proceeding on the ground that the executive act of the governor in dismissing the officers is exempt from interference by the courts for the reason that he is granted by the Constitution exclusive power and authority to do so.

Each of the petitioners was appointed and qualified, for the term of ten years, as a member of the state board of prison directors. The term of none of the directors, with the exception of that of Donald Kolts, has expired. His term ended January 15, 1940. John Gee Clark is the duly appointed director of penology of the state of California. As such officer, he filed adequate written charges of alleged "misconduct, incompetency and neglect of duty", against each of the prison directors, on October 23, 1939. The accusation contained eighteen separate specifications of inefficiency. The removal of the directors from office was thereupon demanded. The charges were regularly served upon the officers. The specifications of the complaint accused the directors of: Employing and retaining as warden of San Quentin state prison an incompetent person; the lack of proper supervision of the state prisons; a failure to supply and prepare wholesome food for the use of the prisoners; permitting the maintenance of unsanitary conditions in the prisons; employing dangerous machinery in the jute mills; the lack of adequate medical attention to prisoners; a failure to require entries to be made in the warden's prison record of corporal punishments administered to prisoners; and of permission granted for prison guards to inflict corporal floggings and cruel and unusual punishment upon prisoners contrary to the provisions of section 681 of the Penal Code.

A motion to dismiss the accusations was denied. The directors filed their answer to the charges denying the material allegations thereof. On November 3, 1939, a hearing of the charges was commenced before the governor sitting in a quasi-judicial capacity, as provided by article X, section 1, of the Constitution. The respective parties were separately represented by counsel. The hearing lasted for several weeks. Three thousand pages of evidence were adduced. Most of the evidence in support of the charges was supplied by testimony from convicts in San Quentin state prison.

During the hearing of that proceeding, a petition for a writ of prohibition was filed in the superior court of Marin county, on December 27, 1939, seeking to restrain the governor from investigating the charges or removing the directors from office. An alternative writ was then issued by the court requiring the chief executive to show cause why he should not be restrained from ousting the members of the prison board.

A demurrer to that petition, on the ground that the superior court was without jurisdiction of the persons or subject-matter, and that the petition failed to state facts sufficient to constitute a cause of action, was argued and submitted for ruling on January 11, 1940. Before that demurrer was determined, the respondent in this cause filed his findings April 11, 1940, sustaining most of the material charges which had been preferred against the members of the prison board, and declaring that he would "make an order of ouster at such time, and under such circumstances as may be proper in the premises". June 21, 1940, the judge of the superior court of Marin county sustained the demurrer to the petition for a writ of prohibition. For failure to amend that petition within the time allowed, judgment was rendered against the petitioners in the prohibition proceeding dissolving the restraining order, and determining that they take nothing by that action. Subsequently the governor made an order formally removing these petitioners from office as prison directors, and he thereafter appointed their successors. This petition for a writ of certiorari was then filed.

[1, 2] The respondent contends that the writ of certiorari may not issue under section 1068 of the Code of Civil Procedure to review the order of the governor of California in removing from office the prison directors, since that act was an exercise of executive and ministerial authority which is exclusively within his province. There is no merit in this contention. In the investigation of charges of misconduct and neglect of duty of prison directors the governor clearly acted under the provisions of article X, section 1, of the Constitution, as an "officer exercising judicial functions". Sec. 1068, Code Civ. Proc.; 4 Cal.Jur. 1071, sec. 38; State ex rel. Kinsella v. Eberhart, 116 Minn. 313, 133 N.W. 857, 860, 39 L.R.A.,N.S., 788, Ann.Cas.1913B, 785. In the case last cited, which was a proceeding to review the order of the Governor of Minnesota in removing from office a county attorney, it is said: "Proceedings for the removal of a public official by the Governor are clearly of judicial character". The constitutional provision above cited confers upon the governor, *as an officer* authority in a judicial capacity to hear and determine written charges of incompetency, as distinguished from his executive power. After authorizing the governor to appoint five prison directors "who shall hold office for ten years", the last paragraph of that section provides that "The Governor shall have the power to remove either of the directors for misconduct, incompetency, or neglect of duty, *after an opportunity to be heard upon written charges*".

Section 1068 of the Code of Civil Procedure authorizes the issuance of a writ of certiorari to review the proceedings of either an inferior tribunal *or an officer* in the exercise of judicial functions. That section provides: "A writ of review may be granted by any court, except a municipal, police or justice's court, when an inferior tribunal, board, *or officer,* exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, *or officer,* and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

[3] The respondent insists that the preceding section is inapplicable to the circumstances of this case since the chief executive may not be deemed to be a mere "*inferior* tribunal". That precise contention was disposed of adversely to this respondent in the case of Harpending v. Haight, 39 Cal. 189, at page 212, 2 Am. Rep. 432; which was a petition for a writ of mandamus under section 1085 of the Code of Civil Procedure. That section contains language very similar to the section we are here required to construe. In the Harpending proceeding a mandate was sought and granted compelling the governor to perform the purely ministerial duty of authenticating a statute which had been adopted by the legislature. It was contended, as it is in the present case, that since the governor was not an "inferior tribunal" the writ should not issue against him. But the court held that "It is obvious that the word 'inferior,' as here used, is a qualification confined to the word 'tribunal'." The court further explained that the word "inferior" was used in the statute merely to designate the class

of tribunals against which the writ may issue as distinguished from the courts which are authorized to issue them. It was specifically said that it has no application to the "person" mentioned in section 1085, against whom the writ may issue. With equal force we may say that the term "inferior", as it is used in section 1068, has no application to the word "officer" against whom it is specifically provided the writ of certiorari may issue. It may issue against an *officer* sitting in a judicial capacity regardless of the station he occupies.

[4, 5] It is true that many authorities have held mandamus proceedings will not lie to control the action of a governor in matters which are strictly and exclusively political or executive in their nature. 105 A.L.R. 1124. On the contrary the authorities from many states, including California, hold that mandamus will lie to compel a governor to perform acts which are purely ministerial in their nature and which acts may properly be imposed on other persons or officers. Harpending v. Haight, supra; State ex rel. Kinsella v. Eberhart, supra; Donnelly v. Roosevelt, 144 Misc. 525, 259 N.Y.S. 356; State v. Frazier, 47 N.D. 314, 182 N.W. 545; 105 A.L.R. 1132, note. The same rule applies to a governor when he is acting in a judicial capacity pursuant to the constitutional provision authorizing him to hear and determine charges of unfitness which have been preferred against prison directors. Certainly the trying and determining of charges against a public officer are judicial in their nature. They are entirely separate and distinct from the governor's ordinary executive duties. Such quasi-judicial duties might just as well have been imposed on the attorney general or any other state officer or court. A review of such a separate judicial proceeding in no way infringes upon the exclusive executive authority which vests in the governor as the chief officer of the state. We are therefore of the opinion the writ of certiorari may properly issue under the circumstances of this case.

[6] It is true that the cases in some other jurisdictions are conflicting with respect to the circumstances under which a special writ may issue to compel the governor of a state to perform acts of a purely ministerial nature. See Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51, 105 A.L.R. 1115, note. California is in accord with the decisions of a dozen other states in holding that mandamus or any other appropriate writ may issue against the governor under proper circumstances. Middleton v. Low, 30 Cal. 596; Stuart v. Haight, 39 Cal. 87; Harpending v. Haight, supra; Elliott v. Pardee, 149 Cal. 516, 86 P. 1087. If a governor were immune from judicial control under all circumstances merely because he is the chief executive of a state, it is apparent that he might arbitrarily remove public officers for political or personal reasons without just cause, and thereby defeat the very purpose of our democratic form of government. State v. Verage, 177 Wis. 295, 187 N.W. 830, 23 A.L.R. 491; State ex rel. Kinsella v. Eberhart, supra; State v. Frazier, 47 N.D. 314, 182 N.W. 545; 52 A.L.R. 24, note. In the Kinsella case, supra, the court quotes with approval the assertion of Chief Justice Field in People ex rel. McCauley v. Brooks, 16 Cal. 11, that "No officer, however high, is above the law." In the headnote to the brief found in 52 A.L.R., at page 24, upon the subject of the conclusiveness of a governor's findings of unfitness of a public officer as the basis for removing him, it is said:

"While the courts are very reluctant to interfere with the governor's action in removing a public officer, yet there is authority for the view that, if the officer is not subject to summary removal, but can only be removed for cause for reasons specified in the Constitution or statute, he is not without redress through the courts."

[7] In the brief last cited many cases are enumerated in which the writ of certiorari was issued to review the proceedings of governors in removing public officers. We are of the opinion the writ may properly issue under the circumstances of this case to determine whether the governor, sitting in a quasi-judicial capacity, has exceeded his jurisdiction in sustaining the charges which were preferred against the prison directors, and in removing them from office. The situation is governed by the same rules which apply to the ordinary proceedings for a writ of certiorari. 2 Cal.Jur. 1071, sec. 38.

[8] It has been uniformly held that all officers are amenable to the law. Not even the president of the United States may arbitrarily remove a public officer, unless he holds his tenure at the will of the chief

executive. In the frequently-cited case of Marbury v. Madison, 1 Cranch 137, at page 162, 2 L.Ed. 60, Chief Justice Marshall said:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. * * *

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

In the case last cited the president of the United States appointed Mr. Marbury as a justice of the peace in the District of Columbia for a definite term of years. His commission was in the custody of the secretary of state for the mere ministerial purpose of affixing the seal and recording the document, when the president's term expired. The succeeding president sought to revoke the appointment of the justice of the peace by directing the secretary of state not to deliver his commission. Marbury asked for a writ of mandamus to compel delivery of his commission of appointment. The syllabi correctly states the principles of law which were decided in that case, as follows:

"The President cannot authorize a Secretary of State to omit the performance of those duties which are enjoined by law.

"A justice of peace in the District of Columbia is not removeable at the will of the President.

"When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete.

"A mandamus is the proper remedy to compel a Secretary of State to deliver a commission to which the party is entitled."

In the case of Humphrey's Executor v. United States, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611, the president's arbitrary removal of a duly appointed member of the Federal Trade Commission, was by a unanimous decision held to be invalid, and a judgment for the commissioner's salary, which accrued after his purported removal from office, was sustained. In that case the Supreme Court of the United States quotes with approval from the Marbury opinion with respect to the remedy of an officer who has been arbitrarily removed without cause by a chief executive. The syllabus of that case also correctly states the principle of law determined, as follows:

"The President's power to remove a member of the Federal Trade Commission is limited to removal for the specific causes enumerated in § 1 of the Federal Trade Commission Act [15 U.S.C.A. § 41].

"The fixing of a definite term for a public officer, subject to removal for cause, is enough * * * to establish a legislative intent that the term is not to be curtailed in the absence of such cause."

In the present case the term of the prison directors is fixed by law at ten years, and the governor is authorized to remove them only for cause after formal charges have been preferred and sustained in a hearing as provided by the Constitution. The writ of review may be properly directed to the chief executive of a state for the purpose of determining whether he acted in a judicial capacity without or in excess of such authority in examining and determining the charges of unfitness which have been preferred against the prison directors as provided by article X, section 1, of the Constitution.

[9-11] The respondent contends that the judgment which was rendered in the prohibition proceeding in Marin county is determinative of the issues of this cause in accordance with the doctrine of res judicata. We are of the opinion the judgment in the prohibition proceeding is not res judicata of the issues presented on this petition for a writ of certiorari. The writ of prohibition was sought to restrain the governor from investigating the charges of unfitness of the prison directors and from discharging them on that account. The writ of prohibition will lie only to prevent an inferior tribunal or officer from performing an act not authorized by law. That writ supplies a preventive remedy to restrain the commission of a future act, and not to review an act which has been performed. State Board of Equalization v. Superior Court, 9 Cal.2d 252, 70 P.2d 482; Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 220 P. 306. At the time judgment was rendered in the prohibition case for failure to amend the petition after a demurrer had been sustained, the governor had not yet completed his investigation of the charges and he had not then dismissed

the prison directors. Both of those acts were subsequently performed before this writ of certiorari was issued. The writ of certiorari is authorized for quite a different purpose. It furnishes the remedy for reviewing the record of an inferior tribunal or officer to determine whether the acts which have been performed were done in excess of or without jurisdiction.

[12] A writ of prohibition may not be converted into a writ of certiorari in the absence of adequate pleadings and a complete record of the inferior tribunal or officer, including the evidence upon which the acts are actually performed. Donner Finance Company v. Municipal Court of the City and County of San Francisco, 28 Cal.App.2d 112, 81 P.2d 1054; Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903; 4 Cal.Jur. 1022, sec. 4. Since the acts complained of in this action were not performed when the judgment in the prohibition case was rendered, that judgment is not res judicata of this certiorari proceeding.

Assuming that res judicata could be successfully pleaded and proved as an estoppel to this proceeding, which we do not concede, that fact is immaterial in view of our determination of the merits of this cause.

[13] After a careful examination of the record in this case we are unable to say the respondent exceeded his jurisdiction in finding that the petitioners were guilty of at least one of the charges preferred against them, to-wit: Authorizing or failing to prevent corporal punishment of prisoners by the guards in San Quentin state prison contrary to the provisions of section 681 of the Penal Code.

[14] While it is true that the respondent found that nine of the charges were sustained by the evidence which was adduced, he evidently deemed them to be of slight weight, with the exception of those which alleged the authorization of corporal punishment of the prisoners, for he says in his findings: "The matters which in and of themselves seem to require dismissal of the board are nearly all bound up with the practice of inflicting cruel and corporal punishment within the prison." We find no substantial evidence of negligence on the part of the prison board in employing the warden, nor of his incompetency. Nor do we find evidence of negligence on the part of the board in purchasing or supplying food for the use of the prisoners. There is evidence that sour mush was occasionally served to the prisoners and that some other food may at times have been inferior or distasteful. The evidence indicates that those defects occurred from the manner of preparation or from a lack of care in preserving the food, rather than from negligence on the part of the prison board in purchasing the food. Many of the other charges are trivial or lack substantial support of the evidence. They are evidently not strongly relied upon by the governor.

[15] If a single material count, however, is supported by substantial evidence, the governor may not be deemed to have exceeded his jurisdiction in finding the directors guilty of the charges, and we may not then interfere with his conclusions regardless of what we might think of the seriousness of the accusations. There is a conflict of evidence regarding nearly every charge. There is little doubt that some of the prisoners were repeatedly flogged with a rubber hose. There is evidence to indicate this practice continued for more than a year during which time some forty prisoners were flogged. Several prisoners testified to such punishment of themselves and of other inmates of the prison. The guards and other officers testified that the prisoners were flogged only to suppress threatened insurrections or to prevent violent disobedience of prison rules. The guards insisted that the corporal punishment which was administered was necessary to quell riots and to preserve order and control of the institution. It is true that some states authorize corporal punishment of prisoners when it is necessary to preserve discipline and to manage and control unruly and refractory convicts. State v. Revis, 193 N.C. 192, 136 S.E. 346, 50 A.L.R. 98. But the California legislature has prohibited corporal punishment of prisoners in our state institutions under all circumstances. Sec. 681, Pen.Code.

It is apparent that only strict obedience to stern prison rules can possibly hold control over the eight thousand prisoners in California's two state prisons, many of whom are hardened, desperate, incorrigible criminals. Lax control of desperate criminals will inevitably lead to defiance of authority and mutiny of prisoners so as to endanger the lives of the prison officers and the maintenance of our prison system. That very situation has occurred in our California state prisons in recent years.

[16-21] It is true that civilized governments discountenance inhuman treatment of prisoners. In that spirit, section 681 of the Penal Code was enacted to prohibit corporal, cruel or unusual punishment of prisoners. We may not question the wisdom of that statute. It is the law of California, and we are bound to abide by its mandate. There is a distinction, however, between the deliberate infliction of corporal punishment for past offenses, and the use of a rubber hose or other weapon to suppress a threatened riot or to prevent a prisoner from doing bodily harm to an officer or to another inmate of the prison. Clearly, the last-mentioned conduct does not come within the inhibitions of section 681 of the Penal Code. The use of weapons under such circumstances is justifiable and necessary. It was, however, the sole province of the respondent, sitting in the capacity of a judicial officer, under article X of the Constitution, to determine whether the prisoners were flogged with a rubber hose under circumstances constituting corporal punishment in conflict with the statute, or merely for the purpose of necessary control of the inmates. There is evidence to support either conclusion. In applying the foregoing rule regarding the weight of evidence and the credibility of witnesses we are mindful of the fact that each of the directors testified he had no personal knowledge that prisoners were being flogged with a rubber hose, and that he was opposed to the infliction of corporal punishment. We also realize that practically all of the witnesses who testified to such deliberate corporal punishment were prisoners who were incarcerated for felonies committed by them, and that they may therefore be subject to the ordinary rule of impeachment. It is also true that two of the convicts subsequently confessed they had perjured themselves in giving their testimony in that regard. But it is unquestionably the rule, applicable to such investigations, that the judicial tribunal or officer, like a trial jury has the exclusive province of determining the credibility of witnesses and the weight and sufficiency of their evidence to prove the charges preferred. With that province we may not interfere. It is only when there is no evidence to sustain a charge that a reviewing court may annul a finding of an inferior judicial officer or tribunal on certiorari. Garvin v. Chambers, 195 Cal. 212, 221, 232 P. 696.

[22-24] The remaining question to be determined is whether the violation of the corporal punishment statute by the guards may be imputed to the directors so as to justify their removal by the governor. We are pointed to no evidence that any of the directors ever had personal knowledge of the practice of flogging prisoners with a rubber hose. The directors testified that they had no such knowledge, and that they neither authorized nor approved corporal punishment. Yet all of the directors had served as such officers for several years during which time it was their duty to regularly attend meetings of the board at the prisons and to superintend the conduct of those institutions. Since floggings occurred frequently for a period of more than a year, it may be assumed that the directors, in the exercise of reasonable diligence, should have discovered that practice on the part of the guards. We are inclined to hold that constructive knowledge of the practice of flogging the prisoners, under the circumstances of this case, would be imputed to the directors, since the respondent has so found. It has been said "courts are very reluctant to interfere with the governor's action in removing a public officer" where there is any evidence to support the charges either by direct testimony or from reasonable inferences which may be drawn from the evidence adduced. 52 A.L.R. 24, note. It has been wisely said that courts may not question the motive of a governor in removing a public officer, in the absence of clear proof of an ulterior purpose on his part.

The law confers upon the prison directors general supervision and management of the state prisons. They become responsible for the conduct of the officers therein. The Constitution and the statutes indicate that fact. Section 2 of article X of the Constitution provides that: "The board of directors *shall have the charge and superintendence of the state prisons,* and shall possess such powers, and perform such duties, in respect to other penal and reformatory institutions of the State, as the Legislature may prescribe."

Section 5 of the same article provides: "The legislature shall pass such laws as may be necessary to further define and regulate the powers and duties of the Board, Wardens, and Clerks, and to carry into effect the provisions of this article."

Section 1573 of the Penal Code provides that: *"For the government and manage-*

ment of the state prisons", the governor shall appoint five prison directors. Section 1576 of the same code prescribes the duties which are imposed on the directors, including authorization for them to appoint necessary officers and employees of the prison, and to specify the duties which they shall perform. This section also requires that at least three of the directors shall visit the prisons each month, and "oftener if necessary". It compels them to report to the governor "the condition of the prisons" once each year. It also makes it their duty to "prescribe rules and regulations *for the government of the prisons*".

Section 1578 of the Penal Code prescribes the duties imposed upon the warden. Subdivision 3 of that section declares that it is his duty "to supervise the government, discipline and police of the prisons, and *to enforce all orders and regulations of the board* in respect to such prisons".

[25] While the statute does purport to confer upon the warden supervision of the conduct of the prisoners, the various provisions of the Constitution and statutes in that regard must be read together, from which it appears that the warden has supervision, subject only to the paramount authority and control of the board, for section 2 of article X of the Constitution, previously quoted, declares that "The Board of Directors shall have *the charge and superintendence of the state prisons.*" Certainly this gives them authority, and we think it imposes upon them the duty to see that the statute against corporal punishment of prisoners is not violated by guards or employees of the prison, when the members of the board have either actual or constructive knowledge of that unlawful practice.

The petitioners, however, seek to invoke the principle which relieves a superior officer of liability for damages for the torts of a subordinate officer who is engaged in the same public service. See Michel v. Smith, 188 Cal. 199, 205 P. 113, 115; Noack v. Zellerbach, 11 Cal.App.2d 186, 53 P.2d 986, 987.

[26, 27] Quoting with approval from the Michel case, supra, the Noack opinion concisely states the rule as follows: "'A public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government, unless he has directed such acts to be done, or has personally cooperated therein.' This statement is in accord with the rule uniformly followed in other jurisdictions. 1 A.L.R. 222; 3 A.L.R. 149; 12 A.L.R. 980. In Hilton v. Oliver, 204 Cal. 535, page 539, 269 P. 425, 426, 61 A.L.R. 297, trustees of a reclamation district were held not liable for the negligence of subordinates, the court saying: 'The defendant trustees can be held liable under the facts shown herein only by reason of the application of the doctrine of *respondeat superior*. This doctrine has no application as between a public officer and his subordinates, who are likewise in the public service, *unless the public officer has directed or countenanced the tortious acts* to be done, or has cooperated therein.' See annotation in 61 A.L.R. 300."

[28] The doctrine announced in the preceding quotation is well established. It will be observed, however, that those cases involved the liability of superior officers for damages for torts committed by subordinate officers engaged in the same public service. Moreover, numerous cases hold that when the tortious acts of subordinate officers are performed under the direction of the superior officer, or even with his acquiescence or approval, he may be held liable. We assume that when such tortious acts are *countenanced* by the superior officers by permitting subordinate officers to repeatedly violate a statute specifically prohibiting the acts complained of, whether knowledge of that practice is actual or constructive, such conduct may furnish grounds for removal of the superior officers for alleged unfitness or neglect of duty, even though they might not be personally liable for damages for injuries sustained.

We are of the opinion the present proceeding furnishes ample evidence distinguishing it from facts which would relieve the directors, as superior officers, from responsibility of the wrongful acts of subordinate officers of the prison under the foregoing rule.

[29] We fully realize the seriousness of the removal of the entire prison board for alleged inefficiency in view of the fact that they have rendered valuable service for the state in that capacity for many years without previous criticism. Upon this proceeding for a writ of certiorari we have no discretion except to determine whether the governor, acting in a quasi-

judicial capacity, exceeded his jurisdiction in determining that any one of the charges is supported by some substantial evidence. We are satisfied there is substantial evidence to support the finding that the board had constructive knowledge, and therefore became responsible for permitting the guards of San Quentin state prison to administer corporal punishment contrary to law upon many prisoners over a period of several months. We are therefore powerless to interfere with the respondent's discretion in passing upon the charges and dismissing the members of the board.

The order of removal of the officers is affirmed.



42 Cal.App.2d 318

PEOPLE v. O'NEAL.

Cr. 3398.

District Court of Appeal, Second District, Division 2, California.

Jan. 6, 1941.

Larceny ⇐65

Prosecuting witness' testimony corroborated in part by the testimony of other witnesses sustained conviction of petty theft.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Frank W. O'Neal was convicted of petty theft with prior conviction of a felony, and from the judgment of conviction and order denying a motion for new trial, he appeals.

Judgment and order affirmed.

Wm. J. F. Brown, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged by information with the crime of petty theft with the prior conviction of a felony. He admitted the prior conviction and a jury returned a verdict finding him guilty. He prosecutes this appeal from the judgment and from the order denying his motion for a new trial and now asserts that the evidence is insufficient to justify the conviction.

After banking hours in the afternoon of February 19, 1940, Lorrin Andrews, a lawyer, while in his office in the city of Los Angeles, received from a client an envelope containing a $100 bill and a $50 bill. The envelope was left temporarily on Andrews' flat top desk. At this time defendant came into the office for an interview. Andrews was to appear for defendant in a criminal trial which was set for the following day. After a conversation of a few minutes concerning the approaching trial Andrews was called out of the office for a minute. Upon his return defendant was standing in the doorway. He said to Andrews "I will see you in the morning" and left the office. Andrews thereupon wrote a letter and started to put the money in his safe but could not find the envelope containing the bills. He called defendant's home by telephone but received no answer. The next morning Andrews met defendant at the courtroom and asked him "Where is that money you took off my desk?" to which defendant replied that he had left it at his home and that he had taken it because he was afraid someone else might pick it up while Andrews was out of the office. Defendant assured Andrews that he would return the money upon the completion of the trial which was about to commence. Defendant was convicted at the trial and was immediately sentenced to ten days in jail. Andrews asked defendant to tell him where the money was so that he could get it but defendant promised to bring it to Andrews upon his release from jail. Defendant did not return the money to Andrews but left for Colorado, from which place he was extradited. Defendant was sworn as a witness and denied having been in Andrews' office on the day in question. He also denied having had a conversation with Andrews concerning the money.

The testimony of Mr. Andrews concerning the facts above related, which was in part corroborated by other witnesses, is ample to sustain the conviction. The jury was justified in concluding that defendant had taken the money from Mr. Andrews' desk with criminal intent.

The judgment and the order denying a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

SCHNECK v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11596.

District Court of Appeal, First District, Division 2, California.

Jan. 13, 1941.

Hearing Granted March 13, 1941.

1. Insane persons ⇐33(2)

Orders of superior court appointing guardians of the person and estate of an incompetent person are appealable. Probate Code, § 1630.

2. Insane persons ⇐33(2)

Where woman 43 years of age, who suffered from aphasia but whose mentality was disturbed only about 10 per cent. of the time, during which period she was decidedly incompetent, and at other times being entirely normal, was notified of hearing of application to appoint guardians of her person and estate and was requested to appear in court but refused to do so, petition for writ of review to annul orders appointing the guardians did not lie. Probate Code, § 1630.

3. Insane persons ⇐8, 13, 19

Where alleged incompetent was normal about 90 per cent. of the time and when notified of hearing of application for appointment of guardians for her person and estate refused to attend hearing, trial court, on being informed of facts, had authority to proceed and appoint the guardian, to order a continuance, to issue a bench warrant to compel her attendance, or to go to alleged incompetent's apartment and continue hearing at that place, and court had jurisdiction, and it was its duty as court of chancery, to determine which procedure to adopt.

4. Insane persons ⇐35

The refusal of alleged incompetent, who was normal about 90 per cent. of the time, to attend court hearing on application for appointment of guardians of her person and of estate, after service on her of citation, did not invalidate decree appointing guardians. Probate Code, § 1461; Code Civ.Proc. § 410.

5. Insane persons ⇐35

Orders appointing guardians for the person and estate of alleged incompetent were not defective for failure to recite that she was an incompetent, statute not requiring recital of existence of facts on which court's jurisdiction rests. Probate Code, § 1220.

6. Certiorari ⇐50

A writ of review brings up a complete transcript of the evidence.

7. Certiorari ⇐69

On a writ of review, if an inspection of the record discloses evidence supporting the orders of the trial court, they must be affirmed, regardless of existence of finding.

8. Insane persons ⇐32

Even if trial court should have made a finding that alleged incompetent was an incompetent before appointing guardians for her person and estate, failure to do so was a mere irregularity, not an act in excess of jurisdiction.

9. Insane persons ⇐13

Under statute providing that service in proceedings for appointment of guardians of person and estate of alleged incompetent shall be made in same manner as provided for service of summons, it is not necessary to serve petition on alleged incompetent, notwithstanding complaint is required to be served with a summons, since petition merely advises that an inquiry is to be made and such fact is in effect contained in citation. Probate Code, § 1461; Code Civ.Proc. § 410.

10. Insane persons ⇐33(2)

Where documents attached to a return and answer were not before trial court on date when it made orders appointing guardians of person and estate of an incompetent person, but were filed with return and answer on a subsequent date, they constituted no part of the proceedings of the trial court, and a motion to strike out such documents was, therefore, granted by appellate court.

11. Mandamus ⇐164(1)

A return and answer is proper in proceeding to obtain a writ of mandamus.

Petition by Celia Schneck, an incompetent, by J. W. Ehrlich, her guardian ad litem, against the Superior Court in and for the City and County of San Francisco and others, for a writ of review to annul orders appointing guardians of her person and estate. The proceeding was transferred to the District Court of Appeal by the Supreme Court, and petitioner moved to strike out a return and answer filed by respondents and certain documents attached thereto.

Motion granted in part and denied in part and orders affirmed.

J. W. Ehrlich, of San Francisco (Roy A. Sharff and Alfred M. Miller, both of San Francisco, of counsel), for petitioner.

Felix Lauricella, Eustace Cullinan, and Cullinan, Hickey & Cullinan, all of San Francisco, for respondents.

STURTEVANT, Justice.

On the 14th day of August, 1939, the respondent court made an order appointing a guardian of the person of Celia Schneck, an incompetent person, and on the same date it made another order appointing a guardian of her estate. On October 7, 1940, Celia Schneck, by J. W. Ehrlich, her guardian ad litem, commenced a proceeding in the Supreme Court asking for a writ of review to have said orders annulled. A writ was issued and the respondents filed a return thereto. Later the proceeding was transferred to this court for a hearing and determination.

[1] The petitioner contends (1) the superior court has no jurisdiction to hear proceedings to declare a person incompetent and appoint guardians unless the alleged incompetent is present in court, or her inability to be present is certified to by the affidavit of and a certificate of a duly licensed physician and surgeon; (2) the orders appointing guardians are void because there was no finding that Celia Schneck was an incompetent nor was there any adjudication that she was an incompetent person; and (3) the service upon the alleged incompetent was void because a copy of the petition was not served with the citation. The respondents call to our attention that both of the orders made on August 14, 1939, were appealable orders. Probate Code, sec. 1630. Continuing they assert that it is settled by a long line of decision that certiorari does not lie where there is an appeal or any other plain, speedy and adequate remedy even in the cases where the lower court exceeded its jurisdiction. They assert that the fact a petitioner has allowed his right of appeal to expire does not entitle him to a writ of review, unless there was a lack of notice originally or where the circumstances are aggravated and justify immediate relief. They further claim that the facts in the record before us do not bring this case within any of those exceptions. Postal etc., Co. v. Superior Court, 22 Cal.App. 770, 772, 136 P. 538 et seq. The petitioner answers by citing Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635, 647. That case, like the present, involved a proceeding appointing guardians for an incompetent person. However, the facts are clearly distinguishable. Mrs. Grinbaum had been a resident of San Francisco. While visiting in Europe she became insane. By an order duly made by the proper court in Germany she was adjudged an insane person. A similar order was made by the proper court in the republic of Switzerland. While those orders remained in full force and effect, and while she was still detained in Europe, guardians of her person and estate were appointed by the superior court of the state of California in and for the city and county of San Francisco. At no time was any notice or process served on Mrs. Grinbaum in any manner whatsoever. The contention which these respondents make was made in the Grinbaum case. In reply to the contention that Mrs. Grinbaum had another remedy to-wit, an appeal, the court said: "As to the first of these remedies [an appeal], it is conceded that the time has long gone by for its exercise, and it is obvious from the state of this record that the petitioner neither had nor was in any condition to receive notice of the making of such order or of the defects in the same during the statutory time when such appeal might have been taken." Further on in the decision Mr. Chief Justice Wilbur, speaking on the same contention, said: "It clearly appears that, at the time of the appointment of the Mercantile Trust Company, Mrs. Grinbaum was in fact insane, and that she continued to be so for many years thereafter. It further appears that her insanity is of such type that actual notice to her of the pendency of the proceeding for the appointment of a guardian in California would have no effect whatever upon her; that is to say, she was incapable mentally of receiving notice, and whatever form the notice may have taken her mentality was so clouded that she would not have understood or appreciated the nature or effect of the notice." It thus clearly appears that the rule in the Grinbaum case rested on the special facts of that case and brought it within the exception to the general rule. (4 Cal.Jur. 1056.) The Supreme Court has so construed the decision on several occasions. Erickson v. Municipal Court, 219 Cal. 737, 740, 29 P.2d 192; State Board of Equalization v. Superior Ct., 9 Cal.2d 252, 255, 70 P.2d

482; see, also, Ivory v. Superior Court, 12 Cal.2d 455, 460, 85 P.2d 894.

[2] In the instant case the record does not disclose any special circumstances excusing the failure of Celia Schneck to exercise her right of appeal. The facts are quite otherwise. The record shows that she is a woman about forty-three years of age; that some years ago she had syphilis; that she still suffers from the effects thereof; and that one of the effects causes her to suffer from aphasia. That affliction is progressing; however, at the time of the hearing, according to the report made by Dr. Stockton, her mentality was not disturbed excepting about ten per cent of the time. During these mental attacks she was decidedly incompetent. During the remaining ninety per cent of the time she was entirely normal. The record further shows that she was duly notified of the hearing of the application to appoint a guardian. She was requested to go to court but refused to do so. About thirty days thereafter she filed a petition asking to be restored to competency. At least at that time she had full knowledge that the orders under attack had been made and that she fully comprehended the effect thereof. Therefore, as stated above, the instant case does not disclose any special circumstances bringing it within the exception. (4 Cal.Jur. 1056.)

[3, 4] As stated above she was duly notified of the hearing but refused to attend. When the hearing was called on August 14, 1939, Mr. Lauricella, the attorney for the guardian, took the stand as a witness and at once disclosed the fact that Mrs. Schneck was not present, that she had been served with notice and had been requested to attend but that she refused to go to court. Thereupon he asked to be advised what to do in the premises. In order to determine that question the trial court heard Mr. Lauricella and it also heard the testimony of Dr. Firestone, Dr. Hirschfeld, and Mr. Landi, who was applying for letters. Under the circumstances the trial court had the authority (1) to proceed as it did, (2) to order a continuance, (3) to issue a bench warrant to compel her attendance, or (4) to go to her apartment and continue the hearing at that place. It had the jurisdiction and it was its duty as a court of chancery to determine which rule of procedure to adopt. Sullivan v. Dunne, 198 Cal. 183, 189, 244 P. 343. But the refusal of the petitioner, after service of the citation, to attend on the court, did not invalidate the decree. Chaloner v. Sherman, 2 Cir., 215 F. 867, 872, affirmed 242 U.S. 455, 37 S.Ct. 136, 61 L.Ed. 427; Re Moynihan, 332 Mo. 1022, 62 S.W.2d 410, 91 A.L.R. 74, 78. Such statements are not at variance with the doctrine stated in Monks v. Duffle, 163 Ark. 118, 259 S.W. 735. That is an Arkansas decision. In that state the statute (sec. 5829 of Crawford & Moses' Digest) does not provide for the service of a citation, but provides the alleged incompetent shall "* * * be brought before [the] court * * *." Manifestly such statute provides for the most certain kind of notice and also if it is not complied with the court will have acquired no jurisdiction, by notice or otherwise, of the incompetent. The most that can be said is that the trial court possibly erred but not that it exceeded its jurisdiction.

[5-8] The attack that the orders complained of do not recite that Mrs. Schneck is incompetent has no merit. Under the plain terms of the statute, Probate Code, sec. 1220, it was not necessary that said order should recite the existence of facts upon which jurisdiction of the court rested. The effect of a writ of review is to bring up a complete transcript of the evidence. Schwarz v. Superior Court, 111 Cal. 106, 43 P. 580. If an inspection of the record discloses there was evidence supporting the orders of the trial court they must be affirmed—finding or no finding. Estate of Paulsen, 179 Cal. 528, 530, 178 P. 143. If we assume the trial court should have made a finding that Mrs. Schneck was incompetent failure to do so was a mere irregularity and not an act in excess of jurisdiction. Simon v. Craft, 182 U.S. 427, 437, 21 S.Ct. 836, 45 L.Ed. 1165.

[9] Neither do we find merit in the contention that the petition should have been served on Mrs. Schneck, Section 1461 of the Probate Code is not so worded. It contains the direction that the service should be made "* * * in the same manner as provided by law for service of summons". A summons may be served by delivering a copy thereof. Sec. 410, Code Civ.Proc. True it is that said section directs that a copy of the complaint should be served therewith. If the service is not complete it can be attacked by a motion to quash. 50 C.J. 587. However, no authority is cited to the effect that a failure to serve a copy of the complaint constitutes a want of jurisdiction. It is argued that the same practice should be followed

in serving the petition as in serving the complaint. But it is obvious that such is not the fact. A complaint is required to contain a statement of the facts constituting plaintiff's cause of action. Information of such contents is necessary for the defendant to prepare his answer. But in a proceeding under Probate Code, sec. 1461, the petition merely advises that an inquiry is to be made. Such fact is, in effect, also contained in the citation.

[10, 11] After the writ was served on respondents they appeared and on November 12, 1940, they filed a full return as commanded by said writ. On December 6, 1940, they filed a document "Return and Answer". That document contains some denials of allegations contained in the petition, some affirmative allegations, and it also has attached to it (1) an affidavit made by Solomon Lande on December 2, 1940; (2) an affidavit made by Dr. Fred Firestone on December 2, 1940; (3) an affidavit made by Laura Sunseri on November 27, 1940; and (4) a photostatic copy of a letter written by Dr. Andrew B. Stockton to the trial judge on November 12, 1940. On December 9, 1940, when this proceeding was called for hearing, the petitioner filed a written motion to strike out said return and answer filed December 6, 1940, and each of said four documents. Said motion was made and submitted. Comparing the dates, it is manifest said documents attached to said answer were not before the trial court on August 14, 1939, when it made the orders complained of, and therefore they constituted no part of the proceedings in the trial court. Those are the specific documents numbered above 1, 2, 3 and 4. As to them the motion is granted. However, the motion as to the return and answer is denied. The petitioner's application was in form both a petition for a writ of review and for a writ of mandamus. On the hearing the application for a writ of mandamus was abandoned. Conceding that a return and answer is improper in a proceeding to obtain a writ of review, such a document is manifestly proper in a proceeding to obtain a writ of mandamus.

The order of the trial court appointing a guardian of the person, and the order appointing a guardian of the estate of the petitioner are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

42 Cal.App.2d 434

STIEBEL et al. v. ROBERTS et al. (BANK OF AMERICA NAT. TRUST & SAV. ASS'N et al., Interveners).

Civ. 11542.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1941.

Hearing Denied March 13, 1941.

1. Executors and administrators ⇐194(6)

That judgment roll in proceeding to set apart land as a probate homestead did not contain an affidavit showing that notice of hearing of petition for order setting land apart as homestead had been mailed or personally served upon petitioner's coexecutrix did not render order setting apart homestead void on its face where judgment roll showed that such notice had been posted as required by law and order recited that notice of hearing of amended petition therein for order setting apart homestead had been given as required by law. Probate Code, §§ 1200, 1242.

2. Executors and administrators ⇐194(2)

Proceedings of probate court with respect to a petition for an order setting apart land as a probate homestead are "proceedings in rem", and jurisdiction to hear and determine a petition for setting apart a probate homestead is acquired by filing of petition and posting of notice as required by law, personal notices not being jurisdictional. Probate Code, §§ 1200, 1242.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceedings in Rem".

3. Executors and administrators ⇐194(2)

Although failure to give personal notice to petitioner's coexecutrix of hearing of petition for order setting apart land as probate homestead might have constituted grounds for reversal of order on appeal or for relief under statute authorizing trial court to allow amendments to pleadings, failure to mail or personally serve such notice upon coexecutrix did not deprive probate court of jurisdiction to enter order setting apart homestead. Code Civ.Proc. § 473; Probate Code, §§ 1200, 1242.

4. Executors and administrators ⇐194(6)

A complaint alleging that land set apart as probate homestead for widow was separate property of deceased, that defendants connected with proceedings to set land apart knew that fact, that plaintiff, who was de-

ceased's coexecutrix, had no knowledge as to whether land was community or separate property, and that defendants falsely represented to probate court that land was community property and falsely represented value of estate, and that no notice of proceedings was given to plaintiff as coexecutrix disclosed only "intrinsic fraud" and was insufficient to justify setting aside probate court's order setting apart land as homestead. Probate Code §§ 1200, 1242.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

5. Judgment ⇐443(1)

A judgment of a court of competent jurisdiction can be set aside in an independent equitable proceeding for fraud only where fraud alleged was extrinsic to matter which was determined by such court.

6. Executors and administrators ⇐194(6)

Where beneficiaries under decedent's will did not file request for special notices of proceedings for order setting apart land as probate homestead, and notice of proceedings was posted as required by law, probate court's order setting apart land as homestead was binding upon beneficiaries without personal notice to them. Probate Code, §§ 1200, 1242.

7. Judgment ⇐376

A final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony.

8. Pleading ⇐236(1)

Denial of plaintiffs' motions for leave to amend complaint was not an abuse of discretion where it did not appear that complaint would have been sufficient to state a cause of action if proposed amendments had been allowed.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Ethel E. Stiebel and others against Elizabeth Clare Roberts and others, wherein the Bank of America National Trust and Savings Association, etc., and others intervened, to set aside an order of the probate court setting apart absolutely to defendant Elizabeth Clare Roberts certain lands as a probate homestead upon which defendant Elizabeth Clare Roberts thereafter executed a deed of trust to interveners. From a judgment for defendants and in favor of interveners, plaintiffs appeal.

Affirmed.

Potter & Potter, of Los Angeles, for appellants.

Chase, Barnes & Chase, of Los Angeles, for respondents.

M. J. Rankin, Milo V. Olson, and William C. Day, all of Los Angeles, for interveners and respondents.

SPENCE, Justice.

This is an appeal by plaintiffs from a judgment in favor of the defendants and also in favor of the interveners.

Plaintiffs are some of the beneficiaries under the will of Charles H. Roberts, deceased. Defendant Elizabeth Clare Roberts is the widow of said deceased and a beneficiary under said will. Defendants Charles Sims and Earl J. Wherry are also beneficiaries under said will and were named as defendants because of their refusal to join with plaintiffs in prosecuting this action. Defendant C. S. Price is an attorney at law who acted as attorney for the executrices.

Plaintiffs brought this action seeking to set aside an order of the probate court setting apart absolutely to defendant Elizabeth Clare Roberts a certain lot of land as a probate homestead. After said order had been made, defendant Elizabeth Clare Roberts executed a deed of trust upon said lot to secure a note in the sum of $2,500. The interveners obtained leave to file their complaint in intervention in this action seeking to have said deed of trust declared to be a valid and subsisting lien upon said lot and prior to any interest of any of the parties to the action.

Said Charles H. Roberts, deceased, died testate in 1933. In the same year, letters testamentary were issued to defendant Elizabeth Clare Roberts, his widow, and to plaintiff Ethel E. Stiebel, his daughter by a former marriage. Defendant C. S. Price was the attorney for said executrices. Said executrices filed an inventory and appraisement and, in 1934, they filed a first account and a report. Thereafter and in the same year defendant Elizabeth Clare Roberts individually filed a petition and later an amended petition for an order setting apart a certain lot as a probate homestead. She alleged therein, among other things, that said property was community property; that it consisted of a bungalow

court in which she was residing; and that it was impossible to give a description of that portion of said lot upon which the bungalow was situated in which she was residing, and that she therefore selected and designated the entire lot and asked that it be set apart to her as a probate homestead. Said amended petition came on for hearing and was granted on October 10, 1934. The order recited that notice of the hearing of the amended petition had been given as required by law; that the inventory and appraisement had been filed; that no homestead had been selected during the lifetime of the deceased; and that the lot described was community property. It was ordered that said lot be "set apart absolutely as a homestead for the use and benefit of Elizabeth Clare Roberts, the widow of the deceased". In 1936, a motion was made to vacate said order but said motion was denied. It does not appear that any appeal was ever attempted from either the order setting apart the homestead or from the order denying the motion to set aside said order.

The present action was commenced in 1937. All of the foregoing facts were alleged in the complaint and there were many other allegations. Demurrers to the complaint were overruled and defendants answered. The complaint in intervention was filed and an answer thereto was filed. The cause was set down for trial and certain stipulations were entered into by the parties and certain evidence was introduced relating to the facts set forth in the complaint in intervention. When plaintiffs offered evidence in support of their complaint, objection was made on the ground that said complaint failed to state a cause of action. Said objection was sustained. Plaintiffs then moved to amend their complaint by adding as a party plaintiff "Ethel E. Stiebel, as executrix of the Estate of Charles H. Roberts, deceased" and by adding certain further allegations. Said motion was denied. The judgment of the trial court was thereafter entered. With respect to plaintiff's complaint, it was adjudged that said complaint be dismissed and that plaintiffs take nothing by their action. With respect to the complaint in intervention, it was adjudged that the deed of trust was a valid and subsisting lien upon said lot and that the interest of plaintiffs, if any, and the interest of defendants were subordinate thereto. The portion of the judgment relating to the complaint in intervention was based upon findings of fact and conclusions of law theretofore filed. Plaintiffs appealed from the entire judgment.

Plaintiffs contend that the trial court erred in dismissing their complaint and in entering judgment in favor of the defendants and interveners. They claim that their complaint stated facts sufficient to constitute a cause of action to set aside the order setting apart the probate homestead "on the ground of extrinsic fraud and/or lack of jurisdiction."

We will first consider plaintiffs' contention in so far as it may relate to the judgment in favor of the interveners. It is not alleged that said interveners were parties to any fraud, extrinsic or otherwise, and it is apparently conceded that their deed of trust was valid unless the judgment roll in the proceeding to set apart the homestead showed on its face that the order setting apart the homestead was void for want of jurisdiction in the probate court to make such order.

[1-3] Plaintiffs' claim that such order was void on its face is based upon the fact that the judgment roll in the proceeding to set apart the homestead did not contain an affidavit showing that notice of the hearing of the petition had been mailed or personally served upon Ethel E. Stiebel, the coexecutrix of the petitioner. Probate Code, §§ 1200 and 1242. It appears from said judgment roll, however, that such notice had been posted as required by law and the order setting apart the homestead recited that "notice of the hearing of the amended petition herein for an order setting apart homestead has been given as required by law". It is a sufficient answer to plaintiff's claim to point out that the failure to mail or personally serve such a notice upon a coexecutrix does not affect the jurisdiction of the probate court. The proceedings of the probate court are proceedings in rem and jurisdiction to hear and determine a petition for the setting apart of a probate homestead is acquired by the filing of the petition and the posting of notice as required by law. "The personal notices are not jurisdictional. * * *" 11a Cal.Jur. 151, § 84. Their purpose is not the same as that of a summons but is somewhat similar to that of certain citations. As was said in San Francisco Prot. G. A. v. Superior Court, 116 Cal. 443, at page 453, 48 P. 379, at page 382, "The office of the citation, then, was not like

that of a summons, to give the court jurisdiction." While the failure to give such personal notice might constitute grounds for reversal of an order on appeal or for relief under section 473 of the Code of Civil Procedure, we conclude that the failure to give such personal notice to the coexecutrix in the instant case did not deprive the probate court of jurisdiction and that the order of the probate court was not void on its face. It follows that judgment must be affirmed in so far as said judgment relates to the interveners and adjudges the validity of said deed of trust.

This brings us to a consideration of the contention of plaintiffs that the complaint stated a cause of action as against the defendants to set aside the order on the ground of extrinsic fraud. In this connection, it may be stated that plaintiffs apparently concede that defendant Elizabeth Clare Roberts was entitled to have a homestead set apart for a limited period but they contend that the property was separate property rather than community property and that said defendant was not entitled to have said property set apart absolutely.

The allegations of the complaint were quite lengthy but we believe that the main allegations were that the property set apart was the separate property of the deceased; that defendant Elizabeth Clare Roberts and defendant C. S. Price, who had acted for both executrices and who appeared as attorney for defendant Elizabeth Clare Roberts individually in the proceeding to set apart the homestead, knew that said property was separate property; that the coexecutrix "had no knowledge as to whether the property belonging to the estate was community or separate property"; that defendants Elizabeth Clare Roberts and C. S. Price falsely represented to the probate court that said property was community property, falsely represented the value of the estate and of the property set apart and falsely represented the impossibility of giving a description of the portion of the lot on which the bungalow was situated in which defendant Elizabeth Clare Roberts was residing; that no notice of said proceeding was ever given to the coexecutrix; and that said proceedings were "concealed from plaintiffs".

[4-7] We are of the opinion that the allegations of said complaint were insufficient to state a cause of action to set aside said order of the probate court. In many respects these allegations were similar to those which were under consideration in Hanley v. Hanley, 114 Cal. 690, at page 693, 46 P. 736, at page 737, where the court said, "A judgment or decree of a court of competent jurisdiction can be set aside in an independent equitable proceeding for fraud only where the fraud alleged was extrinsic or collateral to the matter which was tried and determined by such court; and such is not the character of the fraud alleged in the complaint in this action." See, also, Fealey v. Fealey, 104 Cal. 354, 355, 38 P. 49, 43 Am.St.Rep. 111. The plaintiffs here were beneficiaries under the will of the deceased. It is conceded that they had filed no request for special notices and there was therefore no duty resting upon defendants to give plaintiffs any personal notice of the proceedings. Notice was posted as required by law and the order of the probate court was binding upon plaintiffs without personal notice to them. Kearney v. Kearney, 72 Cal. 591, 15 P. 769. Any alleged fraud set forth in the complaint here was not "extrinsic or collateral to the matter which was tried and determined" but was intrinsic fraud which is insufficient to warrant the setting aside of the order under attack. The rule declaring intrinsic fraud to be insufficient has been established in order that there may be an end to litigation for as was said in Pico v. Cohn, 91 Cal. 129, at page 134, 25 P. 970, at page 971, 27 P. 537, 13 L.R.A.,N.S., 336, 25 Am.St.Rep. 159, "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, ad infinitum."

[8] Plaintiffs finally contend that the trial court abused its discretion in denying plaintiffs' motions for leave to amend the complaint. We find no merit in this contention. It does not appear that the complaint would have been sufficient to state a cause of action even if the proposed amendments had been allowed and the denial of the motions cannot be held to have constituted an abuse of discretion.

The judgment is affirmed.

We concur: NOURSE, P.J.; STURTEVANT, J.

42 Cal.App.2d 427

In re BURNETT'S ESTATE.

BURNETT et al. v. BURNETT.

Civ. 2908.

District Court of Appeal, Fourth District, California.

Jan. 13, 1941.

Hearing Denied March 13, 1941.

1. Executors and administrators ⇐510(12)

The Court of Appeal would proceed on the theory that respective counsel correctly assumed in their briefs that the expression "beteen" in a will meant "between", and that "ayers" meant "heirs".

2. Wills ⇐466

Grammatically, "between" is used when applied to two things and the word "among" is more properly used when more than two are referred to, but this is not necessarily controlling in the construction of a will. Probate Code, § 101.

See Words and Phrases, Permanent Edition, for all other definitions of "Among" and "Between".

3. Wills ⇐525

In construing a will dividing property equally "between" testator's wife and seven named heirs, the court is required by statute to determine the testator's real intention. Probate Code, § 101.

4. Wills ⇐525

In interpreting wills and determining whether the beneficiaries receive their share individually or as a class, great stress is laid on the question whether the beneficiaries are named both as a class and as individuals, and if they are named individually, then they share equally.

5. Wills ⇐525

In construing a will dividing property equally "between" testator's wife and seven heirs previously named in the will, the trial court correctly concluded that each beneficiary took a one-eighth share, especially in view of evidence that the testator was 83 years old when he made the will, that all his children were by a prior marriage, that for some time he had received financial aid from them, and that property which he deeded in part to his wife, as stated in the will, was acquired after their marriage. Probate Code, §§ 101, 105.

6. Husband and wife ⇐262(1)

Real property acquired by a testator after marriage was presumptively community property.

7. Appeal and error ⇐1008(3)

Where the trial court's construction of an instrument appears to be reasonable and consistent with the intent of the maker, appellate courts will not substitute another interpretation, though it seems equally tenable.

8. Executors and administrators ⇐104(3)

The commingling of estate funds with the private funds of the executor, or the retention of the funds in his possession, or the deposit thereof with another, does not alone make the executor liable to pay interest thereon; it being necessary to show that he used the money for his own benefit.

9. Executors and administrators ⇐507(3)

Where the evidence, consisting of the executor's testimony alone, may have shown that he commingled estate funds with his own, but did not show any use thereof by the executor, the trial court's findings that the executor should not be charged with interest thereon, were sufficiently supported.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

In the matter of the estate of W. I. Burnett, deceased. From an order settling the final account of the executor, G. C. Burnett, and a decree of distribution, the widow, Lucena Burnett, and others appeal.

Affirmed.

Gaylord & Gaylord, of San Francisco, and W. R. Bailey, of Visalia, for appellants.

Russell & Heid, of Tulare, for respondent.

KLETTE, Justice pro tem.

This is an appeal taken by Lucena Burnett, widow of deceased, and by Robert B. Gaylord and Robert B. Gaylord, Jr., her assignees, from an order settling final account and directing distribution of the above-entitled estate. W. I. Burnett died August 5, 1929, at the age of eighty-five. He was survived by his widow, Lucena Burnett, four sons, a daughter, and two grandchildren, who were children of a deceased son. After his death three wills

were found, the last of which was as follows:

"Tulare 5 May/192

"This is my last will and testament

"I have deeded to my wife lots 14 & 15 in block 135 one half interest in same also one half interest in lots 21 & 22 on block 70 all in Tulare the other half to my ayers G. C. Burnett Grace Rosson C L Burnett Roy Burnett C M Burnett also Anne & A H. Burnett Junior and all other property to be divided equally b*eteen* my wife and ayers mentioned in this will

"W. I. Burnett

"May 5 1927"

This is the third appeal which has been taken from the proceedings had in this estate, the other two having passed upon questions not involved in this appeal. See In re Estate of Burnett, 6 Cal.App.2d 116, 44 P.2d 435; In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89.

The decree of distribution made under the last will, dated May 5, 1927, distributes to Robert B. Gaylord and Robert B. Gaylord, Jr., as assignees of the widow, ⅛ of the estate, and to the four sons, one daughter, and two grandchildren each ⅛ of the estate.

It is the contention of the appellants that they, as assignees of the widow, were entitled to receive and have distributed to them ½ of the estate. This claim they base upon the use of the word "between" in the will, which they contend imports a division of the estate into two equal parts, one for the widow, and the other for the named heirs; that, had the testator intended that the widow, and each of the heirs, should receive an equal ⅛ share, he would have used the word "among", instead of the word "between".

[1] Respective counsel, in their briefs, assume that the testator meant "between", when he used the word "beteen", and that he meant "heirs", when he used the word "ayers". The court will accept these meanings of these words as correct.

[2] There can be no question, that in its grammatical sense, the preposition "between" is used when applied to two things, or to two groups of things, and that when more than two are referred to, the word "among" is more properly used. But this is not necessarily controlling.

[3] Section 101 of the Probate Code provides: "A will is to be construed according to the intention of the testator." It therefore becomes the duty of the court to determine what the real intention of the testator was.

Appellants, in their brief, have referred to, and have quoted from a number of cases in other jurisdictions, but do not cite any California case. We believe that several California cases are decisive in this matter.

In Re Estate of Morrison, 138 Cal. 401, 71 P. 453, the will provided that the residue of the estate was "to be divided between my sister Mrs. Wann and her daughters and my brother Edward Stettinius". It was contended by Stettinius, that he was entitled to ½ of the estate, and that the other half was to go to Mrs. Wann and her two daughters. The probate court, however, gave each ¼, which decree was upheld by the Supreme Court. The Supreme Court here says:

"As applied to persons and things, the word 'between' primarily refers to two, though Webster gives 'among' as a synonym, and in a large number of cases the word is used in wills where a per capita devise or legacy was to more than two. As to the weight to be given to the word 'between', it was said in Haskell v. Sargent, 113 Mass. 341, 343: 'The use of the word "between," strictly implying but two parties to the division, is a slight circumstance favoring the construction to which we incline, though not of much weight in itself, independently of the other considerations mentioned.'"

In Re Estate of Fisk, 182 Cal. 238, 187 P. 958, 959, the provisions of the will were very similar to these being here considered. In determining the effect of the word "between", the Supreme Court said:

"Giving to the word 'between' all the etymological significance to which it is justly entitled, that word alone is hardly sufficient to determine the question involved in the case. We turn, therefore, to a more complete analysis of the clause, the interpretation of which is here involved."

[4] In interpreting wills, and in determining whether the beneficiaries of the will receive their share individually, or as a class, the courts have laid great stress on the question as to whether the beneficiaries are named both as a class, and as individuals. If they are named individually, then they share equally, share and share alike.

This matter was discussed in Re Estate of Murphy, 157 Cal. 63, 106 P. 230, 233, 137 Am.St.Rep. 110. In this estate, the Supreme Court, in reversing a decree of distribution which distributed the estate to the nieces and nephews, as a class, said:

"But, assuming, however, that the language used in the clause in question is capable of two different legal meanings resulting from the testator devising his estate to the four children of his late sister, followed by other words of express devise to each of the children by name and in equal proportions, still this mention of them by name and a devise to them in equal shares will control the description of them as children of his deceased sister. If words, which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take that the devisees are to take individually and as tenants in common, and that the descriptive portion of the clause (children of a deceased sister) is intended merely as matter of identification."

After considering certain evidence taken, the Supreme Court says further:

"We are still remitted to the application of the general rule that when in a devise a class and individuals are both mentioned, and nothing appears from other clauses of the will or extraneous evidence requiring a different construction, the devise will be construed as one to devisees individually and not to them collectively—to them as tenants in common and not to them as survivors of a class."

Referring again to In re Estate of Fisk, supra, the Supreme Court says:

"We are inclined to think that the strong inference to be derived from the use of the word 'between' by the testatrix, who was a cultured woman and well acquainted with the use of language, is overcome by the use of the names of the residuary legatees, and that a consideration of the entire residuary clause shows that she had in mind five individuals to whom the residuary legacies were to go, and that in providing for distribution these individuals thus named were to share alike."

[5, 6] In the instant case, the trial court took certain evidence, under section 105 of the Probate Code. This evidence bears out the conclusion of the trial court, that each of the eight persons named in the will, were to share alike. This evidence shows that the testator was 83 years of age, when he made the will; that for some time prior, he had received financial aid from his children; that he had married appellant, who was not the mother of his children, in 1915, when he must already have been 71 years of age; that the two pieces of property, the ½ interest of which he deeded to his wife, as stated in his last will, was acquired after their marriage and were presumptively community property. The property remaining in the estate, after his death, was his separate property, having been acquired by him prior to his marriage to appellant.

The three wills presented to the court, show the testator was illiterate, and incapable of knowing the shaded distinctions, and meanings of the words "between" and "among". The three wills are almost, if not entirely, without punctuation, and in the first will, the given name of the wife is not correctly spelled. In the last will, the word "between", is spelled "beteen", and the word "heirs", is spelled "ayers".

For the reasons stated, the court is of the opinion, that it was the intention of the testator to divide his estate into eight equal parts, between his wife, his children, and grandchildren, and that the decision of the trial court, in distributing ⅛ of the estate to the assignees of the widow, and ⅛ to each of the named "ayers" is reasonable and correct.

[7] In Re Estate of Bourn, 25 Cal.App. 2d 590, at page 600, 78 P.2d 193, at page 198, the court says: "And it is a well-established principle of law that when the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable." See In re Estate of Mallon, 34 Cal.App.2d 147, at page 158, 93 P.2d 245; Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668.

The second point raised by appellants, is that the executor should be charged with legal interest, compounding annually, on estate moneys, which it is claimed he commingled with his own funds, or used in his own business. The evidence on this point is very unsatisfactory, and consisted of the testimony of the executor alone.

It shows that he, at all times, carried an account in the bank as executor, in which

he carried a balance; that he carried an account in his office, in his own books, under the name "G. C. Burnett, Executor of the Estate of W. I. Burnett", or in the Burnett Lumber Company books, as "G. C. Burnett, Executor", where he credited amounts of money received by him for the estate; that about a year before the decree of distribution was made, all of the money was deposited in the bank, under an account as executor, and was there at the time distribution was ordered. The executor stated that he was in a position to pay at any time distribution was made. It does not appear, at any place in the evidence, that the money was used by the executor.

Under this evidence, the trial court found that "it is not true that said Executor should be charged with any interest on said sums" and rendered its decision in accordance therewith.

Appellants rely on the following cases to support their contention: In re Estate of Stott, 52 Cal. 403; In re Estate of Clark, 53 Cal. 355, and Wheeler v. Bolton, 92 Cal. 159, 28 P. 558. In each of these three cases, it clearly appears that the executor not only commingled the funds of the estate with his own, but that he made use of them in his own business, and in one of the cases, the bank account in which the money was on deposit, was twice overdrawn.

The cases cited by respondents, all of which are of later dates than those cited by appellants, apply more directly to the facts of this case. In Re Estate of Sylvar, 1 Cal.App. 35, 81 P. 663, 664, the court said: "In regard to the money having been deposited with, and to some extent used by, Hoffman, it does not appear that the administrator consented to, or was in any way privy to, such use. The administrator never used any of the money himself, nor received anything for its use. We are not prepared to say that an administrator may not deposit the funds of the estate with a private banker or with an individual."

In Re Estate of Sarment, 123 Cal. 331, 55 P. 1015, the Supreme Court, in reversing a judgment allowing interest on funds of the estate, says:

"As he is required by the statute to take into his possession all of the estate of his intestate, and to give bonds for its preservation, it would be inequitable to charge him with interest upon moneys which might at any time be received by him, from the date of their receipt, merely because he had retained them in his possession. * * * The court does not find, nor is there any evidence, that the administrators used the funds of the estate in their own business, or made any profit from their use. The mere fact that one of them mingled the proceeds of the sale with his own funds would not justify charging him with interest thereon, since he had the right to their custody, and there is no provision of law which required him to keep them separate from all other funds." See, also, In re Estate of Mallory, 99 Cal.App. 96, 278 P. 488, to the same effect.

[8] It will thus be seen, that the mere commingling of funds of an estate, with the private funds of an executor, or the retention of the funds in his possession, or the deposit of the same with another, does not of itself make the executor liable to the payment of interest thereon. It must actually appear that he used the money for his own benefit.

[9] Applying these principles of law to the facts in the instant case, we must conclude that the findings of the trial court are supported by the evidence.

For the reasons herein set forth, the order of the trial court settling the final account and the decree of distribution are affirmed. Respondent to recover costs on appeal.

We concur: BARNARD, P. J.; GRIFFIN, J.



42 Cal.App.2d 415

KELSO v. BOARD OF EDUCATION OF CITY OF GLENDALE et al.

Civ. 12189.

District Court of Appeal, Second District, Division 1, California.

Jan. 13, 1941.

1. Municipal corporations ⇨79

A city, by adopting a charter, becomes independent of general laws only as to municipal affairs, and in matters of general state concern the general law is paramount. Const. art. 11, §§ 6, 8.

2. Schools and school districts ⇐115

The public school system is a matter of general concern and not a "municipal affair", and hence an ordinance was invalid as conflicting with the state law if the ordinance allowed only one month instead of the 90 days limited by statute for the filing of claims for damages against school districts, etc. St.1921, p. 2221, art. 11, § 5; St.1931, p. 2475, § 1; p. 2476; Const. art. 9; art. 11, §§ 6, 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

3. Counties ⇐24
Municipal corporations ⇐69
Schools and school districts ⇐89

The liability of municipalities, counties, and school districts for tortious acts or omissions of their servants is a matter of general state concern and not a "municipal affair". Const. art. 11, §§ 6, 8.

4. Schools and school districts ⇐115

An ordinance requiring the timely presentation of a claim as a condition precedent to an action against the City of Glendale or against any board, commission, officer or employee thereof, does not apply to claims or actions against the Glendale Unified School District, which is a corporate entity distinct from the municipal corporation of Glendale.

5. Schools and school districts ⇐45

A legislative declaration that every incorporated city is a school district does not import into the organization of the school district any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has by virtue of the Political Code.

6. Schools and school districts ⇐115

A city has no power to shorten the time limited by statute for the filing of claims for damages against municipalities, school districts, etc., nor to extend the time fixed by the state law in a matter affecting a school district, since the school district is a separate entity from the city, and is not a "municipal affair", even though occupying exactly or substantially the same territory. St.1931, p. 2475, § 1; Const. art. 9; art. 11, §§ 6, 8.

7. Schools and school districts ⇐115

Members of the board of education of a city are not "city officers" within an ordinance limiting the time for filing claims for damages. St.1921, p. 2221, art. 11, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "City Officers".

8. Schools and school districts ⇐115

A claim signed by a father and stating that his son named therein, a junior high school student, while leaving school on a certain date at about 3:15 p. m., fell against a century plant on the premises, and that his right eye was punctured and was subsequently removed, and that the son resided with the father at a given address, and that claim was thereby made for a specified amount as damages for the loss of an eye by the son, was sufficient under the statute requiring claims to specify the claimant's name and address, the date and place of the accident, and the extent of the injuries or damages received. St.1931, p. 2475, § 1.

9. Schools and school districts ⇐115

A claim signed and verified by the father, who was described in the verification as the claimant, stating that his son fell against a century plant on the premises of a junior high school and injured his right eye which was subsequently removed, and that claim was thereby made for $25,000 damages for the loss of an eye by the son, was not objectionable as being merely a claim for damages sustained by the father; it being the claim itself rather than the verification which should be looked to.

10. Schools and school districts ⇐89

A board of education or school district, if not liable for injuries to a junior high school student who fell against a century plant on the school premises, would not be liable to compensate his father for any damages sustained by the father.

11. Municipal corporations ⇐812(6)

As regards the sufficiency of a claim for damages against a municipality, etc., in the absence of an intention to mislead, a substantial compliance with the charter requirement is sufficient.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Earl C. Kelso, a minor, etc., against the Board of Education of the City of Glendale and others, for injuries caused by falling against a century plant on the premises of a junior high school. The

trial court granted a nonsuit on the ground that the claim was not filed within the time prescribed, and from the ensuing judgment for defendants, plaintiff appeals.

Reversed and remanded for a new trial.

W. L. Baugh and Elwood Bowles, both of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondents.

WHITE, Justice.

In an action brought by the minor plaintiff to recover damages for the loss of an eye as a result of his falling against a century plant allegedly maintained in a negligent manner by the defendant school district upon the premises of a junior high school, the trial court, on a stipulated statement of facts, granted a nonsuit upon the ground that the verified claim presented to the defendant school board and school district was not filed within the time prescribed by law, and further, that such claim "was not sufficient in law". From the ensuing judgment that plaintiff take nothing by his complaint, this appeal is prosecuted.

The plaintiff sustained his injuries on November 19, 1936. On or about December 31, 1936, more than one month, but less than ninety days after the date of the injuries, there was presented and filed with defendants a verified claim for damages in words and figures as follows:

"Glendale Unified School District and Board of Education of the City of Glendale,

"411 East Wilson Street,
"Glendale, California
"Gentlemen

"On the 19th day of November, 1936, at about 3:15 P. M., my son, Earl C. Kelso, a student at Wilson Junior High School in Glendale, while leaving school, fell against a century plant which was planted on the side of the pathway leading from the said school to the street. His right eye was punctured and was subsequently removed.

"My son resides with me at 130 North Cedar Street, Glendale, California.

"Claim is hereby made for Twenty-five Thousand Dollars ($25,000.00) as damages for the loss of an eye by said Earl C. Kelso.

"Dated this 31st day of December, 1936.
"(Signed) Claude Kelso."

By the general laws in effect at the time of the accident and when the claim was filed (Stats.1931, p. 2475, § 1; Deering's Gen.Laws, Act 5149; see, also, Stats.1931, p. 2476), it was provided as follows:

"Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."

There was also in force at all times herein pertinent ordinance No. 1664 of the City of Glendale, providing in section 1 thereof in part as follows:

"No action shall be brought against the City of Glendale, or against any board, commission, officer or employee thereof because of any act omitted or committed by it or him within the scope of its or his employment by the City of Glendale, on any claim or demand for money or damages whether founded in contract or in tort, unless a verified claim in writing therefor shall have been presented to the proper board, commission or officer thereof, as provided by the charter of said City, and to the board, commission, officer or employee against whom it is intended to bring action, within one month from the time of the maturing of the obligation or occurrence of the injury upon which such claim or demand is based, and such claim shall have been rejected in whole or in part.

"If such claim is founded in tort, it shall set forth the name and residence address of the claimant, the nature, extent, date, place and time of injury, and an itemized statement of the damages claimed or demanded. * * *"

It is urged by appellant that the general law allowing ninety days in which to file a claim is applicable in the present case, and that therefore the trial court erred in holding that his cause of action was barred because his claim was not filed within the one-month period prescribed by the ordinance. Respondents' position is that the ordinance is a valid exercise of authority granted by the city charter of the City of Glendale (Stats. 1921, p. 2204), which provides in article

XI, section 5, that "* * * No action shall be brought on any claim or demand for money or damages against the City or any Board, Commission or Officer thereof, until a demand for the same has been presented as provided in this charter or by ordinance and rejected in whole or in part."

[1-3] Respondents' contention in this regard cannot prevail. A city, by adopting a charter, becomes independent of general laws only as to "municipal affairs", and in matters of general state concern the general law is paramount. City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745; Const., art. XI, §§ 6 and 8. And it has been held not only that the public school system is a matter of general concern (Lansing v. Board of Education, 7 Cal.App.2d 211, 45 P.2d 1021; People v. Mertz, 2 Cal.2d 136, 39 P.2d 422; Id., Cal.App., 34 P.2d 726; Esberg v. Badaraco, 202 Cal. 110, 259 P. 730; Vallejo H. S. Dist. v. White, 43 Cal.App. 359, 185 P. 302), but also that the question of the liability of municipalities, counties and school districts for tortious acts or omissions of their servants is not a "municipal affair". Douglass v. City of Los Angeles, 5 Cal.2d 123, 128, 53 P.2d 353. In the last-cited case a claim for damages based on the defective condition of a street was filed with the board of public works and not with the city council as required by statute. It was held that such filing was ineffectual and the action could not be maintained. The court there said (page 128 of 5 Cal.2d, page 355 of 53 P.2d):

"The important question of the liability of municipalities, counties, and school districts for the tortious acts or omissions of their servants is a matter of general state concern, and not, as contended by the plaintiff, a municipal affair. As this point is now regularly raised, we confirm the "foreword" stated by this court in Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, that it would be an anomalous situation if a city could, by adopting a freeholders' charter, exclude itself from the operation of a general law of the state imposing a liability on municipalities generally for the negligent acts or omissions of its servants in the maintenance of the public streets, on the theory that such city is independent of general laws in municipal affairs. The question of the safety of public ways is 'a matter of state concern, and the obligation of a city to make its highways reasonably safe for general use cannot be chartered away, even though a municipality should attempt to do so.' Id., 207 Cal. 657, page 665, 280 P. 118, 122."

In Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216, which was a suit against the City of Pasadena for damages resulting from the defective condition of a street, it was held that the act of 1931 allowing ninety days in which to file a claim, and not the requirements of the city charter, "governs the situation".

In Esberg v. Badaraco, supra [202 Cal. 110, 259 P. 732], the Supreme Court, holding that the board of supervisors of the city and county of San Francisco was without power to modify the school budget prepared by the board of education, said:

"* * * The school system of the state is a matter of general concern as distinguished from a 'municipal affair,' as that term is considered in connection with charter cities. Article 9 of the organic law of California provides for the establishment of a public school sytem. It is provided in section 1 of that article: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.' Section 5 of the same article provides that: 'The Legislature shall provide for a system of common schools. * * *' Section 6 of the article provides that the Legislature 'shall provide for' the levy of a 'city and county' tax by the board of supervisors for school purposes. By this article of the Constitution the people of the state have made the school system a matter of state supervision, and judicial declarations to the same effect are numerous. [Citing cases.]

"The effect of this framework of laws surrounding and supporting our public school system is that the acts of the Legislature, within constitutional bounds, are controlling over conflicting provisions of freeholders' charters. * * *"

[4] Moreover, even assuming it to be a valid regulation in the case of claims against the City of Glendale or its officers, the ordinance in question does not by its terms cover the situation here, for the present suit is against the Glendale Unified School District, a corporate entity distinct from the municipal corporation of Glendale.

[5] See Ward v. San Diego School Dist., 203 Cal. 712, 265 P. 821, and the authorities therein referred to. In the cited case, quoting from Kennedy v. Miller, 97 Cal. 429, 32 P. 558, 559, it was said: "* * The legislative declaration that every incorporated city is a school district does not import into the organization of the school district any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has, by virtue of the Political Code. The city is a corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory. The one derives its authority directly from the legislature, through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized; and, even though the charter may purport to define the powers and duties of its municipal officers in reference to the public schools in the same language as has the legislature in the Political Code, yet these powers and duties are referable to the legislative authority, and not to the charter. * * *"

[6] To us the conclusion seems inevitable that so far as the provisions of the city ordinance impair or abridge the time fixed by the general law of the state for filing such claims, such provisions of the ordinance are invalid, because of their conflict with the state law. We further hold that the city is without power to shorten the time within which to file claims under the state law in matters of this kind, just as it is without power by charter or ordinance to extend the time fixed by the state law in a matter affecting school districts, which are, without doubt, of general state concern and not "municipal affairs".

[7] Not only is the school district a separate entity from the city, but upon the authority of Ward v. San Diego School District, supra, it must be held that the members of the board of education are not "city officers", and hence, whether the suit be deemed one against the district or one against the members of the board of education, the city ordinance has no application.

[8-10] It is next contended that the trial court erred in holding that appellant's claim "was not sufficient in law". In this contention appellant must be upheld. The requirements of the statute are that the claim specify the "name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received". These requirements are fully met by the filed claim here in question. But it is urged by respondents that the claim does not designate the injured plaintiff as the claimant, but rather purports to be a claim for damages sustained by his father, Claude Kelso, for the reason that the verification is by the father, who is described therein as the "claimant". The claim, say respondents, would support an action by the father for damages sustained by him alone, but affords no basis for an action by the son. This contention cannot be sustained. We think it is the claim itself that should be looked to, rather than the verification. The claim itself shows clearly enough that the son is the claimant. It is stated therein that the son was injured, his place of residence being given, and that "claim is hereby made for Twenty-five Thousand dollars ($25,000.00) as damages for the loss of an eye by said Earl C. Kelso". It would strain one's imagination to suppose that the board could have been led to believe that a claim for $25,000 was for damages sustained by the father alone. In making their concession that the claim as filed would have supported an action by appellant's father for such damages as he might have suffered personally as a result of the accident, respondents argue that in considering the claim for allowance or rejection they were only interested in whatever liability they owed to the father and were not concerned with any liability to the injured minor child. It is then admitted by respondents that the law requiring a claim to be filed as a condition precedent to bringing a suit against public entities, boards, commissions, etc., is simply to enable such public officials to make a proper investigation concerning the merits of the claim and to settle it without the expense of a lawsuit, if settlement should be shown to be proper. It is at once apparent that before the defendants could determine the presence or absence of any liability upon their part to the injured boy's father, they would of necessity have to determine the existence of any primary liability to the injured minor. If they owed the latter no obligation by way of compensation, then of course, no liability to the father would attach.

[11] It is the law that in the absence of an intention to mislead, a "substantial compliance with the charter requirement is sufficient". Sandstoe v. Atchison, T. & S. F. Ry. Co. [28 Cal.App.2d 215, 82 P.2d 221], supra. The claim filed in the instant case certainly meets the requirements enunciated in Wagner v. City of Seattle, 84 Wash. 275, 146 P. 621, Ann.Cas.1916E, 720, and quoted with approval in Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377, 379, as follows: "When, therefore, there is no evident intention to mislead, but a bona fide attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead." In our opinion, the claim filed herein did not in any wise mislead respondents, but on the contrary, indicated without equivocation that it was filed for and on behalf of the minor child who sustained the injuries in question, and it certainly gave the respondents full opportunity to investigate the merits thereof. In the method pursued in the instant case, in the filing of appellant's claim, the respondents were not prejudiced or misled in any manner, and the claim must therefore be held to be sufficient.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial.

I concur: DORAN, J.

I concur in the conclusion reached: YORK, P. J.



42 Cal.App.2d 440

ZIMMER v. GORELNIK et al.

Civ. 11538.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1941.

1. Action ⇐6

Under statute authorizing actions for declaratory relief, an action may be maintained as to controversies relating to oral contracts and obligations. Code Civ.Proc. § 1060 et seq.

2. Action ⇐6

A proceeding for declaratory relief is a "proceeding in equity". Code Civ.Proc. § 1060 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding in Equity".

3. Equity ⇐39(1)

When a court of equity assumes jurisdiction of an equitable controversy, it will seek to administer complete relief and make a final disposition of litigation.

4. Action ⇐6

Where plaintiff and defendant entered into written partnership contract under which parties agreed to engage in business and proper method of division of profits was in dispute, plaintiff was entitled to declaratory relief, whether upon theory that parties were partners, or joint adventurers, or that defendant held profits as trustee for plaintiff. Code Civ.Proc. § 1060 et seq.

5. Action ⇐6

That plaintiff designated complaint as one in declaratory relief did not bar right to a declaration of respective rights of plaintiff and defendant concerning division of profits in connection with business operations of parties so long as plaintiff pleaded facts entitling him to equitable relief. Code Civ.Proc. § 1060 et seq.

6. Judgment ⇐252(1)

When a party comes into equity pleading facts which may entitle him to some equitable relief, the court will assume jurisdiction of entire controversy and grant relief which proof warrants though it may not be the same as that prayed for.

7. Action ⇐6

In suit for declaratory relief as to respective rights of plaintiff and defendant concerning division of profits in connection with business operations under a written contract, where plaintiff claimed that parties had operated as partners or joint adventurers, refusal to permit plaintiff to prove a subsequent oral contract under which plaintiff claimed certain rights and which contract was denied by answer was error. Code Civ. Proc. § 1060 et seq.

8. Action ⇐6

Where admitted facts in suit for declaratory relief showed that plaintiff was entitled to some relief, statute authorizing trial court to refuse to exercise powers to grant

declaratory relief where a declaration is not necessary or proper was inapplicable. Code Civ.Proc. § 1060 et seq., and § 1061.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by Max Zimmer against Hyman Gorelnik and another for declaratory relief as to the respective rights of plaintiff and defendant Hyman Gorelnik concerning division of profits of a business on the theory that they were operating as partners or joint adventurers. From a judgment that plaintiff was entitled to no relief and that a written contract between the parties was void for uncertainty, plaintiff appeals.

Reversed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Biby & Biby and John E. Biby, all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for declaratory relief as to the respective rights of himself and defendant Hyman Gorelnik concerning the division of profits in connection with business operations of the two on the theory that they were operating as partners or joint adventurers. The trial resulted in a judgment that plaintiff was not entitled to any relief. The controversies between the parties arise out of a written contract under which they began their business associations some time in August, 1935. The plaintiff alleged that, while operating under that contract, the parties orally agreed to continue similar business connections in accordance with some of the terms of the contract relating to the division of profits. These allegations the trial court refused to let the plaintiff prove on the theory that the court was without jurisdiction to determine a controversy involving a disputed oral contract. It then found that all these allegations were untrue. In denying plaintiff any relief the court also held that the written contract was void for uncertainty.

The written contract reads as follows:

"Agreement

"This Agreement made and entered into in duplicate this —— day of August, 1935, by and between Hyman Gorelnik, party of the first part, and Max Zimmer, party of the second part, both parties being of the City and County of Los Angeles, State of California.

"Witnesseth:

"That Whereas, the parties are now in the process of purchasing premises situated at the intersection of Virgil and Normal Avenues, in the City and County of Los Angeles, State of California, for the purpose of constructing thereon a market building; and described as the E 120' of Lots 1, 2 and 3, excepting the S 2' of the E 120' of Lot 3, Tract 1458;

"Whereas, it is the further desire of the parties hereto to form the Virgil Investment Company, a corporation, and that they are now in the process of forming such corporation for the purpose of conducting the construction and maintenance thereof; and

"Whereas, the party of the first part will invest in the venture the sum of Eight Thousand Dollars, ($8,000.00), and the party of the second part will invest in the venture the sum of One Thousand Dollars ($1,000.00);

"Now Therefore, for and in consideration of the covenants and agreements hereinafter contained, it is mutually agreed as follows:

"1. That the parties hereto shall draw a salary, as managers of the enterprise, on the following basis commencing with the completion of the market building: The party of the first part to receive the sum of Three Hundred Thirty-three and 33/100 Dollars ($333.33) and the party of the second part to receive the sum of One Hundred Sixty six and 67/00 Dollars ($166.67), as wages per month, provided, however, that in the event there is not sufficient net profit in any month or months to pay unto the parties such salaries, then in that event they will receive as salaries during such month or months on the following basis: Two-third (2/3rds) of the net income to be paid to the party of the first part, and one-third (1/3rd) of the net income to the party of the second part.

"2. In the event a bona fide offer in the sum of Thirty One Thousand Dollars ($31,000.00) or more is offered for the premises the same shall be sold if either of the parties hereto desire it to be sold, and the proceeds thereof to be divided in the following manner, to wit:

"a. There shall first be deducted from the said sale price the total investment, which said sum shall be divided between

the parties hereto in the following manner: eight-ninths (8/9ths) thereof to the party of the first part, and one-ninth (1/9th) thereof to the party of the second part.

"b. Of the sum in excess of the total net investment the same shall be divided in the following manner: two-thirds (2/3rds) to the party of the first part and one-third (1/3rd) to the party of the second part.

"3. In the event of dissolution or final winding up of the affairs, a division of the assets thereof shall be had on the same basis as set forth in sub-sections a and b of paragraph 2 hereof.

"In the event shares of stock be issued in the corporation to be formed, to either of the parties hereto, such party will not offer his share nor any portion thereof for sale to anyone before having first offered in writing the said shares to the other party at the reasonable market value thereof, and the other party shall have thirty (30) days within which time to accept and purchase the same.

"In the event of the death of either of the parties hereto, the other shall immediately proceed with the dissolution and winding up of the affairs of the business.

"It is understood that a contract is contemplated between the corporation to be formed, to wit, Virgil Investment Company as owner and Hyman Gorelnik and the Zimmer Construction Company as contractors wherein the latter will construct a building according to plans and specifications to be submitted and in furtherance thereof the parties hereto agree to execute and sign all documents and papers which may be necessary or expedient thereto; losses, if any, to be borne 2/3rds by the first party and 1/3rd by second party.

"In Witness Whereof, the parties hereto have hereunto set their hands, the day and year in this instrument first above written.

"(Signed) Hyman Gorelnik
"Party of the first part

"(Signed) Max Zimmer
"Party of the second part".

The plaintiff alleged and proved that in full accord with the terms of the contract the parties formed the corporation, constructed the Virgil street building, operated it for a time, and divided some of the profits of operation. In April, 1937, this property was sold for $31,500 and part of the proceeds of operation, together with other money advanced by the respective parties, and money borrowed on their joint obligations, was used in the purchase of a lot on Sunset boulevard and in the construction of a building thereon. These transactions were all made in the name of the Virgil Investment Company, but the plaintiff alleged, and attempted to prove, that the corporation was but the alter ego of the partners and that the entire investment in the Sunset property was preceded by the oral agreement of the parties that the operations should be conducted, and the profits should be divided in some respects similar to the manner stipulated in the written contract.

In denying plaintiff the right to prove the alleged oral contract the trial court was in error. The ruling was based upon the holding in Transport Oil Co. v. Bush, 114 Cal.App. 152, 1 P.2d 1060, but, as we will point out hereafter, that case is no longer an authority on that subject. It should be said at this point, however, that there is considerable authority in other jurisdictions in accord with the rule of the Bush case, but it would serve no useful purpose to go into foreign fields of authority when the entire subject matter is covered by our legislative enactments.

Actions for declaratory relief are authorized in this state by section 1060 et seq. of the Code of Civil Procedure. Section 1060 reads in part: "Any person interested under a * * * written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; * * *."

[1] It should be noted that the legislature used the word "or" after the word "instrument", and again after the word "contract"; that it did not use the word "written" before the word "contract"; and that the clause reading: "or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property" begins with the word "or"; and also that this clause

is not tied in to any reference to a written instrument, or to a contract, or to any kind of a written document. The language of the statute is plain and does not call for judicial construction or interpretation. Notwithstanding the early rulings of the common-law courts limiting the right of action to written instruments our statute clearly broadens the scope of the action to cover controversies relating to oral contracts and obligations. And we must take the law as we find it.

In Transport Oil Co. v. Bush, supra, 114 Cal.App. at pages 161, 162, 1 P.2d at page 1064, the court reached the opposite conclusion, saying: "The question arises, must the contract sought to be construed be in the form of an instrument in writing? Is it within the contemplation of the section that testimony shall be taken to establish an oral contract, and then pronounce judgment construing the same and declaring the intent and purpose of the parties as found in such contract? While the language of the section, literally construed, would include an oral contract, a careful consideration of all the words preceding the word 'contract' leads us to the conclusion that the portion of the section quoted and relied upon in this action must be held to refer only to a contract that is in writing, to a contract the terms of which are fixed and definite and not depending upon the oral declarations of witnesses or the memory of the parties as to the language used by them in entering into an agreement." But in Tolle v. Struve, 124 Cal.App. 263, 12 P.2d 61, the court declined to follow the rule of the Bush case, relying upon the authority of Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782, and in Herrlein v. Tocchini, 128 Cal. App. 612, 18 P.2d 73, it was said that the language quoted from the Bush case was dicta, and not controlling. In Wollenberg v. Tonningsen, 8 Cal.App.2d 722, 48 P.2d 738, 742, the court, without reference to the Bush case, held that the remedy under the statute was not limited to a written instrument. In Hamilton Corp., Ltd. v. Corum, 218 Cal. 92, 95, 21 P.2d 413, 414, the Supreme Court dismissed the subject with the direct statement that "it has been already decided that in such actions the court may determine disputed questions of fact. Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782; Herrlein v. Tocchini [128 Cal.App. 612], 18 P.2d 73. Appellant's argument is concluded by the cited cases."

Though we have found no California case which expressly overrules the Bush case, those cited reject the doctrine either by referring to it as dicta, or by making no reference to it. It must be apparent that the reasoning upon which the rule was based is not in harmony with the code section. It would be more precise to say that the conclusion is based upon the false premise that, in a proceeding of this nature, the court is without power to determine "disputed questions of fact". That this is a false premise we need to refer only to Hamilton Corp. v. Corum, supra. Acting upon this premise the trial court ruled, in line with numerous cases cited by respondent, that it was without power to take any evidence tending to prove the existence of the alleged oral contract because that contract was denied in the answer. If the premise were sound, it would of course apply equally to a written contract if its existence is denied. The fact of the execution of a contract and its existence or present force should not be confused. Here the plaintiff sought to prove that an oral contract was executed under which he claimed some legal rights which he asked the court to determine and declare. Precisely the same proof would be necessary in a suit founded upon a written instrument. He was stopped with the objection that the evidence "would tend to prove the existence of a disputed oral contract and that it is not within the jurisdiction of this court to determine whether an oral contract does exist, and then construe it". This objection was sustained as well as that made to an offer of proof upon the same subject matter.

The error of the ruling is based upon the doctrine of the Bush case which, in turn, is based upon authorities from other jurisdictions holding that the court is without power to determine "disputed questions of fact". Though this rule would foreclose consideration of all disputed questions of fact the courts for some reason have limited it to an oral contract—and have held that the proceeding will not lie when such a contract is involved even though its existence is not disputed. Hence, by putting one false premise upon another, a conclusion has been reached which is neither sound nor reasonable. There is no escape from the conclusion that, if as stated in Hamilton Corp. v. Corum, supra, the court may determine disputed questions of fact, it has the power

to take evidence of the existence of the contract upon which the asserted rights are based, and that, so far as our code section is concerned, it makes no difference whether such contract be written or oral. See Borchard on Declaratory Judgments, pp. 409, 410, where later English cases are cited involving oral contracts. Also 16 Am. Jur., p. 294; 8 Cal.Jur.Supp. pp. 110–112.

[2-6] These conclusions may be placed upon another principle which is equally controlling. The proceeding in declaratory relief is one in equity. The complaint pleaded facts sufficient of which were admitted to entitle plaintiff to some relief. It is the settled rule that, when a court of equity assumes jurisdiction of an equitable controversy, it will seek to administer complete relief and make a final disposition of the litigation. 19 Am.Jur., p. 281. The record discloses a partnership contract in writing under which the parties agreed to engage in business under the corporate entity over which they had absolute control. The complaint, which was filed on January 6, 1938, joined the corporation as a party defendant. Upon evidence taken the trial court found that prior to the commencement of the action and on December 27, 1937, the corporation had been dissolved by the defendants. During the trial it developed that the operation and sale of the Virgil street property resulted in a profit of about $7,500 and that the profit on the Sunset property was about $14,000. These profits not having been distributed, and the proper method of division being in dispute, the plaintiff was entitled to a declaration of the rights and duties of the respective parties whether upon the theory that they were partners, or joint adventurers, or that the defendants held as trustees for the plaintiff. The respondent argues that the written contract was void because uncertain in the paragraph relating to division of the net profits. If so the uncertainty might have been cleared by the oral contract which plaintiff sought to prove. All these considerations are elements of equity and proper subjects for determination in a court of equity. To restate the proposition: it is of no matter that the plaintiff designated his complaint as one in declaratory relief so long as he has pleaded facts which would entitle him to equitable relief. When a party comes into a court of equity pleading facts which may entitle him to some equitable relief the court will assume jurisdiction of the entire controversy and grant the relief which the proof warrants though it may not be the same as that prayed for. Brown v. Anderson-Cottonwood Irr. Dist., 183 Cal. 186, 190 P. 797; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Bank of America, etc., Ass'n v. Gillett, 36 Cal.App.2d 453, 97 P.2d 875.

[7, 8] For the reasons given the court erred when it denied plaintiff the right to prove the oral contract, and when it dismissed the action without giving plaintiff the relief which the facts disclosed he was entitled to. We do not discuss the other points raised except to add that this is not a case for the application of section 1061, Code of Civil Procedure, authorizing the trial court to refuse to exercise the powers where a declaration is not necessary or proper. Because the admitted facts are that the plaintiff was entitled to some relief over which the parties are in controversy a declaration was both necessary and proper. Hence, the case comes squarely within the rule of Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 277 P. 487.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



42 Cal.App.2d 423

In re KENYON'S ESTATE.

GOSE v. KENYON et al. (two cases).

Civ. 12828.

District Court of Appeal, Second District, Division 2, California.

Jan. 13, 1941.

1. Wills ⇐302(1)

To establish a document as last will of a deceased person, in addition to other requirements, there must be substantial evidence that decedent intended the very document to be his last will and to make disposition by it of his property in favor of the party claiming thereunder.

2. Appeal and error ⇐996

Where from the evidence either of two inferences reasonably may be drawn, inference accepted by trial court to support a

finding of fact will not be disturbed by an appellate court.

3. Appeal and error ⇐996

The rule that where from the evidence either of two inferences reasonably may be drawn, one accepted by the trial court to support a finding of fact will not be disturbed by an appellate court, presupposes that the inference drawn from the evidence finds reasonable support therein.

4. Wills ⇐302(6)

Where letter propounded by decedent's relative as holographic will discussed sundry topics, had none of the earmarks of a holographic will and only incidentally mentioned relatives who desired by the letter to acquire decedent's estate, and witness testified that decedent told her on numerous occasions that he wanted to leave all of his property to relatives mentioned in letter, neither the letter nor the testimony was sufficient indicia of testamentary intent to create a will out of the letter, and it was error to admit the letter to probate as an "holographic will".

See Words and Phrases, Permanent Edition, for all other definitions of "Holographic Will".

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding in the matter of the estate of Harvey F. Kenyon, deceased, wherein Robert D. Gose offered for probate an instrument purporting to be the last will of the decedent, opposed by Edith M. Kenyon and others, contestants, and Edith M. Kenyon offered for probate a document purporting to be the last will of the decedent, opposed by Robert D. Gose, contestant. From an order admitting to probate the document offered by Edith M. Kenyon as the last will of the decedent, Robert D. Gose appeals.

Reversed.

Edward J. Guirado, of Whittier, and Harold F. Pettee, Jr., of Los Angeles, for appellant.

J. W. Falkner, of El Monte, and L. G. Shelton, of Los Angeles, for respondents.

McCOMB, Justice.

This appeal transferred from the Supreme Court to this court for decision, pursuant to the provisions of article VI of section 4c of the Constitution of the State of California, is from an order of the superior court sitting in probate admitting a document to probate as the last will and testament of decedent.

The essential facts are:

August 2, 1938, Harvey F. Kenyon died, a resident of the county of Los Angeles, leaving a document entitled Last Will and Testament, signed by said decedent, dated August 15, 1933, subscribed by two witnesses, which purported to be the last will and testament of decedent.

Respondent, Edith M. Kenyon, offered the following document as the last will and testament of decedent, and it was admitted to probate as such:

"El Monte Calif
March 4–38.

"Mr. Frank Givens
Amarillo Tex.

"Dear Frank.

I recd your check and it was a life saver to me. If that woman writes to you or Mr. Truelove tell her to go to H———— I did not authorize her to. I do not her to get a anything out of me. If Truelove come to you with any more such moves from her, I am done I can do my own business. The end end is in sight Where are the girls I dream of them every night Is Grace Married I heard she was if so where is she? And what is her

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name? and wher does she live? And where is little Marjorie? They are the only will benif by my death so I want to sure of their names I want them to have that section and what I have here or else where I dont expect to die but I want to keep posted we are have awful floods here Los Angles alone 10,000,000 damage Sant Anna Riverside pretty near sweep away Traffic is paralize on all R. R. briges are out by the hundred I hvent heard how the Glavayes are no way to hear roads are all whedout. I think the Old Age Recovery plan will pass this Congress, and then I can help you on your feet and I will be free once more and by

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(God) I will stay that way Peaches trees are in bloom and oranges trees to You cousin was here that run the filling station They are all well

Say Frank when you writ put you letter in Address to me and one to Mrs.

Salsbury. She is good friend to me, I fainted away in her house her and her husband took good care of me bath my face and hands and they put me on the sofa until I could go home and her neares neighbor brought hom . I am almost (75) yers old I am slipping fast If anything happens I or they will let you know

ove

Am feeling pretty good now. I am getting enough to eat Hopeing this will find you all right—everthing is satisfactory with me.

"Yours Truly
"HARVEY F. KENYON."

In addition to the above documents there was received in evidence testimony of a Mrs. Salisbury to the effect that decedent had told her on numerous occasions that he had a will deeding his property to his two granddaughters Marjorie and Grace and that he wanted them to have all of his property, and that he asked her on one occasion if she would be the executrix of his estate if he made a new will.

The trial court found "that it [the letter dated March 4, 1938, *supra*] was of testamentary character and intended to bequeath his [decedent's] entire estate to said granddaughters, and that said letter constituted an olographic will."

This is the question for us to determine:

Was there substantial evidence to sustain the finding of the trial court, supra?

This question must be answered in the negative. The law is established in California by a long line of decisions that before a document may be admitted to probate as the last will and testament of decedent, in addition to meeting all other legal requirements, there must be substantial evidence that the decedent intended the very document which is offered as his last will and testament to be such and to make disposition by it of his property in favor of the party claiming thereunder (In re Estate of Button, 209 Cal. 325, 331, 287 P. 964; In re Estate of Dotta, 18 Cal.App.2d 763, 764, 64 P.2d 741).

[2, 3] The law is also established that, where from the evidence either of two inferences reasonably may be drawn, the one accepted by the trial court to support a finding of fact will not be disturbed by an appellate court (In re Estate of Hathaway, 38 Cal.App.2d 526, 101 P.2d 741). However, this rule presupposes that the inference drawn from the evidence finds reasonable support therein.

[4] Applying the test as stated in this rule to the facts of the instant case, we are of the opinion that neither from the document which has been admitted to probate as the last will and testament of decedent nor from any facts received in evidence could the conclusion reasonably be drawn that the decedent intended it to be of testamentary character. The letter of decedent offered as a will, discussing divers and sundry topics from blooming peach trees to "Old Age Recovery", has none of the earmarks of an holographic will. Only incidentally does he mention the relatives who desire, by his letter, to acquire his estate. The testimony of witness Salisbury, who related a conversation with decedent in which the latter is said to have stated that he had willed his estate to certain relatives, is insufficient evidence of *animus testandi* to create a will out of a gossipy letter to a frequent correspondent.

The cases cited by respondent, such as In re Estate of Spitzer, 196 Cal. 301, 237 P. 739, are all factually distinguishable from the case which we are now considering.

Therefore, the finding here questioned is unsupported by the evidence.

For the foregoing reasons the order is reversed, appellant to recover his costs.

MOORE, P. J., and WOOD, J., concurred.

ELLIOTT v. McCOMBS et al.

L. A. 16547.

Supreme Court of California.

Jan. 16, 1941.

As Modified on Denial of Rehearing Feb. 13, 1941.

1. Deeds ⇐124(1)

In a grant of realty, it is presumed that grantor intended to convey a fee simple title unless it appears from the grant that a lesser estate was intended. Civ.Code, § 1105.

2. Easements ⇐1

In determining whether deed excepts strip of land from conveyance or conveys fee simple with reservation, a grant of land "to be used for a road" may be entirely consistent with conveyance of a fee-simple title, but a grant of land for purposes of "right of way" for a road recognizes nothing but an easement. Civ.Code, § 1105.

3. Easements ⇐14(2)

Deed conveying land except 60-foot strip reserved for road purposes conveyed a fee-simple title to grantee with the reservation of an easement on part of grantor. Civ.Code, § 1105.

4. Easements ⇐14(1)

A reservation of an easement must be to the grantor or to the grantor's property and cannot be made to a stranger to the deed.

5. Easements ⇐3(1)

Where language of deed is ambiguous and it does not clearly appear whether easement reserved was intended to be in gross or appurtenant to the land, the easement will not be construed as personal to grantor where it may fairly be construed as appurtenant to some other estate.

6. Easements ⇐36(2)

In ascertaining grantor's intention as to whether easement reserved is in gross or appurtenant to the land, the nature of the easement may be determined by evidence outside the deed, in absence of an express declaration.

7. Easements ⇐3(1)

An easement reserved in deed may be appurtenant to the land and not personal to grantor even though deed does not expressly declare it to be so, and the law favors such an interpretation.

8. Easements ⇐3(2)

The benefit of reservation of easement for road purposes in deed would not be construed as having been intended to be personal to grantor rather than appurtenant to the land merely because there was nothing in deed to indicate a contrary intention.

9. Easements ⇐3(2)

In determining whether a land company's deeds reserving strips of land for road purposes created easements in gross or appurtenant to the land, a road is primarily laid out for the benefit of adjoining landowners.

10. Easements ⇐3(2)

Where parcels sold by land company along median line running through tract bounded by four streets each contained 10 or 20 acres and plaintiff's parcel abutting on the line bordered on no main street, reservations of 30-foot strips of land for road purposes in deeds conveying each of the parcels were intended to create easements "appurtenant" to the land and to provide 60-foot road for benefit of adjoining landowners, and not an "easement in gross" personal to land company.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenant" and "Easement in Gross".

11. Easements ⇐1

The principles governing "equitable servitudes", which are equitable in nature, are not applicable to an "easement", which is an incorporeal interest in the servient estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement" and "Equitable Servitudes".

12. Easements ⇐1

An "easement" creates an interest in the land which gives a privilege to a particular person or owner of property to enjoy a right over the property of another.

13. Easements ⇐1

An "easement" can only be created by grant or by implication or prescription, and not by parol.

14. Easements ⇐1

In action to quiet title to easement over defendant's property, where plaintiff's cause of action depended upon rights created in favor of common grantor by deed to defendant's predecessor reserving strip of land for road purposes, to which rights plaintiff succeeded as subsequent owner of adjoining property, plaintiff was not required to show that each deed made by common grantor conveying property abutting on the road con-

tained similar reservations, as against contention that easement could not be enforced for want of mutuality of benefits in the adjoining landowners.

15. Specific performance ⇐65

A contract for the sale of realty may be specifically enforced by the purchaser

16. Equity ⇐57

Vendor and purchaser ⇐54

Equity regards purchaser of realty under contract of sale to be the owner, on theory that equity regards as done that which ought to be done.

17. Vendor and purchaser ⇐54

The vendor of realty under contract of sale who retains legal title as security for payment of purchase price has no greater rights than he would possess if he had conveyed the realty and taken back a mortgage, and the vendee, particularly after he goes into possession of the realty under an executory contract, is for all purposes the owner and vendor retains mere legal title.

18. Easements ⇐3(2)

Where vendee took possession in 1919 under executory contract of sale reserving easement appurtenant to land for road purposes and plaintiff's predecessor acquired adjoining land thereafter but before vendor executed deed to vendee in 1922 in fulfillment of the contract, the vendee in possession was equitable owner and the easement was created and attached to adjoining land before adjoining land was acquired by plaintiff's predecessor, hence easement could be enforced by plaintiff against vendee's successor in interest.

19. Judgment ⇐632

Default judgment obtained in quiet title action against grantor by purchaser of land under deed reserving easement in a strip of the land for road purposes did not bind adjoining landowner who was not a party to the quiet title action and who subsequently sought to enforce the easement.

20. Easements ⇐26(1)

Where original grantor's deed reserved an easement in a strip of the land sold for road purposes for benefit of adjoining property, and original grantee conveyed land to defendant with no reservation of a right of way, subsequent deed from original grantor to defendant quitclaiming the strip of land did not terminate adjoining property owner's easement to the right of way appurtenant to her land.

21. Easements ⇐61(2, 12)

Where original grantor's deed reserved an easement for road purposes for benefit of adjoining property subsequently acquired by plaintiff and original grantee conveyed land to defendant with no reservation of a right of way, plaintiff was entitled to judgment quieting her title to the use for road purposes of the reserved strip of defendant's land as a right of way appurtenant to plaintiff's land, and was entitled to injunction against interference with that use.

22. Easements ⇐3(2)

Where at time land company's deed was made reserving for road purposes a strip of the land sold to defendant's predecessor the company had already conveyed the other parcels which would benefit by the road, the reservation could not have been made for benefit of such other parcels but, in order to give the reservation effect, it would be construed as an "easement in gross". Civ.Code, § 3541.

23. Easements ⇐44(1)

Provision in deed reserving for road purposes a strip of the land conveyed would be presumed to have been made to carry out some purpose, and an interpretation which would give effect to the provision was preferred to one which would make it void. Civ. Code, § 3541.

24. Easements ⇐24, 61(2, 12)

Where land company reserved easement in gross in strip of land for road purposes in deed to defendant's predecessor in interest and subsequently conveyed its rights to the easement in and over defendant's land to adjoining landowner, the adjoining landowner thereby acquired title to the right of way and was entitled to judgment quieting that title and enjoining interference with her use of the road over defendant's property.

HOUSER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Besse C. Elliott against Virgil McCombs and others, to quiet title to an easement and right of way and to enjoin interference with plaintiff's use thereof. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

For prior opinion, see 100 P.2d 499.

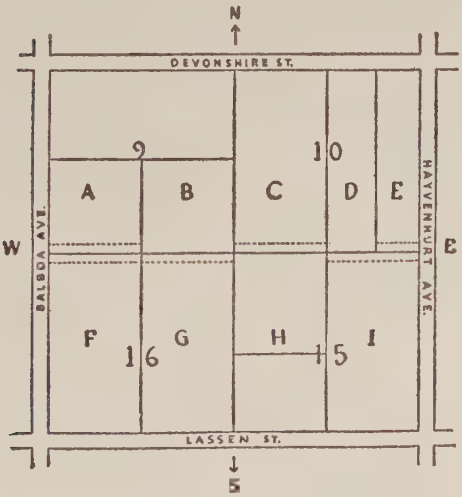
Wm. H. B. Haymond, Herbert L. Iasigi, and Judd Downing, all of Los Angeles, for appellants.

John J. Craig, of Los Angeles, for respondent.

EDMONDS, Justice.

It was successfully asserted in the trial court that a right of way for road purposes was granted under deeds made by a common predecessor in interest of the parties to this action. By the terms of the decree appealed from the respondent's title and right to the use of a strip of land is quieted against the appellants and the latter are enjoined from interfering with such use.

The controversy concerns land within the area bounded by the four streets shown on the diagram, all of which was acquired by San Fernando Mission Land Company many years ago under a deed which described it as lots 9, 10, 15 and 16 according to a map of record. Deeds of the land company have conveyed portions of these lots, designated on the diagram by letters, by metes and bounds. This action was commenced by the respondent, as the owner of parcel B, to quiet title to an easement and right of way over the north 30 feet of parcels F and G and the south 30 feet of parcel A.



Pursuant to the requirements of a contract of sale made in 1919, the terms of which are not disclosed, by a deed dated June 20, 1922, the land company conveyed parcel A "except the south 30 feet thereof reserved for road purposes" and parcel F "except the north 30 feet thereof reserved for road purposes" to one Rice, appellant Virgil McCombs' immediate grantor. Some years later Rice commenced an action against the land company and, in 1930, secured a decree by default quieting his title to this land, including that part of each parcel which had been reserved for road purposes. At the time that action was filed, the land company had conveyed all of its interest in the property shown on the diagram except that reserved for road purposes. On May 22, 1930, the date of the decree quieting Rice's title, there was recorded a deed made by him conveying parcels A and F to appellant Virgil McCombs with no reservation of a right of way.

In 1922, the land company conveyed parcels B and H to Title Guarantee and Trust Company without reservation or any mention of the rights of way reserved in its deed to parcels A and F. Later, Title Guarantee and Trust Company conveyed parcel B, reserving the south 30 feet for road purposes. The respondent acquired title to this parcel by mesne conveyances containing the same reservation. Parcel H was also conveyed by the land company's grantee with a reservation of the right to use the north 30 feet for road purposes.

The land of appellant Eva McCombs is parcel G, which was conveyed by the land company in 1923 with a reservation of the north 30 feet for road purposes. She acquired title by a deed containing the same reservation.

All of the other parcels shown on the diagram were conveyed by the land company in earlier years. Parcel I was deeded in 1920 subject to a reservation of the north 30 feet for road purposes. However, in 1926 the land company executed a deed to the then owner quitclaiming any interest in this land. The deed to parcel D was made in 1921 without reservation. In the same year it conveyed parcels C and E by deeds reserving for road purposes the south 30 feet of the land described.

Two days before the present action was commenced, the land company and Title Guarantee and Trust Company executed various deeds quitclaiming the south 30 feet of parcels A, B, C, D, and E, and the north 30 feet of parcels F, G, H, and I to the owners of parcels abutting therein. These two corporations also separately executed deeds, bearing the same date, quitclaiming to the owners of abutting parcels all right, title and interest in and to an ease-

ment for road purposes in and over the south 30 feet of parcels A, B, C, D, and E and the north 30 feet of parcels F, G, H and I.

The trial court found that it was the intention of the land company "to create a right of way for road purposes sixty feet in width * * * connecting the roadways * * * known as Hayvenhurst Avenue and Balboa Avenue * * *; that for several years prior to the commencement of this action said sixty-foot strip between lots 10 and 15 has been used for road purposes by the owners of property abutting thereon * * * and others who chose to use the same, and that said strip is now a well-defined roadway; that at the time the defendants acquired title to their properties said strip was being so used. * * *" That as to parcels A and F owned by Virgil McCombs "there was no user of that portion of the sixty-foot strip and right of way for road purposes * * *"; that all of the grantees mentioned in the deeds of the 60-foot strip across the entire quarter section, dated October 24, 1936, from the land company to the title company, are the owners of "some parcel of property abutting upon said easement for road purposes, and that collectively they own all of such abutting property"; that "at the time defendants acquired their respective properties, that they had such constructive notice as was given by the public records that a reservation for road purposes, sixty feet in width lying between lots 9 and 10 on the north, and lots 15 and 16 on the south, was reserved for road purposes * * *; that at the time San Fernando Mission Land Company, a corporation, had divested itself of all interest in * * * [the land shown on the diagram] except its interest in said sixty-foot reservation for road purposes * * *."

The appellants contend that the reservation in some, but not all, of the deeds made by the land company did not operate to reserve, for the mutual benefit of all adjoining parcels, the use of the strip of land which is in controversy. Furthermore, declare appellants, the trial court erred in its conclusion of law that the judgment secured by Rice against the land company did not terminate the easement claimed by the respondent, and at the time of the conveyance to them they had no actual or constructive notice of an easement over their land for the benefit of adjoining land.

Respondent, in support of the judgment, urges that the language used in the deed from the land company to Rice states exceptions and not reservations; therefore, the 60-foot strip of land was not conveyed. Title to this strip, she insists, remained in the land company, subject to the vested and irrevocable right in Rice and his successors in interest to use it for road purposes.

[1-3] In a grant of real property it is presumed that the grantor intended to convey a fee simple title unless it appears from the grant that a lesser estate was intended. Civ.Code, § 1105. And as the court said in Parks v. Gates, 186 Cal. 151, 155, 199 P. 40, 42, "there is a vast difference between a grant for purposes of 'right of way' for a road and a grant of land 'to be used for a road'. The latter grant may be entirely consistent with the conveyance of a fee-simple title, as a road may be maintained as readily on land held in fee as under an easement, but the grant of land as a right of way recognizes nothing but an easement." This rule was applied in Cooper v. Selig, 48 Cal.App. 228, 191 P. 983, where the court construed a deed conveying land to the city of Los Angeles for the purposes of a public road as passing the fee simple title. Under the same principle of construction, the language in the deed of the land company to Rice conveyed a fee simple title to him with the reservation of an easement on the part of the grantor. See Winston v. Johnson, 42 Minn. 398, 45 N.W. 958; Coon v. Sonoma, etc., Co., 182 Cal. 597, 189 P. 271; Las Posas Water Co. v. Ventura, 97 Cal.App. 296, 275 P. 817.

[4] The next question is whether this easement is in gross or appurtenant to the land. A reservation, of course, must be to the grantor, or to the grantor's property, and cannot be made to a stranger to the deed. Butler v. Gosling, 130 Cal. 422, 62 P. 596; Beardslee v. New Berlin Light, etc., Co., 207 N.Y. 34, 100 N.E. 434, Ann. Cas.1914B, 1287; Simmons v. Northern Pac. R. Co., 88 Wash. 384, 153 P. 321, 155 P. 1039, Ann.Cas.1918C, 1184. Here again, the answer requires an interpretation of the deed. The appellants contend that no mutuality of benefit for adjoining parcels can be inferred from the language of the reservations, and that as the deeds do not declare that the reservations are for the benefit of the adjoining parcels, they were intended to be personal to the

grantor. Further, declare the appellants, assuming that the land company intended the reservations for the benefit of the adjoining parcels, as the grantees of parcels conveyed with reservations have no right of way over parcels deeded free of reservations, there is no mutuality of benefit in the adjoining landowners, and therefore the easement may not be enforced.

[5-8] This argument is based upon two misconceptions. The first is the appellants' assumption that the benefit of the reservations was intended to be personal to the grantor because there is nothing to indicate a contrary intention. However, when the language of a deed is ambiguous, and it does not clearly appear whether the easement was intended to be in gross or appurtenant to land, it is never construed as personal when it may fairly be construed as appurtenant to some other estate. Hopper v. Barnes, 113 Cal. 636, 45 P. 874; Eastman v. Piper, 68 Cal.App. 554, 229 P. 1002; Nay v. Bernard, 40 Cal.App. 364, 180 P. 827; 19 C.J. 869. The cases which apply this rule also hold that in ascertaining the intention of the grantor, as in any other contract, in the absence of an express declaration, the nature of the easement may be determined by evidence aliunde the deed. An easement, therefore, may be appurtenant although the deed does not expressly declare it to be so, and the law favors such an interpretation.

[9, 10] The evidence shows that the land company, in selling portions of lots 9, 10, 15 and 16, reserved a 30-foot strip for road purposes in six of the nine conveyances of land along an east-west median line. From this and other evidence the trial court was justified in finding that it intended to provide a 60-foot road from Balboa avenue to Hayvenhurst avenue. And a road is primarily laid out for the benefit of the adjoining land owners. It must be remembered that the purpose of the land company was to sell the property which it had acquired as lots 9, 10, 15 and 16, and that it would have no use for an easement in gross. On the contrary, the logical purpose of the grantor in reserving an easement would be to give grantees of land bordering upon the east-west median line of the tract offered for sale an outlet from their property at that point. Parcels A, B, D, E and H each contain approximately 10 acres and the other parcels about 20 acres each. The owners of land having that amount of acreage could well use and might reasonably require access to their land by means other than the public streets shown on the diagram. The only logical conclusion to be drawn from these facts is that the easements were created for the benefit of the adjacent property.

More particularly, the evidence compels the conclusion that the easement was for the benefit of the land later acquired by the respondent. This property borders on no main street, and its only means of access is along the median east-west line. The nearest street to this land is Balboa avenue to the west, which can only be reached by passing over parcel A or F or both. Certainly no property owned by the land company at the time it sold parcels A and F to Rice could have been more clearly intended to receive the benefits of the easement then reserved than the land owned by the respondent.

[11-14] In urging that this conclusion is erroneous because there was no mutuality in the provisions of the various deeds, the appellants have misconceived the nature of the interests created. They insist that the rule stated in Werner v. Graham, 181 Cal. 174, 183 P. 945, is controlling. It concerns equitable servitudes in land and restrictive covenants which are equitable in nature. An easement, on the other hand, creates an interest in the land. Eastman v. Piper, supra; Gale on Easements, 9th Ed., p. 7. It is an interest which gives a privilege to a particular person or owner of property to enjoy a right over the property of another. Jones on Easements, pp. 1 and 2; Thompson on Real Property, Perm.Ed., vol. 1, p. 502. As it is an interest in land it can only be created by grant, or by implication or prescription and not by parol. Eastman v. Piper, supra. It is an incorporeal interest in the servient estate. Kellett v. Ida Clayton, etc., Wagon Road Co., 99 Cal. 210, 33 P. 885; Thompson on Real Property, Perm.Ed., vol. 1, p. 506. The principles governing equitable servitudes are therefore not applicable, and it was not necessary for the respondent to show that each deed made by the land company contained a reservation similar to that in the deed to Rice. Her cause of action depends upon the rights which were created by that deed

in favor of the land company and to which she succeeds as the subsequent owner of the adjoining land.

[15-18] Construing the reservation over parcels A and F as appurtenant to the land, the respondent's right to a judgment against the appellant Virgil McCombs depends upon whether the land company owned parcel B at the time the easements were created.

It appears that in 1919 the land company made a contract of sale with Rice and in 1922 made a deed in fulfillment of that contract. The respondent's land was conveyed by the land company to Title Guarantee and Trust Company, her predecessor in interest, about three years after Rice purchased parcels A and F on contract but before the deed was made to him. However, a contract for the sale of real estate may be specifically enforced by the purchaser, equity regarding as done that which ought to be done; it considers the purchaser to be the owner of the land. Tiffany, Real Property, 3d Ed., vol. 1, p. 528; Orange Cove Water Co. v. Sampson, 78 Cal.App. 334, 248 P. 526; Retsloff v. Smith, 79 Cal.App. 443, 249 P. 886. The vendor who retains the legal title as security for the payment of the purchase price has no greater rights than he would possess if he had conveyed the land and taken back a mortgage. Miller v. Waddingham, 91 Cal. 377, 27 P. 750, 13 L.R.A. 680. The vendee, particularly after he goes into possession of the land under an executory contract, is for all purposes the owner and the vendor retains mere legal title. Thompson, on Real Property, Perm.Ed., vol. 8, p. 522.

The record shows that Rice took possession of the property following the execution of the contract of sale; he thereby became the equitable owner with all the benefits incident to such ownership, and the land was subject to any easements reserved for the benefit of the grantor or the grantor's property. It necessarily follows that the benefits of that easement attached to the property and may now be enforced by the respondent.

[19-21] The judgment secured by Rice quieting his title against the land company does not bind the respondent who was not a party to that action. Also the subsequent quitclaim deed executed by the land company to Virgil McCombs did not terminate the respondent's easement to a right of way appurtenant to her land. But the respondent's rights as against him must be limited to a decree quieting her title to the use for road purposes of the south 30 feet of parcel A and the north 30 feet of parcel F and enjoining any interference with that use.

[22-24] However, when the deed to parcel G was made, the land company had conveyed all of the other parcels shown on the diagram, and the reservation in it could not have been made for the benefit of any other property. But it must be presumed that this provision in the deed was made to carry out some purpose, and "an interpretation which gives effect is preferred to one which makes void". § 3541, Civ.Code. It must, therefore, be construed as an easement in gross.

By a deed executed in 1936, the land company granted to the respondent and others all of its rights to the easement in and over the property of Eva McCombs. Under this deed the respondent acquired a title to the right of way and is entitled to have that title quieted and to an injunction against any interference with her use of the northerly 30 feet of parcel G for road purposes. Callahan v. Martin, 3 Cal.2d 110, 121, 43 P.2d 788, 101 A.L.R. 871.

The judgment is therefore reversed with directions to enter judgment in favor of the respondent in accordance with the conclusions which have been stated, respondent to recover her costs on appeal.

We concur: GIBSON, C. J.; TRAYNOR, J.; CARTER, J.; SHENK, J.; SPENCE, Justice pro tem.

HOUSER, Justice (dissenting).

I dissent.

The appeal from the judgment which was rendered herein in the lower court was originally determined by the District Court of Appeal for the Fourth Appellate District. 100 P.2d 499, 500. Thereafter a petition for hearing in this court was granted, particularly for the purpose of giving more careful consideration to certain points of law than was practicable at the time this court considered the petition for hearing of the appeal herein. Following the submission of the cause and taking into account the points and authorities submitted in the additional briefs which were filed by the respective parties to the litigation, I have become convinced that the opinion which was rendered by the District Court of Appeal, as hereinbefore referred to, has adequately expressed my views with reference to each of the several issues which were presented on the appeal. Accordingly, the said opinion, which was prepared by Mr.

Justice Griffin of the said District Court of Appeal, is adopted as my opinion. It is as follows:

"By this action in equity plaintiff Besse C. Elliott, respondent herein, asks injunctive relief and seeks to quiet title to a right of way and easement for road purposes over the properties of Virgil McCombs and Eva F. McCombs, defendants and appellants. The tract of land involved in this litigation was acquired by the San Fernando Mission Land Company, hereinafter referred to as the 'Land Company', on January 18, 1905, and is described as tracts 9, 10, 15 and 16 of subdivision No. 1 of Porter Land and Water Company, as per map recorded in book 31, page 3, miscellaneous records of Los Angeles county. Said map was recorded in 1888 and showed, included with the subdivision of adjoining lands, the subdivision into quarters of the southwest quarter of section 18, township 2 north, range 15 west, S. B. B. & M., in Rancho Ex Mission de San Fernando. These quarters are designated on this map by the above tract or lot numbers as: Tract No. 9 being the northwest quarter, tract No. 10 being the northeast quarter, tract No. 15 being the southeast quarter, and tract No. 16 being the southwest quarter, which quarters will hereinafter be referred to by their respective tract numbers. This map also showed roads bounding the four sides of said quarter section. These roads came to be known as Devonshire street on the north, Hayvenhurst avenue on the east, Lassen street on the south, and Balboa avenue on the west.

"Defendant Virgil McCombs' property, over which plaintiff claims a right of way, comprises the west half of tract 16 and the southwest quarter of tract 9, the westerly boundary thereof fronting on the aforementioned road, Balboa avenue. Plaintiff's property comprises the southeast quarter of tract 9, adjoining the easterly boundary of defendant's southwest quarter of tract 9. The right of way in question is claimed over a strip of land, 60 feet in width, running east and west across defendant Virgil McCombs' land. This strip claimed as a right of way comprises the north 30 feet of the west half of tract 16 and the south 30 feet of the southwest quarter of tract 9.

"After acquiring title in 1905 from the subdivider, the Land Company conveyed in parcels all that land in said quarter section bounded by the line of abutment between the north and south halves thereof. This line of abutment is the center line of the right of way in question. In certain deeds of parcels bounded on the south by said line the Land Company set forth reservations of the southerly 30 feet thereof for road purposes, while in other deeds of adjoining parcels no such reservations were made. Certain deeds of parcels bounded on the north by said line contained reservations of the northerly 30 feet thereof for road purposes, while deeds of adjoining parcels neglected to provide for like reservations. Plaintiff contends that, by virtue of these reservations, the Land Company intended to and did set apart for the benefit of adjoining landowners a strip of land 60 feet in width lying between the north and south halves of said quarter section and running from the east to the west boundary thereof.

"After the execution and payment of a contract of sale dated in 1919 (the terms of which are not disclosed as to any reservations therein), by deed dated June 20, 1922, the Land Company conveyed to one Rice, defendant Virgil McCombs' immediate grantor, the west half of tract 16 and the southwest quarter of tract 9. This deed conveyed 'the west half of the southwest quarter, except the north 30 feet thereof reserved for road purposes, and the southwest quarter of the northwest quarter, except the south 30 feet thereof reserved for road purposes'. The reservations embodied in this language of the description in said deed to Rice constitute the sixty-foot strip in controversy and over which plaintiff claims to be entitled to a right of way and easement. On July 14, 1927, Rice commenced an action against the Land Company in the superior court of Los Angeles county to quiet title to the west half of tract 16 and the southwest quarter of tract 9, being the land now owned by defendant Virgil McCombs, and mentioned herein as having been conveyed to Rice by the Land Company. Notice of the pendency of the action was duly given in writing and recorded in the office of the county recorder of Los Angeles county. No contest having been made by the Land Company, and its default in said action having been duly entered, Rice was, on May 22, 1930, adjudged the owner and in possession, and the decree quieting his title to said property, including the claimed right of way, was duly entered on May 23, 1930. At the time this quiet title action was filed the Land Company

had conveyed all of its interest in and to the said southwest quarter of section 18, except the interests reserved and retained by it through reservations for road purposes in some but not all of its deeds. On May 22, 1930, the date of the decree in said quiet title action, there was recorded a deed dated May 3, 1930, from Rice and wife to defendant Virgil McCombs, conveying the west half of tract 16 and the southwest quarter of tract 9, being the land plaintiff seeks to burden with an easement. This deed from Rice to defendant did not contain any reservations of, or reference to, an easement or right of way. Thus defendant acquired his interest in the above-described property, which he has held ever since.

"Prior to the conveyance from the Land Company to Rice, and by deed dated February 23, 1922, the Land Company conveyed the southeast quarter of tract 9, plaintiff's property, and the northwest quarter of tract 15 to Title Guarantee and Trust Company, a corporation, hereinafter referred to as the 'Title Company'. The evidence shows that this deed to the Title Company did not contain any reservations. No reservation was made of the south 30 feet of the southeast quarter of tract 9. Such a reservation, if made, would have provided an easterly continuation of the south thirty-foot strip of said southwest quarter of tract 9 reserved by the Land Company in the aforementioned deed to Rice. The Land Company in this deed to the Title Company did not grant, or refer to, or describe any right of way over said southwest quarter of tract 9 or the west half of tract 16. By deed dated February 1, 1926, the Title Company, which was the grantee of the grantee of the original subdivider, conveyed the southeast quarter of tract 9 and the northwest quarter of tract 15. This deed contained the following reservations, to-wit: 'reserving the south 30 feet of lot 9 and the north 30 feet of lot 15, for road purposes'. Through mesne conveyances, and on January 24, 1936, plaintiff acquired title to the southeast quarter of tract 9 by a deed containing a reservation of the south 30 feet thereof for road purposes. Thus plaintiff acquired title to the property, the ownership of which she now claims entitles her to a right of way across defendant Virgil McCombs' land.

"By deed dated August 27, 1921, the Land Company conveyed the west half of the east half of tract 10. This deed contained no reservations. By deed dated April 16, 1920, the Land Company conveyed the east half of tract 15. This deed contained a reservation of the north 30 feet thereof for road purposes. Through mesne conveyances and on June 23, 1926, Hershel C. Baskett acquired title to said east half of tract 15 by a deed containing a like reservation. However, on June 15, 1926, the Land Company executed to Baskett a quitclaim deed covering this east half of tract 15. By deed dated February 19, 1923, the Land Company conveyed the east half of tract 16. This deed contained a reservation of the north and south 30 feet thereof for road purposes. Through mesne conveyances and on January 30, 1928, the defendant Eva F. McCombs, wife of Virgil McCombs, acquired title to this east half of tract 16 by a deed containing like reservations. By deed dated June 22, 1921, the Land Company conveyed the west half of tract 10. This deed contained a reservation of the north and south 30 feet for road purposes. By a similar deed dated January 6, 1921, the Land Company conveyed the east half of the east half of tract 10, containing a reservation of the south 30 feet thereof for road purposes. Two days before the action herein was commenced and on October 24, 1936, the Land Company and the Title Company executed various quitclaim deeds covering the south 30 feet of lots 9 and 10 and the north 30 feet of lots 15 and 16 to owners of parcels abutting thereon. On said date the Title Company executed a quitclaim deed to one Mabel Ruth Craig, covering the north 30 feet of the northwest quarter of lot 15, and it also executed a quitclaim deed to plaintiff Besse C. Elliott, covering the south 30 feet of the southeast quarter of lot 9. Both of these quitclaim deeds contained a provision: 'Subject to an easement for road purposes over said property.' On October 24, 1936, the Title Company executed a quitclaim deed to all the owners of abutting parcels, covering all of its right, title and interest in and to an easement for road purposes in and over the south 30 feet of lots 9 and 10 and the north 30 feet of lots 15 and 16. Finally, on the same date, the Land Company executed a quitclaim deed to the same owners of abutting parcels, covering all of its right, title and interest in and to an easement for road purposes in and over the south 30 feet of lots 9 and 10 and the north 30 feet of lots 15 and 16.

In the spring of 1934, defendant Virgil McCombs planted eucalyptus trees, 10 feet apart, in a row across the west boundary of the 60-foot strip in question where the same enters Balboa avenue. Defendant Virgil McCombs each year plowed up the 60-foot strip, together with the rest of his property, and raised crops on all of the land, as his predecessor had done while he held title.

"The trial court found that it was the intention of the Land Company 'to create a right of way for road purposes sixty feet in width running parallel with the north and south boundaries of said quarter section midway between said north and south boundaries, and connecting the roadways bounding said quarter section on the east and west side, which roadways are now known as Hayvenhurst Avenue and Balboa Avenue respectively; * * * that for several years prior to the commencement of this action said sixty-foot strip between lots 10 and 15 has been used for road purposes by the owners of property abutting thereon and their servants, agents and employees and others who chose to use the same, and that said strip is now a well-defined roadway; that at the time the defendants acquired title to their properties said strip was being so used * * * that through mesne conveyances and on January 30, 1928, the defendant Eva F. McCombs acquired title to the east half of lot 16 except thirty feet along the north and south lines thereof for road purposes; * * *' That as to the west half of lot 16 and the southwest quarter of lot 9, 'there was no user of that portion of the sixty-foot strip and right of way for road purposes * * * and that while the defendant Virgil McCombs has exercised all right of ownership in so far as previous use is concerned of the property from the time he has possessed it and that his predecessor in interest Rice did so from 1919, the benefit of such easement would continue in plaintiff's land and her predecessor in interest whether acts of ownership were ever exercised by the defendant McCombs and his predecessor, Rice'; that the quiet title decree 'did not affect the rights of plaintiff or her predecessors in interest to use all or any part of said sixty-foot strip for ingress and egress to and from their respective properties'; that all of the grantees mentioned in the deeds of the 60-foot strip across the entire quarter section, dated October 24, 1936, from the Land Company to the Title Company, are the owners of 'some parcel of property abutting upon said easement for road purposes, and that collectively they own all of such abutting property'; that 'at the time defendants acquired their respective properties, that they had such constructive notice as was given by the public records that a reservation for road purposes, sixty feet in width lying between lots 9 and 10 on the north, and lots 15 and 16 on the south, was reserved for road purposes by the San Fernando Mission Land Company, a corporation; that at the time San Fernando Mission Land Company, a corporation, had divested itself of all interest in said southwest quarter of said section 18, supra, except its interest in said sixty-foot reservation for road purposes. It had no right, either directly or indirectly, to divest any of the land owners abutting upon the hereinbefore mentioned sixty-foot strip, of their right to the free and unhindered use of said strip for road purposes and travel'. The court then found that 'the defendants, and all other owners of property abutting on said sixty-foot strip, have an equal right with plaintiff to the use of said sixty-foot strip as a roadway and passageway for ingress and egress to and from their respective properties, and to and from said Hayvenhurst Avenue and Balboa Avenue'.

"The judgment rendered herein quiets against defendants a right in plaintiff to use said 60-foot strip over defendants' land for road purposes and also orders defendants to remove all the trees within this 60-foot strip, and perpetually restrains defendants from in any way interfering with plaintiff's free use of said 60-foot strip for road purposes. From this judgment defendants prosecute their appeal.

"Respondent, in support of the judgment, argues that the reservation in the Land Company's deed to Rice and the circumstances related created an easement appurtenant to the parcel now owned by respondent; and that the abutment of respondent's parcel upon part of the terminus of the strip in question reserved in the deed to Rice was sufficient to annex to respondent's parcel the irrevocable right of its free use for the benefit of abutting landowners; and that therefore the quiet title decree against the Land Company did not divest respondent of this right, she not being a party to that action, citing Petitpierre v. Maguire, 155 Cal. 242, 100 P. 690; Syers v. Dodd, 120 Cal.App. 444, 447,

8 P.2d 157; Prescott v. Edwards, 117 Cal. 298, 303, 49 P. 178, 59 Am.St.Rep. 186. Appellants now argue that the trial court erred in the conclusion of law 'that the reservations in some deeds from the Land Company of adjoining parcels of said quarter section operated to reserve for the mutual benefit of all adjoining parcels a strip of land for road purposes, comprising the south 30 feet of lots 9 and 10 and the north 30 feet of lots 15 and 16, thereby creating an easement or quasi-easement or right of way over defendants' land for the benefit of plaintiff's land', and that before such a strip of land extending over the entire quarter section could be said to have been reserved by the Land Company, all its deeds of adjoining parcels would necessarily have to contain reservations. The evidence shows that the Land Company conveyed three of the parcels by deeds containing no reservations, and the trial court so found. The parcels conveyed free of reservations comprise about half the length of that strip which the trial court concluded the Land Company had reserved for road purposes. The parcels conveyed without reservations are interspersed between those conveyed with reservations. The deeds containing reservations did not state that the reservations were for the benefit of adjoining parcels. If the Land Company had intended these reservations to have that effect, it would have expressly so declared in the deeds, as was done in the case of Petitpierre v. Maguire, supra, relied upon by appellant. It therefore seems clear that the benefit of these reservations was intended to be purely personal to the grantor Land Company and there is nothing to indicate a different intention. Taft v. Tarpey, 125 Cal. 376, 58 P. 24. Even were it assumed that the Land Company intended the reservations to be for the benefit of the parcels conveyed without reservations, yet the grantees of those parcels conveyed with reservations had no right of way over those parcels deeded free of reservations. Thus there could be no mutuality of benefit in the adjoining landowners. The fact that a road would be convenient to the grantees could not inject into their respective deeds an intention by the grantor to create one, when the language of the deeds showed no such intent. The intention of the parties should be determined by a fair interpretation of the grant or reservation creating the easement. Berryman v. Hotel Savoy Co., 160 Cal. 559, 566, 117 P. 677, 37 L.R.A.,N.S., 5. It is the general rule that in such cases it is better to get at the intention of the grantor from the language of the deed, interpreted in the light of the attending circumstances, than to conjecture the intent from the circumstances and then to make the language of the deed bend to that.

"Assuming the deeds with reservations did create a road for the benefit of the adjoining parcels, then the road grew in length as the Land Company conveyed each additional parcel by a deed containing reservations for road purposes. If this were true, each grantee would not know the extent of burden imposed by the reservation, if any, in his deed until the conveyances of all the parcels were made. But this could not be, for the extent of burden of the easements reserved was determined by the individual grants themselves. Civ.Code, sec. 806, C. F. Lott Land Co. v. Hegan, 177 Cal. 169, 169 P. 1035.

"There is no evidence that at the time of conveyance the grantees had any notice that the Land Company owned adjoining land, or that a road might be set apart out of the adjoining parcels for their mutual benefit. The map of said quarter section, recorded in 1888, showed no right of way. The individual deeds made no reference to such a road. There is no evidence that there was a use of a road to indicate its existence, nor is there any evidence that the Land Company informed the purchasers of a plan to create a road. A secret intent of the Land Company, if any, to carve a road out of the adjoining parcels conveyed for their mutual benefit could not operate to bind the grantees, else the grantees would be bound in law to investigate the subsequent deeds of the Land Company of other parcels than their own to discover this intent. However, the intention of the grantor must be determined as of the time of conveyance. Further, for such a plan to bind the grantees the intention of the grantor alone does not govern. It is the joint intent of the grantor and grantees which controls. The case of Werner v. Graham, 181 Cal. 174, at page 184, 183 P. 945, aptly states the rule applicable to the instant case:

" 'The intent of the common grantor—the original owner—is clear enough. He had a general plan of restrictions in mind. But it is not his intent that governs. It is the joint intent of himself and his grantees, and as between him and each of his grantees the instrument or instru-

ments between them, in this case the deed, constitute the final and exclusive memorial of such intent. It is also apparent that each deed must be construed as of the time it is given. It cannot be construed as of a later date, and in particular, its construction and effect cannot be varied because of deeds which the grantor may subsequently give to other parties.' See, also, Los Angeles, etc., Co. v. Muir, 136 Cal. 36, 50, 68 P. 308; McBride v. Freeman, 191 Cal. 152, 215 P. 678; 9 Cal.Jur., p. 248.

"This jurisdiction is replete with authority that a grantee who takes his conveyance without notice of such a plan acquires his interest free of the burdens imposed by it. It is true that an easement may be created by estoppel and where a grantor conveys lots in a tract of land under a plan, known to the grantees, to set apart a road for the benefit of the lots conveyed, a reciprocal easement in the road passes with each lot conveyed. Under this rule, however, the grantees are not bound unless at the time of conveyance they were in some way apprised of the plan or the existence of the road. Since such an easement is generally based on the doctrine of equitable estoppel, the notice to the grantee is an essential factor. The cases demonstrate that this notice may be brought home to the grantee in various ways: by the deed itself; by a map, recorded or unrecorded, showing the road; by an open, apparent use of the road, indicating its existence; by a plat or subdivision of the tract showing the road; or by the grantor designating the road by visible markings on the ground. Silveira v. Smith, 198 Cal. 510, 246 P. 58; Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L.R.A.,N.S., 1024; Syers v. Dodd, 120 Cal.App. 444, 8 P.2d 157; Prescott v. Edwards, supra; Eltinge v. Santos, 171 Cal. 278, 152 P. 915, Ann.Cas.1917A, 1143; Petitpierre v. Maguire, supra. The evidence in the instant case does not disclose notice to the grantee in any of the instances above mentioned.

"As applied to the facts related, we are convinced that the evidence does not justify the application of the estoppel rule. Plaintiff has shown no title by prescription. Since the trial court found that there was no user of the easement in question, no title by prescription could have been acquired. The question of the necessity of egress and ingress is not involved. On February 23, 1922, the Land Company conveyed to the Title Company the southeast quarter of tract 9 (plaintiff's parcel). This deed to the Title Company contained no reservations. Four months later, the Land Company conveyed defendant Virgil McCombs' parcel to Rice by deed, to-wit, a deed with the reservations above referred to. This deed to Rice did not declare that the easement reserved was for the benefit of any adjoining parcel. When the conveyance to Rice was made the Land Company had already conveyed the southeast quarter of tract 9 to the Title Company. The easement reserved did not attach an appurtenance to that parcel, of which the Land Company had divested itself of title. Hopper v. Barnes, 113 Cal. 636, 45 P. 874; 9 R.C.L. 737; Werner v. Graham, 181 Cal. 174, 182, 183 P. 945. Therefore, it is patent that the Land Company did not create over the southwest quarter of tract 9, or the west half of tract 16 an easement appurtenant to the southeast quarter of tract 9. Since the easement reserved in the deed to Rice was not appurtenant, then the easement was one in gross, personal to the Land Company. This quiet title judgment in favor of Rice and his successors in interest therefore was conclusive against the Land Company and its successors in interest and as plaintiff is the successor in interest of the Land Company, this judgment was conclusive against her. Knight v. All Persons, etc., 32 Cal.App. 381, 386, 162 P. 1051; Riverside Land Co. v. Jensen, 108 Cal. 146, 41 P. 40; Code Civ.Proc., secs. 751, 1908, and 1962; Baker v. Brickell, 102 Cal. 620, 624, 36 P. 950.

"In conclusion, it may be thus summarized: The reservations for road purposes in the Land Company's deed to Rice vested an easement in gross in the Land Company. The subsequent quiet title judgment for Rice vitiated all rights, title or interest of the Land Company in this easement which it had reserved. By this judgment Rice's title, theretofore incumbered by said easement, was perfected against the Land Company. This perfected title was acquired by defendant here. Since this judgment was effective to divest the title in the Land Company to the easement in question, clearly then, it was error for the trial court to conclude that the judgment was of no effect to bar the plaintiff who claims her right to the easement as a successor in interest of the Land Company."

The judgment should be unconditionally reversed.

17 Cal.2d 77

NEBLETT v. STATE BAR OF CALIFORNIA.

L. A. 17637.

Supreme Court of California.

Jan. 22, 1941.

Rehearing and Modification Denied Feb. 20, 1941.

1. Attorney and client ⇐56

The disciplinary proceeding arising out of false testimony allegedly given by an attorney in a libel action which was still pending would, in interests of justice, be dismissed without prejudice to await determination of issues in pending libel action, though determination of libel action was not necessarily indispensable to prosecution of the disciplinary proceeding tracing its origin to it.

2. Attorney and client ⇐54

The right to practice law is a valuable one which should not be taken away under circumstances that have even the slightest tendency to suggest any possible unfairness or disadvantage therein to attorney whose right to remain in his profession is challenged.

Proceedings by William H. Neblett to review an order of the Board of Governors of the state bar, recommending that petitioner be disbarred from the practice of law for allegedly giving false testimony in a libel action, which is still pending and undetermined.

Proceedings dismissed without prejudice, to await determination of the libel litigation.

Rehearing denied; EDMONDS and HOUSER, JJ., not participating.

E. Walter Guthrie and William C. Ring, both of Los Angeles (H. S. Dottenheim, of Los Angeles, of counsel), for petitioner.

E. W. Miller, of Los Angeles, amicus curiae for petitioner.

J. Marion Wright, of Los Angeles, and Claude Minard, of San Francisco, for respondent.

PER CURIAM.

Petitioner instituted this proceeding for the purpose of reviewing an order of the Board of Governors of the State Bar recommending that he be disbarred from the practice of law in this state.

On February 24, 1940, the petitioner was served with a notice to appear and show cause before a local committee of the respondent State Bar why he should not be disciplined for allegedly having given false testimony in a libel action commenced by him in the superior court of Los Angeles county. The alleged false testimony given by the petitioner before the jury in his libel action is set out at length in the notice to show cause and consumes some twelve typewritten pages thereof. At the hearings before the local committee petitioner admitted that he had so testified in the libel action but denied the charge of falsity. In fact, before the committee he testified to substantially the same effect by way of explanation of the transactions underlying both the libel action and the disciplinary proceeding. In other words, except in immaterial and minor details, petitioner has not receded from the position taken by him as a witness in the libel action.

Briefly stated, both the libel action which is still pending, and the disciplinary proceeding, turn upon the truth of petitioner's statement or testimony as to the purpose for which certain sums of money, approximating $15,000, were paid to him in the latter part of 1936 and early 1937. It was the theory of the respondent State Bar, and it definitely so charged in the notice to show cause, that this money had been paid to the petitioner for the purpose of having him influence his then law partner, who was a United States Senator, to sponsor or support a deficiency appropriation measure in Congress, which measure, if enacted, would supply the funds necessary to complete the new federal building then under construction in Los Angeles. In furtherance of its theory the respondent State Bar urged that the George A. Fuller Company of New York, one of the principal contractors engaged in the erection of the building, and the Newberry Electric Corporation of Los Angeles, a subcontractor for the installation of the electrical work, were both interested in seeing that sufficient moneys were appropriated to complete the building and that either or both had engaged or resorted to the services of one Carl Pustau, as an intermediary, to pay the money above mentioned to the petitioner for the purpose already referred to. A deficiency appropriation measure for the completion of the building was passed by Congress in February, 1937.

In 1938, in an involuntary bankruptcy proceeding then pending against Pustau, there was offered in evidence a lengthy statement wherein he charged that the moneys theretofore paid by him to the petitioner were for the illegal purpose charged in the order to show cause herein.

Apparently copies of this Pustau statement were released to the press and published. Whether the statement was intended to embarrass and thereby defeat petitioner's then law partner for re-election as United States Senator, is purely speculative and presently immaterial, though such is asserted in petitioner's briefs to have been its purpose.

After its publication and in February, 1938, the petitioner herein sued Pustau for damages for libel, alleging his statement to be false. Several other persons were also named as defendants on the allegation that they had induced or procured Pustau to make the charge. As already indicated, upon the trial of the libel action petitioner admittedly testified as charged in the order to show cause in this proceeding. Then, and ever since, he has consistently claimed and testified that the moneys paid to him by Pustau were not for the purpose stated by the latter but, on the contrary, were paid to him pursuant to an agreement whereby petitioner for a fee, reflected in part by the Pustau payments, was to undertake over a year period to procure electrical work or business for the Newberry Electric Corporation, represented by Pustau, with particular view to an effort on petitioner's part to procure for such electrical company a contract for the construction of a power line from Boulder Dam into Los Angeles for the Southern California Edison Company. The president of the latter company was a personal friend of the petitioner, which fact it was assertedly assumed would be of assistance to the petitioner in his negotiations in the particular mentioned. The record herein discloses that petitioner exerted some effort toward the accomplishment of this objective, though the parties hereto differ as to the time when such service was rendered and the result thereof. As stated, in the libel action and ever since, the foregoing substantially has been the petitioner's explanation of his receipt of the money from Pustau. Obviously, this explanation, if accepted or true, discloses nothing of a disciplinary character.

At the trial of the libel action petitioner, as plaintiff, after offering on the witness stand his explanation of the Pustau payments to him, as against Pustau's prior and allegedly libelous charge with respect thereto, was nonsuited as to certain of the defendants but procured a judgment of $70,000 against other defendants, including Pustau. A new trial was thereafter granted to the latter group of defendants, the prosecution of which is assertedly awaiting the determination of petitioner's appeal from the judgment of nonsuit in favor of some of the defendants. In short, the libel action in which it is here charged that petitioner, as witness and plaintiff, had perjured himself is still pending and undetermined in a court possessing the jurisdiction essential to a proper determination of the issues there involved, which necessarily include any question as to the truthfulness of testimony therein given by the petitioner, plaintiff in that action, with respect to the purpose or purposes for which he admittedly received the money from Pustau. For, if petitioner's testimony therein be assumed to be true, obviously he was maligned by Pustau's statement to the contrary, whereas if the latter's statement be accepted petitioner would have no just cause for complaint in the libel action.

[1, 2] Under the circumstances, and for other reasons hereinafter to be mentioned, we are of the view that the ends of justice will best be served by a dismissal of this disciplinary proceeding without prejudice, to await the determination of the issues in the pending libel action out of which, as stated, the present proceeding arose. In Golden v. State Bar, 213 Cal. 237, 249, 250, 2 P.2d 325, wherein there was a connection or tie-in between pending civil litigation and the disciplinary proceeding there involved, we dismissed the latter without prejudice to await disposition of the former. We are mindful that determination of the libel action is not necessarily indispensable to the institution or prosecution of a disciplinary proceeding tracing its origin to the former. But we are equally mindful that the right to practice law is a valuable one which should not be taken away or canceled under circumstances that have even the slightest tendency to suggest any possible unfairness or disadvantage therein to the attorney whose right to remain in his profession is challenged. Some of the principal witnesses against the petitioner in this disciplinary proceeding are defendants in the pending libel action to which this proceeding traces its origin. Without any desire on our part to impugn the honesty of these witnesses, we are of the firm conviction that they should not be confronted with even the slightest temptation to color their testimony

in this proceeding, consciously or unconsciously, in a way that later may prove to be beneficial to them as defendants in the petitioner's pending libel suit against them. Under the peculiar circumstances here present, it is neither fair to the witnesses nor to the petitioner that such a situation be tolerated. Moreover, any present disposition of this disciplinary proceeding on the merits, no matter how guarded, or what the result, could serve only to prejudge, if not determine, the pending libel action. It is not our inclination so to do. If, as the respondent State Bar contends, petitioner actually falsified his testimony on the first trial of the libel suit, on which point we express no opinion, that fact, if it be a fact, may be proved equally as well at the conclusion of that litigation and then be made the basis for disciplinary action free of the obstacles which now rear their heads upon this proceeding.

Our conclusion to dismiss this proceeding without prejudice is fortified by other matters worthy of consideration. There can be no doubt but that in the inception of this proceeding the respondent State Bar relied heavily upon the statements and testimony of Pustau to establish that he had paid the money to petitioner for the improper and illegal purpose charged in the order to show cause. The findings so declare. Unquestionably Pustau at the inception of these proceedings was to be the principal witness against petitioner. His testimony in this proceeding covers approximately 250 pages of the transcript. He did not, however, prove to be a good witness. Concededly, he is now a convicted perjurer. People v. Pustau, 39 Cal.App.2d 407, 103 P.2d 224. Because of this, the committee later and wisely abandoned him and its findings frankly exclude his testimony from all consideration. As a result, the local committee expressly refused to find, as charged in the order to show cause, that the money paid by Pustau to petitioner was for the purpose of having the latter influence his then law partner, as a United States Senator, to assist in the congressional appropriation of deficiency funds with which to complete the Los Angeles federal building. The Board of Governors adopted the findings of the committee and consequently has likewise refused to find upon this issue. It is difficult to perceive how a contrary finding could have been made under the circumstances. In the absence of the testimony of the discredited and rejected witness Pustau, the transcript is destitute of direct evidence tending to establish that the money was received by petitioner for the purpose charged in the order to show cause. Other witnesses called by the respondent State Bar, whether friendly or unfriendly to petitioner, denied having paid or having directed payment to petitioner for such purpose. In fact, the president of the Newberry Electric Corporation, a witness none too friendly toward petitioner, testified that there was "no need for anything of the kind; perfectly absurd to even think of it".

We advance the foregoing without any thought of presently considering or determining the merits of the charge against petitioner but merely to show that the state of the record now before us is such as to support our conclusion that any disciplinary action should await determination of the libel suit. The respondent State Bar being thus precluded by the turn of events from finding that the money was paid by Pustau to petitioner for the purpose specifically alleged in the order to show cause, nevertheless went on to find that petitioner had falsified when he testified in the libel suit to the effect that the money had been paid to him for his services in connection with attempting to procure a contract for the Newberry Electric Corporation to build a power line from Boulder Dam to Los Angeles for the Southern California Edison Company. Assuming, without deciding, that such asserted falsification is within the charge as defined in the order to show cause, as urged by the respondent State Bar, under the express findings of the committee as adopted by the Board of Governors, it is dependent and grounded upon certain conflicts between petitioner's testimony in the libel action (here substantially reiterated by him) and the testimony of certain witnesses, other than Pustau, called by the respondent State Bar in this proceeding, augmented by certain inferences allegedly deducible from such other evidence. In fact, the committee in its findings (later adopted by the board) declared that: "In finally apprising the Board of this Committee's feelings in regard to the credibility of the witnesses, in fairness to the [petitioner] it must be stated that were the Committee obliged to judge this matter solely between the Committee's opinion of the veracity of the [petitioner] and the veracity of the majority of the witnesses upon whom the State Bar was forced to rely, the Committee would indeed have found that task most difficult. We have

been here aided, however, by the exhibits, the establishment of certain definite points of time in relation to the happening of certain matters, and have been further aided by the inferences properly deducible from satisfactory evidence and the Committee's own knowledge of the general and reasonable actions of persons under given conditions."

We do not deny that certain discrepancies exist between parts of petitioner's testimony in the libel suit, explaining the reason and basis for his receipt of the money from Pustau, and parts of the testimony of certain witnesses called herein by the respondent State Bar. However, we do not hesitate to state that some of these discrepancies are not of great consequence and conceivably may be traceable to honest but varying recollections of the same incident by different minds. Nor do we deny the evidentiary value of inferences drawn from evidence. But, in view of the pendency of the libel action out of which this proceeding arose and in which the purpose underlying the Pustau payments to petitioner is equally material, and in the absence from the record now before us of credible direct evidence contradicting petitioner's explanation of the purpose underlying said payments, we are not now inclined to weigh the discrepancies and inferences mentioned and to rule either that they are or are not sufficiently substantial to warrant petitioner's disbarment. Because of the unusual circumstances involved, as indicated above, that may best be done at the more propitious time already mentioned. Particularly does this course appear appropriate when it is further noted that so far as we are aware, or have been informed, this is the first time in the petitioner's twenty-six years of professional activity, twenty-two of which have transpired in this state, that he has been recommended for discipline.

Moreover, our conclusion will serve to avoid the necessity of passing upon petitioner's contention that the recommendation of disbarment made by the Board of Governors is null and void because approved and voted only by the necessary minimum of eight members, one of whom assertedly was disqualified and not entitled to participate therein because of his prior representation as counsel of one of the defendants in the petitioner's libel action. Such representation was in the very libel action out of which this disciplinary proceeding arose. It is true that the particular defendant was early relieved of liability in that action on an order of dismissal and his representation by the challenged member of the Board of Governors was but nominal. It is also true that in response to petitioner's motion to dismiss this proceeding because of said member's alleged disqualification and the asserted resulting deficient vote of qualified members of the Board of Governors, an affidavit has been filed herein by the challenged member in which he avers that at the time of his participation in the deliberations, and voting of the board in this disciplinary proceeding he had "completely forgotten" his prior and nominal representation of one of the minor defendants in the libel action. He likewise disclaimed all "feeling favorable or unfavorable" toward petitioner by reason thereof. We do not question the sincerity or honesty of purpose of the particular member. Nor do we find it necessary to here pass upon either the timeliness or the merits of the challenge directed at him, for obviously our conclusion to dismiss this proceeding without prejudice for reasons already mentioned will effectively serve to remove the circumstance which petitioner asserts has resulted in the recommendation of his disbarment by a vote of an insufficient number of qualified members of the Board of Governors. This latter circumstance is but another factor tending to establish the reasonableness of our disposition of this proceeding in a manner to eliminate all vestige of claimed unfairness.

In conclusion, it may also be pointed out that such course will likewise serve to afford petitioner the requested opportunity to further challenge the testimony of the president of the Newberry Electric Corporation. The respondent State Bar denied a similar request upon the ground that it already had made its recommendation to this court and had lost jurisdiction of the proceeding. It appears from the findings herein that the respondent State Bar has placed much reliance upon the testimony of said witness particularly in so far as it differs from petitioner's explanation of his dealings with that company. In a supplemental affidavit filed in support of his motion to dismiss this proceeding upon the ground last above discussed, the petitioner avers that in the argument before the Board of Governors the State Bar examiner had cast some aspersion upon or had questioned the accuracy of at least a portion of the testimony of the designated witness, who had been called

by the respondent. We do not find in the record now before us any denial by the State Bar of such challenge of its own witness and, as stated, our indicated disposal of this proceeding will not foreclose the petitioner from further challenging the witness' testimony in any particular desired.

Therefore, in view of the pendency of the libel action out of which this proceeding arose, and in view of the unsatisfactory state of the record herein in the respects mentioned, we are of the opinion that the ends of justice will best be served and the valuable right to practice law will more effectively be guarded by a dismissal of this proceeding without prejudice, to await whatever proceedings the respondent State Bar deems appropriate upon the later determination of the libel litigation.

It is so ordered.

EDMONDS and HOUSER, JJ., did not participate in the consideration or decision of this matter.



17 Cal.2d 55

In re PHILLIPS.

L. A. 17367.

Supreme Court of California.

Jan. 17, 1941.

1. Attorney and client ⇐39

The statute providing for suspension of attorney on receipt by court of certified copy of record of conviction and providing for disbarment when judgment becomes final is "mandatory" in character and provides for automatic suspension upon proof of conviction and for automatic disbarment when judgment of conviction becomes final. St. 1939, p. 357, § 6102.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Attorney and client ⇐39

Where trial court suspends the rendition of its judgment of conviction of an attorney of crime involving moral turpitude, Supreme Court can only suspend and cannot disbar attorney since there has been no final adjudication of his guilt in court of law, and in such case if it is thought attorney has been guilty of conduct warranting disbarment, state bar must proceed upon its own initiative under statute. St.1939, p. 357, §§ 6101, 6102; pp. 355, 356, §§ 6075–6087.

3. Attorney and client ⇐39

Where court adjudged that attorney be imprisoned in city jail for term of 180 days, that execution be suspended for two years and that defendant be placed on probation on condition he serve 175 days in city jail, court rendered its judgment of conviction and then suspended its execution, and where defendant thereafter appealed and judgment was affirmed, judgment was "final judgment of conviction" sufficient to sustain an order of disbarment. St.1939, p. 357, § 6102; Pen. Code, §§ 1203.1, 1203.2.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment of Conviction".

4. Attorney and client ⇐56

The statutory language that defendant shall be "released from all penalties and disabilities resulting from the offense" where court places defendant on probation and sets aside verdict after satisfactory completion of probationary period, is not to be interpreted as legislative mandate that order of disbarment of an attorney convicted of crime must be revoked where probation is granted. St. 1939, p. 357, § 6102; Pen.Code, § 1203.4.

See Words and Phrases, Permanent Edition, for all other definitions of "Released from All Penalties and Disabilities Resulting from the Offense".

5. Constitutional law ⇐57

Legislature cannot infringe upon judicial power of court to discipline its own officers and cannot vacate such a judicial order by legislative mandate.

6. Criminal law ⇐1001

The "penalties and disabilities" within the probation statute providing that a person is "released from all penalties and disabilities resulting from offense" where court sets aside verdict after satisfactory completion of probationary period is established, are those which it is within power of legislative branch of government to release. Pen.Code, § 1203.4.

7. Attorney and client ⇐39

Order granting probation to attorney convicted of misdemeanor involving moral turpitude, followed by an order dismissing the action, was not analogous to order granting a new trial or to reversal of judgment of

conviction upon appeal, which would prevent judgment of conviction from being final and prevent automatic disbarment of attorney, since order granting new trial or reversal of judgment is based upon the premise that error was committed rendering it uncertain whether defendant was actually guilty. Pen. Code, § 1203.4; St.1939, p. 357, § 6102.

8. Attorney and client ⇐39

Where attorney was convicted of crime involving moral turpitude and was automatically disbarred, court's setting aside of verdict and dismissing action after attorney completed period of probation operated to mitigate punishment by restoring certain rights and removing certain disabilities but did not obliterate fact that attorney had been finally adjudged guilty of crime and did not suspend automatic disbarment under statute. Pen.Code, § 1203.4; St.1939, p. 357, § 6102.

9. Attorney and client ⇐47

The state bar may carry on its own independent investigation of fitness of a member to practice law without regard to criminal prosecutions which may be pending. St. 1939, pp. 355, 356, §§ 6075–6087.

10. Attorney and client ⇐39

Upon presentation to Supreme Court of certified copy of record of conviction of crime involving moral turpitude, court will order suspension of attorney and will order disbarment when judgment of conviction becomes final on merits without regard to orders of probation in mitigation of punishment. St.1939, p. 357, §§ 6101, 6102.

11. Attorney and client ⇐61

After disbarment of attorney based upon final judgment of conviction, any application for reinstatement should be filed with board of governors of the state bar and Supreme Court should not act until board of governors has completed its investigation and reported thereon. St.1939, p. 357, §§ 6101, 6102; pp. 355, 356, §§ 6078, 6082.

SHENK, HOUSER, and CARTER, JJ., dissenting.

Petition by Michael G. Phillips to set aside an order of disbarment made after petitioner was found guilty of a misdemeanor involving moral turpitude.

Petition denied without prejudice to petitioner's right to make his application for reinstatement upon showing of moral rehabilitation as may be deemed satisfactory by Board of Governors of the State Bar.

Joe Wapner, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for State Bar.

GIBSON, Chief Justice.

Petitioner, an attorney at law, on July 1, 1937, was found guilty in the municipal court of the city of Los Angeles of a misdemeanor involving moral turpitude. On July 13, 1937, a certified copy of the record of conviction was filed with this court and an order was made suspending petitioner from the practice of law. On September 7, 1937, the judgment of conviction was reversed on appeal, but no order vacating the suspension appears to have been made. Petitioner was again placed on trial on the same charge and on December 9, 1937, was found guilty as charged by a jury. He then made application for probation, and the court on December 23, 1937, entered the following judgment: "Whereupon it is ordered and adjudged by the court this December 23, 1937, that for said offense of violation of Section 311, Penal Code, Subd. I, the said Michael G. Phillips be imprisoned in the city jail of Los Angeles City for the term of 180 days and the said defendant be discharged at the expiration of said term; execution suspended for 2 years and respondent placed on probation on condition he serves 175 days in City Jail." An appeal was taken and the judgment was affirmed on March 1, 1938.

On April 5, 1938, this court made an order of disbarment which recited that a certified copy of the judgment had been filed and that the judgment had become final. Subsequently on October 10, 1939, the petitioner having complied with the terms of the order of probation, the judge of the municipal court made a further order setting aside the verdict of guilty and dismissed the accusation against petitioner in accordance with the provisions of Penal Code, section 1203.4 Petitioner then filed this application in which he asked that the order of disbarment be set aside and that his name be restored to the roll of attorneys authorized to practice law in this state.

[1] The ground upon which petitioner seeks to have the order of disbarment of April 5, 1938, set aside is that there was no

such "final judgment of conviction" as would justify an order of disbarment under the provisions of Business and Professions Code, sections 6101, 6102, St.1939, p. 357, Deering's 1939 Supp., p. 521. Section 6101 provides: "Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension as provided in section 6102. The record of conviction shall be conclusive evidence. * * * A plea or verdict of guilty is deemed to be a conviction within the meaning of this section." Section 6102 provides: "Upon the receipt of the certified copy of the record of conviction of an attorney of a crime involving moral turpitude, the court shall suspend the attorney until judgment in the case becomes final. When a judgment of conviction becomes final, the court shall order the attorney disbarred."

The language of section 6102 is mandatory in character and provides for an automatic suspension upon proof of conviction, and for an automatic disbarment when the judgment of conviction becomes final. The sole question presented is whether, under the facts of this case, there was a final judgment of conviction. An appeal from the judgment of conviction was taken and it was affirmed. Thus, the only ground upon which petitioner can rest his argument that no final judgment was rendered is that the trial court granted him probation, and later dismissed the accusation against him upon the satisfactory completion of the probationary period.

[2] The power of the trial court to grant probation after a conviction may be exercised in either of two ways: the court may suspend the imposition of the sentence, in which case no judgment of conviction is rendered, or it may impose the sentence and thereafter suspend its execution. Penal Code, §§ 1203.1, 1203.2. In the latter case a judgment of conviction has been rendered from which an appeal can be taken, and upon affirmance, it becomes a final judgment. In the former situation, however, where the court suspends the imposition of the sentence, that is, the rendition of a judgment of conviction, there is no judgment from which the defendant can prosecute an appeal (People v. Von Eckartsberg, 133 Cal.App. 1, 3, 23 P.2d 819; People v. Noone, 132 Cal.App. 89, 92, 22 P.2d 284; People v. De Voe, 123 Cal.App. 233, 236, 11 P.2d 26; 8 Cal.Jur. 493), and thus there can be no final judgment of conviction. It has been suggested that this places power in the hands of the trial court to control disbarment orders because the power of this court to enter an order of disbarment under the statute is made to depend upon whether the order of probation suspends the imposition of the judgment or merely its execution. In a sense this is true, but it is merely the result of the statutory scheme, for only in the one case is there a final determination of the defendant's guilt upon which this court can act in making its order of automatic disbarment. Where the trial court suspends the rendition of its judgment, this court acting under section 6102, supra, can only suspend and cannot disbar the attorney, for there has been no final adjudication of his guilt in a court of law. In such a case, if it is thought that the attorney has been guilty of conduct warranting disbarment, it is incumbent upon the State Bar to proceed upon its own initiative under article 5 of the State Bar Act. Business and Professions Code, §§ 6075–6087, St.1939, pp. 355, 356, Deering's 1939 Supp. p. 519. Following the disciplinary procedure therein provided, a recommendation can be made upon which this court may then make an order of disbarment.

[3] But such is not the situation disclosed by this record. In the present case the court "ordered and adjudged * * * that * * * the said Michael G. Phillips be imprisoned in the City Jail of Los Angeles City for the term of 180 days * * *; execution suspended for 2 years and Defendant placed on probation on condition he serves 175 days in City Jail". It is clear from the language of this order that the court *rendered* its judgment of conviction and then suspended its execution. Thereafter the defendant appealed, which would have been impossible if no judgment of conviction had been rendered (see cases cited supra), and the judgment was affirmed. The judgment of conviction in this case was "final" in the sense that it was no longer possible to contest the guilt of the defendant upon the merits of the case. It was therefore a "final judgment of conviction" sufficient to sustain an order of disbarment by this court under section 6102.

[4-6] In urging a contrary conclusion, petitioner relies upon the fact that the trial court acted under Penal Code, section 1203.4 to "set aside the verdict of guilty", after compliance with the conditions of his probation. The power of the trial court to

place the defendant on probation and to set aside the verdict after a satisfactory completion of the probationary period is established by section 1203.4, which reads as follows: "Every defendant who has fulfilled the conditions of his probation for the entire period thereof * * * shall * * * be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted * * * provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." A preliminary point may be noticed here. The statutory language purporting to release the defendant "from all penalties and disabilities resulting from the offense" is not to be interpreted as a legislative mandate that the order of disbarment of an attorney must be revoked where probation is granted. It is established by the decisions of this state that the legislature cannot infringe upon the judicial power of the court to discipline its own officers, and cannot vacate such a judicial order by legislative mandate. In re Lavine, 2 Cal.2d 324, 41 P.2d 161. Any language of In re Herron, 217 Cal. 400, 19 P.2d 4, which might be deemed to support a contrary conclusion is hereby disapproved. See discussion, infra. The "penalties and disabilities" to which the probation statute refers are those which it is within the power of the legislative branch of the government to release.

Petitioner does not, however, rely primarily upon the theory that his order of disbarment is a "disability" which was released under the probation statute. He argues that the action taken under the Penal Code, section 1203.4 operated to *set aside* the judgment of conviction and that, therefore, there was never a "final judgment" upon which this court could have based its order of disbarment. Under section 6102 "convictions" in the sense of a plea or verdict of guilty (see 12 So.Calif.L.Rev. 201) is followed by an automatic suspension from the practice of law, and a "final judgment of conviction" is followed by disbarment. Was the finality of the judgment of conviction rendered in this case and affirmed on appeal destroyed by the order granting probation and the subsequent order setting aside the verdict of guilty and dismissing the accusation?

[7] It is contended that the order granting probation followed by an order dismissing the action under Penal Code, section 1203.4 is analogous to an order granting a new trial or to the reversal of a judgment of conviction upon appeal, and that a judgment of conviction cannot be final so long as the court can set it aside by any of these methods. But we do not believe that the power granted to the trial court under section 1203.4 can be given this effect. An order granting a new trial or a reversal of the judgment of conviction is based upon the premise that error was committed which renders it uncertain whether the defendant is actually guilty of the crime of which he was convicted. See 8 Cal.Jur. 414, 489. So long as such action can be taken, it is clear that the judgment of conviction is not final because it is still possible that an ultimate determination on the merits will find the defendant not guilty. In re Riccardi, 182 Cal. 675, 189 P. 694. No such considerations are present in the granting of probation to a convicted defendant. Whether the court suspends the rendition of the judgment of conviction or whether it merely suspends the execution of the judgment, the order of probation presupposes that the defendant is guilty. Where probation is granted before the judgment is rendered, it has been said that the defendant waives any right to appeal on the merits. People v. Von Eckartsberg, supra; and other cases cited supra. Where probation is granted after a judgment of conviction an affirmance on appeal is a final adjudication of the fact of his guilt. In either event the order granting probation is based upon the premise of the defendant's guilt, while a reversal upon appeal or an order granting a new trial is based upon the premise that the defendant's guilt has not been sufficiently proved.

[8] The powers possessed by the trial courts under the probation statutes, Penal Code, § 1203, et seq., are concerned with mitigation of punishment and confer discretion upon the courts in dealing with a convicted defendant. The power of the court to reward a convicted defendant who satisfactorily completes his period of probation by setting aside the verdict and dismissing the action operates to mitigate his

punishment by restoring certain rights and removing certain disabilities. But it cannot be assumed that the legislature intended that such action by the trial court under section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime. This is made clear by the provision that the fact of the defendant's conviction can be used against him in any later prosecution, despite dismissal of the action under section 1203.4. In brief, action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law. Such a final determination of guilt is the basis for the order of disbarment in this case. That final judgment of conviction is a fact; and its effect cannot be nullified for the purpose here involved, either by the order of probation or by the later order dismissing the action after judgment. Whether the judgment of conviction is final is to be determined from considerations apart from whether the trial court saw fit to mitigate the punishment by granting probation to the convicted defendant.

[9, 10] Counsel have suggested that the procedure to be followed in cases of this sort is uncertain. It is, of course, true that the State Bar may carry on its own independent investigation of the fitness of any one of its members to practice law without regard to criminal prosecutions which may be pending. Shafer v. State Bar, 215 Cal. 706, 12 P.2d 957. That is one of the alternative methods by which an attorney may be disbarred. Business and Professions Code, § 6075 et seq. The other method, which is intended to relieve the State Bar of the burden of carrying on a separate investigation where the defendant's unfitness has been finally determined by a court of law, is set forth in Business and Professions Code, section 6100 et seq., and provides the basis for the order in this case. Upon the presentation to this court of a certified copy of the record of conviction, we will make an order of suspension; and we will make an order of disbarment when the judgment of conviction becomes final on the merits of the cause, without regard to orders of probation in mitigation of punishment which may have been made by the trial court.

Among the cases cited as illustrative of existing confusion in automatic disbarment cases where probation has been granted, only In re Herron, 217 Cal. 490, 19 P.2d 4, seems inconsistent with the view we have herein set forth. In that case, after the conviction of an attorney of a crime involving moral turpitude, the court "suspended sentence" which was held to be equivalent to granting probation and suspending the execution of the judgment of conviction. Later the trial court set aside the verdict of guilty and dismissed the action, and this court held that the dismissal removed all disabilities and prevented the entering of an order of disbarment. In so far as that decision suggests that disbarment is a disability which can be removed by legislative mandate expressed in the probation statutes, it is contrary to the doctrine of our later case of In re Lavine, supra, and in so far as it suggests that the action of the trial court after a judgment of conviction could prevent the judgment from becoming final, it is erroneous and must be disapproved. In the case of In re Jacobsen, 202 Cal. 289, 260 P. 294, the trial court suspended the imposition of the sentence and granted probation to the defendant attorney who had been convicted of a crime involving moral turpitude. In this case probation was granted before the imposition of the sentence, that is, before the rendition of the judgment, and no final judgment of conviction was possible, despite contrary suggestions in the opinion on that point. Thus, the order of suspension, rather than disbarment, was proper. In Shafer v. State Bar, 215 Cal. 706, 12 P. 2d 957, the order granting probation was made after the judgment of conviction was rendered, and this court properly made its order suspending the defendant until the judgment became final, in which case he was to be disbarred. In the case of In re Hatch, 10 Cal.2d 147, 73 P.2d 885, this court properly suspended the defendant attorney where only the "record of conviction" was filed and it appeared that probation was granted before any judgment of conviction was rendered. In each of these cases the result properly depended upon whether there was a final judgment of conviction as required by the statute.

[11] In the present case the court properly made its order of disbarment based upon a final judgment of conviction. Any application for reinstatement which petitioner desires to make should be filed with the board of governors of the State Bar, and this court should not act until the board of governors has completed its investigation and reported thereon. Busi-

ness & Professions Code, §§ 6078, 6082; In re Lavine, supra.

The petition to set aside the order of disbarment and to restore petitioner's name to the roll of attorneys is denied without prejudice to petitioner's right to make his application for reinstatement upon such showing of moral rehabilitation as may be deemed satisfactory by the board of governors of the State Bar.

We concur: TRAYNOR, J.; EDMONDS, J.

SPENCE, Justice pro tem. (concurring).

I concur, as there was clearly a final judgment of conviction in the present case upon which the order of disbarment was based. I believe, however, that it is proper to call to the attention of the legislature the anomalous situation presented by our statutes relating to probation.

When a court decides to grant probation either upon application of the defendant or upon its own motion, Penal Code, § 1203, it may suspend the imposition of sentence or it may impose sentence and suspend the execution thereof. Penal Code, § 1203.1. Either procedure is based upon the record of conviction and the order or judgment of the court in either case is in the nature of a judgment of conviction, which may provide, in the discretion of the court and as a condition of probation, for fine or imprisonment or both. Penal Code, § 1203.1. It seems well settled, however, that where a defendant is ordered on probation by suspending the imposition of sentence, no appeal lies in the absence of a statute expressly authorizing such an appeal; but on the other hand, where a defendant is ordered on probation by imposing sentence and suspending the execution thereof, an appeal does lie. People v. Gibbons, 39 Cal.App.2d 671, 673, 103 P.2d 1005; People v. Dawes, 37 Cal.App.2d 44, 98 P.2d 787; People v. Smith, 36 Cal.App. 2d 361, 362, 97 P.2d 867; People v. Johnson, 14 Cal.App.2d 373, 375, 58 P.2d 211; People v. Brooks, 140 Cal.App. 480, 481, 35 P.2d 583; People v. Von Eckartsberg, 133 Cal.App. 1, 3, 23 P.2d 819; People v. Neel, 133 Cal.App. 332, 333, 24 P.2d 230; People v. Noone, 132 Cal.App. 89, 92, 22 P.2d 284; People v. Bentson, 132 Cal.App. 295, 298, 22 P.2d 734; People v. Patello, 125 Cal. App. 480, 487, 13 P.2d 1068; People v. De Voe, 123 Cal.App. 233, 237, 11 P.2d 26; In re De Voe, 114 Cal.App. 730, 300 P. 874; People v. Hartman, 23 Cal.App. 72, 75, 137 P. 611; see, also, Birnbaum v. United States, 4 Cir., 107 F.2d 885, 126 A.L.R. 1210; 117 A.L.R. 929. While there appears to be justification for holding that the right of appeal exists in the one case and not in the other, it would seem that the legislature might well consider the desirability of according to the defendant a right of appeal in either case.

An application for probation is directed to the matter of punishment and not to the matter of guilt. If there is a serious question regarding the sufficiency of the evidence to establish the guilt of the defendant or a serious question regarding the fairness of the trial in which he was found guilty, it would seem appropriate that a defendant should not be deprived of his right of appeal by applying for probation and by the granting thereof without the imposition of sentence. It appears that trial courts ordinarily have no occasion to consider the distinction between the two procedures permitted in granting probation and that it might be deemed good policy by the legislature to provide by statute that any order placing a defendant upon probation under either procedure should be deemed a "judgment of conviction" for the purposes of appeal and for the purposes of section 6102 of the Business and Professions Code.

SHENK, Justice (dissenting).

I dissent.

In this proceeding the majority has departed from the rule followed in this state for over half a century. In fact, never in the history of this court has a judgment that has been reversed or otherwise set aside been permitted to form the basis of a summary order of disbarment under the statute. That the conclusions of the main opinion are unsupported by and are contrary to the uniform holdings in similar cases will more fully appear from the following discussion of the case:

The petitioner was admitted to the bar of this state on July 22, 1915. In 1937 he was charged in the municipal court of the city of Los Angeles in two counts with violation of section 311 of the Penal Code, a misdemeanor. On July 1 of that year he was convicted on both counts and sentenced to serve one hundred and eighty days in the city jail. Upon a certificate of the record of his conviction, presented by the secretary of the State Bar, this court on July

13, 1937, suspended the petitioner from the practice of the law until the judgment should become final. That order of suspension has not been formally set aside, and is not affected by the present proceeding. The petitioner appealed from the judgment of conviction and from an order denying his motion for a new trial. The judgment was reversed and a new trial ordered by the Appellate Department of the Superior Court. On a retrial the petitioner was found guilty on the same two counts, and the court on December 23, 1937, sentenced him to imprisonment in the city jail for one hundred and eighty days. As a part of the same order the court suspended the execution of the judgment and placed the petitioner on probation on condition that he serve one hundred and seventy-five days in the city jail. He appealed from that judgment on the ground that the evidence was insufficient to support the conviction. The judgment was affirmed on March 1, 1938. Upon a certificate of the second judgment of conviction, which included said probationary order, this court on April 5, 1938, ordered the petitioner disbarred. He satisfied the terms of his probation and, on his application, the trial court on October 10, 1939, set aside the verdict of guilty and dismissed the accusation under the authority of section 1203.4 of the Penal Code.

Thereafter, the petitioner filed the present petition to set aside the order of disbarment of April 5, 1938, on the ground that the order of the trial court setting aside the verdict and dismissing the criminal action pursuant to said section 1203.4 had released him from all penalties and disabilities resulting from the offense of which he had been convicted, and that there was, therefore, no final judgment of conviction upon which an order of disbarment had been or could be based.

The petitioner relies first on the Penal Code section and on In re Herron, 217 Cal. 400, 19 P.2d 4. The code section provides that when the defendant has fulfilled the conditions of his probation "the court shall set aside the verdict of guilty; and * * * shall thereupon dismiss the accusation or information against such defendant, *who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted*". Neither the language of the code section which we have italicized nor In re Herron, supra, when properly applied in the light of the subsequent case In re Lavine, 2 Cal.2d 324, 41 P.2d 161, affords support for the granting of the petition on the ground first urged. On this point there is no disagreement here. The disagreement is on the question whether under the statutes and decisions in this state there is in this proceeding a final judgment on which a summary order of disbarment can be based.

There are two well-recognized statutory methods of disciplining members of the bar in this state. Both are set forth in articles 1 to 9 inclusive of chapter 4 of the Business and Professions Code, which chapter is called the State Bar Act. One method is provided for in article 5 under the heading "Disciplinary Authority of the Board of Governors". Sections 6075–6087 of the State Bar Act; Deering's California Codes, General Laws and Constitution, 1939, p. 519. Under this article and the rules of professional conduct adopted thereunder, the procedure is provided for initiating and conducting disciplinary proceedings against members of the bar through the medium of accusation, notice and hearing before committees of the State Bar and its board of governors, culminating in a recommendation to this court that the accused be subjected to the discipline suggested, with opportunity afforded for review by this court of the order of recommendation. This methed is entirely independent of any prior court proceeding.

The second method is prescribed in article 6 of said chapter 4, under the heading "Disciplinary Authority of the Courts". Sections 6100–6118 of the State Bar Act; Deering's California Codes, General Laws and Constitution, 1939, p. 521. Here it may be said that the codification in 1939 of the State Bar Act and the former sections of the Code of Civil Procedure effected no substantive change in the law as it formerly existed, at least so far as the disciplinary power of the courts is concerned.

Section 6101 of the State Bar Act provides: "Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension as provided in section 6102. The record of conviction shall be conclusive evidence and the clerk of the court in which the conviction is had shall, within thirty days thereafter, transmit a certified copy of the record of conviction to the Supreme Court. The proceedings to disbar

or suspend an attorney shall be undertaken by the court upon the receipt of the certified copy of the record of conviction. A plea or verdict of guilty is deemed to be a conviction within the meaning of this section."

Section 6102 provides: "Upon the receipt of the certified copy of the record of conviction of an attorney of a crime involving moral turpitude, the court shall suspend the attorney until judgment in the case becomes final. When a judgment of conviction becomes final, the court shall order the attorney disbarred. The other provisions of this article providing a procedure for the disbarment and suspension of an attorney do not apply to an attorney convicted of a crime involving moral turpitude, unless expressly made applicable."

Then follow sections of the same article having to do generally with disciplinary proceedings which may be instituted in court upon the information of another, and like proceedings initiated in the State Bar, which proceedings are carried forward on notice and with an opportunity on the part of the accused to be heard.

It will be noted that the proceedings for disbarment or suspension taken under sections 6101 and 6102 upon the filing of a certified copy of the record of conviction do not provide for notice to or for a hearing in behalf of the accused attorney. The statute itself, and that alone, is the authority of this court thus summarily to disbar or suspend an attorney found guilty of a crime involving moral turpitude. These statutory provisions, like their predecessors to like effect, §§ 287, 288, 289 and 299, Code of Civ.Proc., have always been deemed valid statutory regulations affecting the rights of members of the legal profession and as such binding upon the courts. See article on Disbarment and Suspension and cases cited, 3 Cal.Jur., p. 719 et seq.

The statute is too clear to admit of doubt that upon the presentation to the court of a certified copy of the "record of conviction" the power and duty of the court is to enter an order of suspension "until judgment in the case becomes final". When the judgment has become final it is then, and not until then, that the court has the power to enter a summary order of disbarment under the statute. The record of conviction may but does not necessarily include a judgment of conviction. Under section 6101 "a plea or verdict of guilty is deemed to be a conviction within the meaning of this section". Upon the certification of the record of a plea or verdict of guilty the court is authorized to enter an order of suspension. A judgment of conviction is not essential to the validity of such an order. In re De Voe, 114 Cal. App. 730, 300 P. 874. In a criminal case the sentence is the judgment. Section 1191 of the Penal Code provides: "After a plea or verdict of guilty * * * the court must appoint a time for pronouncing judgment which must not be less than two, nor more than five days after the verdict or plea of guilty * * * and provided, further, that the court may extend the time not more than twenty days in any case when the question of probation is considered in accordance with section 1203 of this code * * *." The terms "judgment" and "sentence" in criminal cases appear to have been used interchangeably. See Matter of Smith, 152 Cal. 566, 93 P. 191; 8 Cal.Jur., p. 448, et seq. The sentence is, therefore, the judgment from which an appeal may be taken under section 1237 of the Penal Code, even though an order of probation has been made. See Berman v. United States, 302 U.S. 211, 58 S.Ct. 164, 82 L.Ed. 204.

Since a judgment of conviction that has become final is the only basis upon which an order of disbarment may be made under the statute, it is necessary to consider whether the judgment certified to this court was a final judgment of conviction as contemplated by the statute, for, as said by this court in In re Herron, supra, 217 Cal. at page 402, 19 P.2d at page 5, "if the conviction has become final and has not been set aside, this court, under sections 287 and 299 of the Code of Civil Procedure, has no election, but must disbar respondent".

The means by which a judgment of conviction may be "set aside" are well recognized. A conviction, that is, a verdict of guilty, may be set aside by an order granting a new trial pursuant to section 1181 of the Penal Code. This usually takes place before a judgment is pronounced. After sentence the judgment of conviction may be set aside on appeal pursuant to section 1237 of the Penal Code, by certiorari or habeas corpus when the judgment is void, and by order of court pursuant to section 1203.4 of the Penal Code when the

defendant has been placed on probation and has complied with the terms of the order of probation. Not only this, but when the terms of probation have been complied with the court is authorized, as was done in this matter, to dismiss the action against the defendant.

What, then, are the powers of the trial court under sections 1203, 1203.1 and 1203.4 of the Penal Code? Under section 1203, the court, after a plea or verdict of guilty, is authorized to enter an order placing the defendant on probation. Under this order, and pursuant to section 1203.1, the court "may suspend the imposing, or the execution of the sentence". If the court suspends the "imposing" of sentence and places the defendant on probation, there is then no judgment of conviction, and although new trial proceedings may be taken, no right on the part of the defendant to take an appeal from the verdict or from that order of probation is provided for. However, "conviction" is present and a suspension from practice of a defendant attorney is authorized, but there is yet no final or any judgment of conviction upon which to base an order of disbarment. Again, if the court suspends the "execution of the sentence", a sentence or judgment necessarily preceded that order; and from such a judgment the right of appeal has uniformly been recognized. The petitioner in the present matter availed himself of that right. Whether the imposition of sentence be suspended or the execution of sentence be suspended, there is no finality to the proceeding or the judgment which is not subject to be disturbed by order of court under the statute at an appropriate time after the terms of probation have been complied with. That is to say, in the one case no judgment at all is entered, and in the other there is no judgment of conviction except one which may be set aside upon the happening of a condition subsequent and under specific statutory authority.

But it does not follow that the order of probation has placed the defendant-attorney beyond the pale of disciplinary action. It is not and should not be within the power of the trial court by an order of probation to relieve a member of the bar convicted of a crime involving moral turpitude of accountability arising out of his professional misconduct. However, the order of probation may affect and in the present matter has affected the summary power of this court to disbar him. Upon a plea or verdict of guilty on a charge involving moral turpitude this court is authorized and is bound to enter an order of suspension. The fact that a judgment of conviction may not be entered or that the execution of the judgment may be suspended in pursuance of an order of probation, or that the criminal proceeding may ultimately be dismissed, does not enable the attorney to avoid disciplinary proceedings, for there is ample authority for the State Bar to proceed against him independently of the court proceeding and to recommend to this court appropriate discipline either of suspension from practice or disbarment. A record of conviction or a judgment of conviction has never been a condition precedent to disbarment or suspension. In Shafer v. State Bar, 215 Cal. 706, 12 P.2d 957, the attorney had been convicted of an offense involving moral turpitude, judgment of conviction had been entered, and he had been placed on probation. A copy of the judgment of conviction was certified to this court and an order of suspension was made until said judgment "shall have become final". During Shafer's period of probation and temporary suspension, in fact, within a week after the period of probation commenced, the State Bar proceeded against him to redetermine for itself the same issues involved in the criminal proceeding. As a result of this independent proceeding, the board of governors recommended Shafer's suspension for the period of three years. In the proceeding brought by Shafer to review the order of recommendation, this court held that the judgment of conviction was not a bar to an independent investigation and recommendation by the State Bar based on the same facts involved in the criminal case. This court followed the recommendation of the State Bar and entered another order of suspension for the period so recommended.

In Re Hatch, 10 Cal.2d 147, 73 P.2d 885, it was said: "The State Bar is not deprived of jurisdiction in disciplinary proceedings to enquire into the fitness of an attorney to practice when a record of his conviction is on file with the court under section 287 et seq. of the Code of Civil Procedure. Shafer v. State Bar, 215 Cal. 706, 12 P.2d 957."

A further review of the cases in this state discloses a uniformity in decision in harmony with the foregoing. It is stated by counsel for the petitioner, is not disputed by counsel for the State Bar, and is sup-

ported by our research, that this court has never entered an order of disbarment in any case where the defendant-attorney has been placed on probation, with the single exception of the order now sought to be set aside.

It has been and is the settled law of this state that a valid, final judgment of conviction of an offense involving moral turpitude is a necessary prerequisite to the entry of an order of disbarment by this court based solely on a certified copy of the judgment of conviction. It was held in Re Riccardi, 182 Cal. 675, 189 P. 694, decided in April, 1920, that this court had no authority to disbar an attorney under sections 287–299 of the Code of Civil Procedure "on the receipt of a certified copy of the record of conviction" when it appeared as a conceded fact that an appeal from the judgment of conviction was pending; that the statute meant that a final judgment of conviction was necessary as a basis for the order, and that while the appeal was pending the judgment was not final. After the decision in that case, the legislature in 1921, by an amendment of section 288, added the last sentence, to wit: "a plea or verdict of guilty is deemed to be a conviction within the meaning of this section", and likewise amended section 299 to provide that upon the presentation of a certified copy of the record of "conviction", as defined in section 288, the attorney must be suspended and that he must be disbarred when the "judgment" of conviction has become final. The court in the Riccardi case reviewed the prior cases over a period of some thirty-five years, and refused, notwithstanding the earnest insistence of counsel for the Bar Association, to disturb the uniform rule. The amendments of 1921 served to settle the question of legislative intent in conformity with what the court held was the proper construction of the statute.

In no case has it been held that the judgment of conviction referred to in section 6102 of the State Bar Act was final when an appeal therefrom was pending, or when the defendant had been placed on probation either by suspending the imposition or the execution of sentence. Nor has such a judgment of conviction been deemed final, although affirmed on appeal, where in subsequent proceedings the judgment was held to be void. In contemplation of the fact that a judgment of conviction, when followed by a probationary order, might be set aside by the court pursuant to section 1203.4 of the Penal Code, this court has uniformly proceeded on the theory that such a judgment is not a final judgment authorizing summary disbarment under section 6102 of the State Bar Act.

In Re Jacobsen, 202 Cal. 289, 260 P. 294, it appeared that Jacobsen, an attorney at law, had been convicted of a felony involving moral turpitude. He took no appeal. This court said that "in that regard" the judgment of conviction had become final. The clerk of the trial court transmitted to this court a certified copy of the record of conviction. But the trial court had placed Jacobsen on probation. This court did not disbar him, as counsel for the State Bar insisted should be done, but suspended him from practice until the further order of the court, plainly indicating that by reason of the provisions of section 1203 of the Penal Code as it then existed (now section 1203.4) the judgment of conviction had not become final.

In Re Herron, 217 Cal. 400, 19 P.2d 4, it appeared that Herron had been convicted of a misdemeanor involving moral turpitude, and had been sentenced to imprisonment in the county jail; but the trial court suspended the execution of the sentence. On presentation of the record this court issued its order directing Herron to show cause why he should not be disbarred. It was held that the order suspending the sentence was equivalent to an order of probation. This court declined to order disbarment, and discharged the order to show cause.

In Re Hatch, 10 Cal.2d 147, 73 P.2d 885, attorney Hatch was found guilty of violations of the Corporate Securities Act, and was placed on probation. A certified copy of the record of the convictions was transmitted to this court. While the main point in the case was whether the offenses of which the attorney had been found guilty involved moral turpitude, it was not questioned that if it should be determined that they were of that character an order of disbarment would not necessarily follow.

Numerous other cases are cited by petitioner wherein orders of suspension were entered after the attorney, defendant in the criminal action, had been placed on probation. Those orders were made upon the presentation of a certified copy of the records of conviction. A few of them are: Matters of suspension of C. M. Gill, Misc. 1536; J. B. Mandel, Misc. 1543; A. R. Hemm, Misc. 1546; D. F. Wisdom, Misc. 1564; J. W. Lenahan, Misc. 1599; and L. G. Stanford, Misc. 1603.

In Re Rothrock, 14 Cal.2d 34, 92 P.2d 634, it appeared that Rothrock, an attorney at law, had been charged on two counts of attempted murder and on a third count with assault with a deadly weapon. The court sitting without a jury found him guilty on all three counts. Before judgment was pronounced the court set aside the verdict. On appeal by the People the order was reversed and the cause remanded with instructions to enter judgment of conviction. People v. Rothrock, 8 Cal.2d 21, 63 P.2d 807. On appeal from the judgment so entered the judgment was affirmed. People v. Rothrock, 21 Cal.App.2d 116, 68 P.2d 364. Upon the certificate of the record of conviction an order of disbarment was entered on June 21, 1937. Notwithstanding the judgment of affirmance this court later held that said judgment was ineffective and ordered a new trial. In re Rothrock, 14 Cal.2d 34, 92 P.2d 634. On August 23, 1939, this court entered an order vacating and setting aside the order of disbarment on the ground that said order "lacked the necessary foundation to support it, to-wit, a valid final judgment of conviction". Minutes of this court, August 23, 1939, 98 Cal.Dec. I. The several proceedings in the Rothrock case are referred to in support of the conclusion that even an affirmance on appeal is not necessarily conclusive of the finality of a judgment of conviction. If an order of disbarment may be set aside because of a determination that no valid judgment had ever been entered, it would follow, in the present matter, that the order of disbarment of petitioner should be set aside because the judgment which was entered has been set aside under specific statutory authority, and there is now no valid or any judgment to support it.

By the main opinion this court has by implication overruled its prior decisions which are in point in the petitioner's favor, and in doing so has departed from the uniform practice and decision in this state. It has constituted the order of disbarment here involved, an arbitrary assumption of power not justified by constitutional or statutory authority. No considerations of public policy are apparent which would justify a departure from the established standards. The principles of justice would also best be served by proceeding independently of the court action on notice and an opportunity to be heard in cases where orders of probation have been made in criminal cases. Probation, as distinguished from parole, is not solely concerned with rehabilitation. It is authorized in common recognition of the fact that circumstances of mitigation may have attended the commission of the offense, which should, in the discretion of the trial court, relieve the defendant of the rigors of the punishment which would otherwise be imposed.

Furthermore, the ruling of the majority will result in a lack of uniformity in disciplinary proceedings. It will mean that in court proceedings, when the trial judge finds mitigating circumstances sufficient to place the defendant on probation and later to set aside the judgment of conviction, the defendant-attorney must nevertheless be subjected to summary disbarment, notwithstanding the board of governors of the State Bar might, in the presence of like mitigating circumstances, recommend only suspension, or this court on the same record refuse to enter an order of disbarment. It will also mean that the power of this court to enter an order of disbarment under section 6102 will depend on the too uncertain contingency of whether the trial court in granting probation had suspended the "imposition" or the "execution" of sentence, for in the one case no order of disbarment may properly be made, and in the other an order of disbarment would have to be made.

There are numerous instances where a member of the bar has been found guilty of an offense involving moral turpitude by the board of governors of the State Bar and has been recommended for suspension only. The Shafer case is one of them. Some of the other and more recent cases are: Methever v. State Bar, 12 Cal.2d 230, 82 P.2d 1109; Waterman v. State Bar, 8 Cal. 2d 17, 63 P.2d 1133; and Jacobs v. State Bar, 219 Cal. 59, 63, 64, 25 P.2d 401. See, also, Disbarment of Richardson, Cal.Sup., 102 P.2d 1076, in which the rule in the Shafer case was approved.

There is no necessity to lay down extended rules of procedure in cases where an attorney in a criminal action has been convicted of an offense involving moral turpitude and has been placed on probation. The established practice is the certification of the record of conviction to this court, which is followed by a summary order of suspension, at least until the further order of the court. The State Bar then is authorized to proceed, as it did in the Shafer case, and without further or any delay, to initiate disciplinary proceedings independently of the court proceeding and after notice to the accused and an opportunity to

be heard, to make its findings, and submit its recommendation to this court for such an order as it deems appropriate.

From the foregoing it would follow that the order of disbarment entered against the petitioner on April 5, 1938, should be set aside. And, although the State Bar has the authority to so proceed without a reference, it would be appropriate in this case to refer the matter of further disciplinary action to the board of governors of the State Bar for investigation and for such recommendation as it may deem proper in the premises.

I concur: HOUSER, J.

CARTER, Justice (dissenting).

I dissent.

I am in entire accord with everything contained in the masterful dissenting opinion prepared by Mr. Justice Shenk and I unqualifiedly concur in the views expressed by him therein.

To my mind it is nothing short of paradoxical to say that an order of disbarment can be predicated upon a plea or verdict of guilty which has been vacated and set aside or upon a judgment which is no longer in existence. Such is the legal effect of the conclusion reached in the majority opinion in this case.

Section 1203.4 of the Penal Code provides:

"Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time prior to the expiration of the maximum period of punishment for the offense of which he has been convicted, dating from said discharge from probation of said termination of said period of probation, be permitted by the court to *withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.*"

When the foregoing provision has been complied with, the clear and unqualified legal effect is that there is no plea or verdict establishing the guilt of the defendant, and even the accusation or information upon which such plea or verdict could be predicated has been dismissed. How it is possible to predicate an order or judgment of disbarment upon such a plea or verdict is beyond my comprehension.

Not only is the legal conclusion reached by the majority opinion astounding, but its practical effect is even shocking. An attorney who would enter a plea of guilty of a violation of section 476a of the Penal Code for issuing a check overdrawing his bank account $1.00 and is granted probation would be automatically disbarred. Whereas, if disciplinary proceedings were instituted against said attorney before the State Bar, the discipline, if any, administered to him, would probably not exceed that of a short period of suspension or reprimand. The lack of uniformity in discipline resulting from the application of the rule announced in the majority opinion is so shocking that the necessity for an immediate change in the provisions of sections 6101 and 6102 of the Business and Professions Code should appeal very forcibly to the members of the Legislature, to the end that disbarment thereunder be not permitted in cases where probation is granted and the conditions thereof fulfilled.

42 Cal.App.2d 509

In re BAILEY'S ESTATE. LINSTRUM v. CATE.

Civ. 2616.

District Court of Appeal, Fourth District, California.

Jan. 21, 1941.

1. Executors and administrators ⇐135

The proceeding authorized by statute providing for decree by court directing executor or administrator to transfer property in compliance with contract of decedent dying before making conveyance is similar to and, in practical effect, is an action for specific performance. Probate Code, § 850.

2. Executors and administrators ⇐135

An executor ought to complete a contract made by his testator. Probate Code, § 850.

3. Executors and administrators ⇐224

The holder of trust deed securing decedent's indebtedness is not required to file a claim against estate to enforce his lien against the specific property of decedent, covered by trust deed. Probate Code, § 716.

4. Executors and administrators ⇐224

One who claims as his own specific property held by an estate cannot be called a "creditor" of estate within requirement for filing claims. Probate Code, § 707.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditor".

5. Executors and administrators ⇐224

A person seeking as owner to recover specific real property from executor of an estate is not required to file a claim against estate. Probate Code, § 707.

6. Executors and administrators ⇐224

The purchaser, under contract whereby decedent agreed to convey realty after paying encumbrance thereon, which had not been paid prior to decedent's death, was not a "creditor" or a "claimant" within statutory provision for filing claims, and was not required to file claim as prerequisite to obtaining order directing executor to comply with contract. Probate Code, §§ 707, 850.

See Words and Phrases, Permanent Edition, for all other definitions of "Claimant".

7. Executors and administrators ⇐135

Where time had come when purchaser was entitled to conveyance of realty with clear title under contract with decedent, who had agreed to convey property after paying encumbrance thereon, court was authorized, under statutory provision therefor, to enter order directing executor to convey realty to purchaser in accordance with terms of contract. Probate Code, § 850.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding in the matter of the estate of Harvey E. Bailey, Sr., deceased, wherein Delya Linstrum filed a petition against Clyde E. Cate, executor, to require the executor to convey property to her in accordance with the terms of her agreement with the deceased. From an order directing executor to convey the property, the executor appeals.

Order affirmed.

J. G. Crichton and Ralph Robinson, both of Fresno, for appellant.

Julius Hansen, Dearing & Jertberg, and Kenneth G. Avery, all of Fresno, for respondent.

BARNARD, Presiding Justice.

Harvey E. Bailey, Sr., was the owner of a parcel of real property subject to an indebtedness secured by a trust deed on which he was personally liable. He agreed, in writing, to sell the property to Delya Linstrum, agreeing to pay off this incumbrance in accordance with the terms of the trust deed and then to convey the property to her. After his death the full amount of the incumbrance became due under the terms of the trust deed. Mrs. Linstrum, having fully performed her part of the contract, filed a petition asking that the executor of Bailey's estate be directed to pay off the trust deed and convey to her a clear title to the property in accordance with the terms of the agreement.

The executor filed an "objection" to the petition alleging, among other things, that the full amount of the trust deed indebtedness was not due and that no claim for the amount thereof had been presented or filed. The court found in all respects in favor of the petitioner, finding, however, that no claim for the trust deed indebted-

ness had been presented or filed. An order was entered directing the executor to convey the property to the petitioner free and clear of the trust deed indebtedness, from which order this appeal was taken.

The effect of the order was to require and direct the executor to pay off the trust deed incumbrance and to convey a clear title to the property to the respondent in accordance with the purchase agreement. The sole point raised on this appeal is that the court was without authority to make this order because no "creditor's claim" for the amount of the trust deed indebtedness had been presented or filed, and that the payment thereof was forever barred by the provisions of section 707 of the Probate Code. The appellant contends that this was a debt of the deceased arising upon contract, and that it was incumbent upon the respondent to present and file a creditor's claim as required by section 707 of the Probate Code. In support thereof cases are cited in which it has been held that contingent claims based upon contracts of indemnity or warranty come within the purview of this statute requiring the presentation and filing of a claim.

[1-3] We are not here concerned with any warranty or other contract under which any money was owed to the respondent. Under the terms of the contract, by which the decedent agreed to sell this property to the respondent, the amount of this incumbrance was not to be paid to her and the amount thereof is not a debt due to her from the estate. The decedent had agreed to convey the property to her free and clear of this incumbrance and the effect of that part of the contract giving him the right to pay off the incumbrance as the installments came due was merely to give him additional time within which to clear his title. Under the terms of the agreement this additional time had expired and the respondent was entitled to the conveyance of the property, with a clear title. This she applied for under the provisions of section 850 of the Probate Code. The proceeding therein provided for is similar to and, in practical effect, is an action for specific performance. Estate of Garnier, 147 Cal. 457, 82 P. 68. Had the decedent been still alive there is no question the respondent would have been entitled to maintain such an action. An executor ought to complete a contract made by his testator. Estate of Fulmer, 203 Cal. 693, 265 P. 920, 58 A.L.R. 430. The amount of this incumbrance was not a debt owed to the respondent and the payment thereof was an incident to clearing the title which the decedent had agreed to convey. The respondent was in no position to file a claim therefor and even the holder of the trust deed was not required to file a claim in order to enforce his lien as against the specific property. Sec. 716, Probate Code.

[4,5] In Mix v. Yoakum, 200 Cal. 681, 254 P. 557, 558, the court said: "There is a clear distinction between the cause of action of one who claims specific property held and claimed by the estate adversely to the claimant and a cause of action founded upon a claim against the estate. In the one case the claimant is in no sense a creditor of the estate, and in the other he occupies the position of a creditor." One who claims as his own specific property held by an estate cannot be called a creditor of the estate. Estate of Dutard, 147 Cal. 253, 81 P. 519; Newport v. Hatton, 195 Cal. 132, 231 P. 987. In an action against the executor of an estate to recover specific real property as the owner thereof it is not necessary to file a claim. Cohn v. Cohn, 100 Cal.App. 746, 281 P. 504. In Porter v. Van Denburgh, 15 Cal.2d 173, 99 P.2d 265, it is held, in effect, that a claim need not be filed where the plaintiff's claim is one of ownership and not for the recovery of a part of the estate of a decedent. The proceeding here was one to obtain specific property, to which the respondent was entitled, and not one to recover on a claim against the general assets of the estate. See, also, Trower v. Young, Cal. App., 105 P.2d 160.

[6,7] We conclude, therefore that the respondent was not a creditor or a claimant within the meaning and effect of section 707 of the Probate Code, that the requirements of that section had no application here, and that under the provisions of section 850 of that Code the court was authorized and empowered to make the order and decree here appealed from.

No error being brought to our attention, the order is affirmed, the respondent to recover her costs on this appeal.

We concur: MARKS, J.; GRIFFIN, J.

42 Cal.App.2d 546

McCALLA v. GROSSE et al.

Civ. 12714.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1941.

1. Automobiles ⇐238(2)

Under complaint alleging that defendants owned and had control over automobile which was registered in codefendant's name to avoid liability for injuries resulting from operation of automobile, and that defendants furnished codefendant funds and knowingly permitted codefendant, who was allegedly incompetent as a driver, to drive automobile, and that codefendant carelessly operated automobile with result that plaintiff was injured, plaintiff was entitled to judgment against defendants, if plaintiff proved allegations. Vehicle Code, § 402, St.1937, p. 2353.

2. Automobiles ⇐192(1)

Under statute providing that owner of an automobile shall be liable for injuries resulting from negligence in operation of automobile by any person using or operating automobile with owner's permission, it was legislative intent to make actual owners of automobiles liable for negligence of those to whom permission is given to drive automobiles. Vehicle Code, § 402, St.1937, p. 2353.

3. Automobiles ⇐238(2)

A complaint alleging that defendants knowingly permitted their automobile to be registered in name of and to be driven by a person who was unfit to drive upon highways, that defendants knew that such person in driving automobile would endanger lives of others using highways, and that defendants furnished the person funds to purchase gasoline and oil was sufficient as against demurrer, irrespective of statute concerning liability of owners of automobiles, since allegations brought case within rule that one who knowingly permits an unfit driver to use his automobile is liable for damages caused by negligent acts of driver in operation of automobile. Vehicle Code, § 402, St.1937, p. 2353.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by E. E. McCalla against John G. Grosse and others to recover damages for injuries allegedly suffered when plaintiff was struck by an automobile driven by defendant John G. Grosse and alleged to be owned by defendants Stover, wherein a judgment was rendered in favor of plaintiff against defendant John G. Grosse in the sum of $9,000. From a judgment sustaining the demurrer of defendants Stover to the third amended complaint without leave to amend, and dismissing the action, plaintiff appeals.

Reversed, with directions to overrule demurrer.

W. M. Greathouse, of Los Angeles, for appellant.

C. E. Crowley, of Ontario, for respondents.

WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which he suffered when on November 25, 1938, he was struck by an automobile driven by defendant Grosse and alleged to be owned by defendant Stover. Judgment was rendered in favor of plaintiff against defendant Grosse in the sum of $9,000 but the demurrer of defendants Stover to the third amended complaint was sustained without leave to amend and the action was dismissed as to them. The appeal is prosecuted from the judgment of dismissal.

From the allegations of the complaint it appears that prior to the accident in question defendants Stover were doing business as automobile dealers and that on November 18, 1938, they received the automobile driven by defendant Grosse as part payment on the purchase price of an automobile which they sold to one Bertrand Close; that after the sale to Close "defendants Stover were the owners of and used said automobile as a family car". A new certificate of ownership was issued by the motor vehicle department showing Mae G. Stover to be the new owner of the car and a certificate of registration was issued showing the registered owner to be John G. Grosse. It is further alleged "that no chattel mortgage, conditional sale contract, or other evidence showing Mae G. Stover to be owner for security purposes was ever recorded with said motor vehicle department; that the record ownership of said automobile has continued in the same parties without change since said November 18, 1938, * * * that the said defend-

ants Stover did thereupon permit said defendant Grosse the use of said automobile and caused the same to be registered in his name for the sole purpose of avoiding liability for injuries which might result from the operation of said automobile by the said defendant John G. Grosse, and that despite said registration in the name of John G. Grosse the said defendants Stover were at the time said accident occurred the true owners of said automobile".

In paragraph 2 of the amended complaint plaintiff makes the following allegations: "That plaintiff is informed and believes, and therefore alleges, that at all times mentioned herein said defendant John G. Grosse was and now is an aged and enfeebled man more than eighty (80) years of age, with eyesight so defective he could not see a distance of more than 25 feet; that by reason of such defective eyesight, together with the infirmities of his age, said defendant was at all such times an incompetent and unfit person to operate a motor vehicle on the public highways of the state of California. That plaintiff is further informed and believes, and therefore alleges, that during the year 1937 said defendant Grosse, by reason of his aged and enfeebled condition became incapable of taking care of business matters, and at such time said defendants Stover did undertake to care for and provide a home for said defendant so long as he lived; that from such time the said defendant Grosse has made his home with the said defendants Stover, and had been entirely dependent upon said defendants Stover for his care and support; that since such time said defendant Grosse has had no source of income or funds other than said defendants Stover; that said defendant Grosse is by blood relation an uncle to said defendant Mrs. Robert L. Stover. That plaintiff is informed and believes, and therefore alleges, that by reason of the dependency of the said defendant Grosse on said defendants Stover for a home and for funds for every purpose the said defendants Stover did at all times mentioned herein have complete control over the operation of an automobile on public highways by the said defendant Grosse; that said defendants Stover at all such times have had full knowledge of the matters and facts in this paragraph alleged."

It is further alleged that defendants Stover, notwithstanding their knowledge that defendant Grosse was incompetent and unfit to operate a motor vehicle on the public highways and notwithstanding their knowledge that the lives of persons using the highways would be endangered by the operation of the automobile in question by defendant Grosse did nevertheless permit defendant Grosse to operate the automobile upon the public highways and did furnish him with funds to purchase gasoline and oil for the automobile; that defendant Grosse did carelessly operate the automobile with the result that plaintiff suffered the injuries for which compensation is sought.

[1] We are satisfied that if plaintiff could prove the allegations set forth in his complaint he would be entitled to judgment against defendants Stover under the provisions of section 402 of the California Vehicle Code, St.1937, p. 2353, as in force at the time of the accident. This section provides in part: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages. * * * If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner, within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section."

[2] The complaint contains clear and positive allegations of ownership in defendants Stover. The provisions of section 402 of the Vehicle Code have long been a part of the law of this state and have given rise to several decisions by reviewing courts. In Bunch v. Kin, 2 Cal. App.2d 81, 37 P.2d 744, it was held that the owner who became liable for the negligent acts of the person permitted to use an automobile on the streets was the "registered owner". The statute in force at the time of the decision in that case was substantially the same as section 402 of

the Vehicle Code and it was held that the provision that the vendor under a conditional sale contract prior to repossession of the car was not to be deemed the owner under the section showed the legislative intent to make the registered owner the party liable. This was a logical conclusion since the vendor in such a contract does not have possession while the vendee, the registered owner, is the party who uses the automobile and should be liable for its operation. It was not held, however, that the true and actual owner of an automobile can be relieved from liability by the expedient of registration in the name of another. Such a situation is governed by the general provision fixing the liability of owners. It is clear that it was the legislative intent to make the actual owners of automobiles liable for the negligence of those to whom permission is given to drive them. According to the allegations of the complaint defendants Stover were in fact the true owners of the car and had control of it, the registration being in the name of defendant Grosse for the purpose of avoiding liability.

[3] The complaint may be upheld without the aid of section 402 of the Vehicle Code. Allegations of ultimate facts are made that defendants Stover knowingly permitted the automobile to be registered in the name of and to be driven by a man who was unfit to drive it upon the public highways; that they knew that defendant Grosse in driving the car would endanger the lives of persons using the highways; and that they furnished funds to him for the purpose of purchasing gas and oil. These allegations bring the case within the rule that one who knowingly permits an unfit driver to use his automobile is liable for damages caused by the negligent acts of the unfit driver in the operation of the car. In Rocca v. Steinmetz, 61 Cal.App. 102, 214 P. 257, 260, a demurrer was sustained to the complaint and from the judgment of dismissal the plaintiff appealed. It was alleged in the complaint that Steinmetz, Jr., was a careless and reckless person and a careless and reckless driver and that his father, the defendant, having such knowledge, negligently permitted him to drive the car. In reversing the judgment the reviewing court said that it would shock the common understanding to hold that a man would not be chargeable with negligence if he should entrust his car to a person whom he knew to be insane or intoxicated or utterly incompetent to run a car and further said that there was "no difference in principle but only in degree, where he knows the driver to be careless and reckless in the operation of the machine". In Owens v. Carmichael's U-Drive Autos. Inc., 116 Cal. App. 348, 2 P.2d 580, the defendant, which was in the business of renting cars, rented a car to one Watson who negligently drove it and struck the plaintiff. The plaintiff sought to impose liability on the defendant as owner by alleging that the defendant "negligently let and hired" the automobile to Watson; that the defendant "negligently permitted Watson to drive and operate said automobile upon the highway"; that "defendant knew * * * that said Max Watson was not competent to operate" said automobile; and "that said Max Watson was not licensed to drive or operate any automobile upon such highway". In holding that the trial court erred in directing a verdict for the defendant the reviewing court held that the allegations of the complaint were sufficient on the theory that "liability may be imposed upon an owner who negligently intrusts his automobile to another". The court pointed out that "such negligence is most frequently predicated upon the fact that an owner knowingly intrusts his car to an incompetent person * * *".

The judgment is reversed and the superior court is directed to overrule the demurrer.

We concur: MOORE, P. J.; McCOMB, J.

42 Cal.App.2d 489

POWERS v. CHERRY.

Civ. 12185.

District Court of Appeal, Second District, Division 1, California.

Jan. 21, 1941.

Rehearing Denied Feb. 13, 1941.

1. Trial ⇐142

A trial court is not justified in directing verdict, unless, as matter of law, no other reasonable conclusion is legally deducible from evidence and any other holding would be so lacking in evidentiary support that appellate court would be impelled to reverse it or trial court to set it aside.

2. Trial ⇐142

An inference of truth of facts essential to cause of action will support judgment in accordance with such facts, and ultimate question of weight to be accorded evidence is for exclusive original determination by jury, though trial judge believes that evidence to contrary of such inference greatly preponderates.

3. Automobiles ⇐245(6)

In action for injuries to pedestrian struck by defendant's automobile, evidence that defendant saw plaintiff walking toward automobile along edge of debris on boulevard, when 150 feet away, but continued to drive forward, without keeping plaintiff in view, and swerved toward him or changed course of automobile within 40 feet of place of collision, was sufficient to take to jury question of defendant's negligence.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Olin W. Powers against Ralph Cherry for personal injuries. Judgment for defendant, and plaintiff appeals.

Reversed.

Murchison & Clopton, of Los Angeles, for appellant.

Elbert E. Hensley, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an action for personal injuries received by appellant on or about the 5th day of March, 1938, while walking along Ventura boulevard near its intersection with Vineland avenue, and is based upon the alleged negligent operation of an automobile by respondent. At the conclusion of appellant's case respondent moved for a nonsuit which motion was by the court denied. At the conclusion of the trial the court on respondent's motion directed a verdict in his favor and denied appellant's motion for a new trial. This appeal is prosecuted from the judgment which was thereafter entered pursuant to said directed verdict, as well as from the order denying a new trial.

The facts which form the basis of the instant litigation are as follows: Ventura boulevard in the city of Los Angeles extends in a general easterly and westerly direction and is approximately 70 feet wide between Lankershim boulevard on the east and Vineland avenue on the west. On March 5, 1938, as the result of extremely heavy rainstorms which had washed out bridges and interrupted transportation in the North Hollywood district, the described portion of Ventura boulevard was partially covered with sand, mud and other debris, and for some distance east and west thereof traffic was blocked off except for the cars of residents of the said district. Just north of and adjacent to Ventura boulevard in this area was a Pacific Electric Railway right of way and tracks which gradually circled away from the boulevard as it progressed westerly toward Vineland avenue where the tracks proceeded due north. At approximately 10 o'clock in the evening of said March 5th, appellant was on his way from his place of business to his home which was situated near Vineland avenue north of Ventura boulevard, and was walking westerly from Lankershim boulevard on the south side of Ventura boulevard, using a footpath slightly south of the south curb thereof. When he reached the M & M Auto Court which was two or three blocks west of his starting point, appellant crossed Ventura boulevard from the south to the north side, in order to reach the aforesaid Pacific Electric tracks which were higher than the surrounding terrain, were free from debris and mud, and furnished a direct route to appellant's home.

As he crossed to the northerly side of the boulevard, appellant encountered mud and debris which extended out into the highway from the northerly curb thereof, whereupon he turned and walked in an easterly direction for 15 or 20 feet along the edge of this debris which he testified was 6 or 7 feet south of said northerly curb, "looking for a place to get through the debris and get onto the track running parallel to

the boulevard". As he was so walking in an easterly direction along the edge of this debris, appellant saw respondent's automobile approaching him from the east at a distance of 100 to 150 feet traveling almost in the center of the highway. When respondent's automobile was 30 or 40 feet from him, appellant testified that it swerved toward him and that he "jumped to get out of the way, or tried to run from it", and was hit on the back of his legs with the bumper of the automobile. He was thrown by the force of the impact, thereby sustaining painful and serious injuries.

Respondent testified that he was traveling westerly at a speed of thirty miles per hour on the northerly half of Ventura boulevard about 2 feet to the right of the double white line in the center thereof, preparatory to making a left-hand turn, his home being located on the south side of Ventura boulevard about a block west of the place where the accident occurred. He testified that mud, sand and debris extended from the north curb to the single white line in the center of said north half of the highway, or a distance of approximately 15 feet, and that, as he proceeded toward the point of impact, there was a space of from 3 to 5 feet between the right-hand side of his car and the edge of the debris; that when he was 150 or 170 feet east of the point of the impact he saw appellant, who appeared to be standing 5 or 6 feet south of the north curb; that a car had pulled out from the south curb near the M & M Auto Court and the lights from it shone across the boulevard so that respondent got a glimpse of appellant, who was dressed in light-colored clothing and was bareheaded; that when this parked car came out toward the center of the street it seemed to be making a "U" turn, and respondent took his foot off the gas and swung 3 or 4 feet to the north from the center of the boulevard to a point where he was partially astraddle the single white line which marked the center of said north half of Ventura boulevard. In making this operation, respondent traveled about 40 feet and did not again see appellant until the point of impact when he "saw a body just coming right directly in the car from the side, and it was just practically at the same moment of the impact"; that the impact occurred approximately 15 feet south of the north curb of Ventura boulevard and opposite the M & M Auto Court, at a point which he described as being 5 feet south of the edge of the debris; 5 feet north of the single white line in the center of the north half of the highway; that the distance between the right side of his car and the edge of the debris at the place of the impact was 5 or 6 feet. He also testified that he traveled 40 or 50 feet after the collision before he brought his car to a stop; that the impact threw appellant sidewise from the automobile and he was found lying on the edge of the debris. At the time and place in question there was no other traffic on the same side of the highway in the vicinity of respondent; his windshield was clear, his headlights were good and capable of illuminating objects for a distance of from 120 to 150 feet in advance of his machine, and the street lights in the vicinity were in operation. Furthermore, he testified that he at no time used his brakes from the time he first saw appellant at the edge of the pavement until the collision occurred.

[1] It is established law in this state with reference to the authority of a trial court to direct a verdict that, "Unless it can be said that, as a matter of law, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, a court is not justified in taking a case from a jury and itself rendering the decision." Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 572, 90 P.2d 792, 793.

A review of the evidence herein shows that appellant was walking easterly along the edge of the debris on the north half of Ventura boulevard facing traffic traveling to the west; that respondent was 150 feet away when he first saw appellant at the side of the boulevard and that he thereafter continued to drive forward without keeping appellant in view. It is also shown that respondent either swerved toward appellant or changed the course of his automobile and that within 40 feet of such change of course the collision occurred.

The condition of the boulevard at the point in question was of a very unusual character because of the damage caused by the rainstorms, above referred to. The evidence is uncontradicted that appellant was on the north half of Ventura boulevard either walking directly on or very close to the edge of the mud and debris when he was first glimpsed by respondent, as well as at the time of the impact.

It is clear that the evidence adduced at the trial herein could as well support an inference of negligence on the part of respondent as one of contributory negligence on the part of appellant.

[2] As was so aptly stated in Gash v. Los Angeles Ry. Corp., supra, 13 Cal.2d at page 583, 90 P.2d at page 799: "It is clear that an inference of the truth of facts essential to a cause of action will support a judgment which may be rendered in accordance with such facts. 19 Cal. Jur., pp. 704, 717. And although to the comprehension of a trial judge, evidence to the contrary of such an inference may greatly preponderate, nevertheless the ultimate question of the weight that should be accorded to the evidence which may have been presented by the respective parties to the litigation is one for the exclusive original determination by the jury."

[3] It follows that the jury in the instant case should not have been directed to return its verdict in favor of respondent.

The judgment is reversed. The appeal from the order denying motion for new trial is dismissed.

We concur: DORAN, J.; WHITE, J.



42 Cal.App.2d 464

WINDSOR v. WINDSOR.

Civ. 11545.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1941.

1. Divorce ⇐327

Evidence *held* to authorize denial of divorce sought by wife, on ground that previous divorce obtained by husband in Nevada was based on bona fide residence and valid.

2. Appeal and error ⇐1011(1)

Where trial court might have decided a disputed issue of fact either way, appellate court may not interfere after trier of facts has made its determination.

3. Courts ⇐92

Where appellate court upheld finding of trial court, statement in the opinion that a contrary finding could not have been sustained was "dictum".

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum".

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action for divorce by Winifred S. Windsor against James B. Windsor, wherein Ewing Mayfield was named co-respondent. From a judgment denying any relief, plaintiff appeals.

Affirmed.

S. S. Hahn, W. O. Graf, and Stanton Rippey, all of Los Angeles, for appellant.

Hanna & Morton and Thomas J. Cunningham, all of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff appeals from a judgment denying her any relief in an action for divorce.

Plaintiff and defendant married in 1915. They separated in 1936. Thereafter defendant went to live in the state of Nevada, where he resided for a period slightly in excess of that required to obtain a divorce. While so residing in Nevada, defendant there filed an action for divorce and plaintiff employed an attorney in Los Angeles and authorized an attorney in Nevada to represent her in the Nevada action. A property settlement agreement was prepared by plaintiff's attorney in Los Angeles and was forwarded to Nevada for defendant's signature. Defendant signed said agreement and plaintiff filed an answer in the Nevada action and was represented by counsel at the trial thereof. A divorce decree was entered in the Nevada action on January 7, 1937, and the property settlement agreement was approved and made a part of said decree. Shortly thereafter defendant returned to the state of California and, on March 17, 1937, he married Ewing Mayfield in the state of Arizona. Plaintiff made no objection to the Nevada decree and she accepted the benefits of the property settlement and the monthly payments thereunder until the present action was commenced on December 29, 1937.

Plaintiff's complaint herein was in two counts. The first count charged desertion. The second count charged adultery, alleged to have been committed with Ewing Mayfield at times subsequent to the marriage of

defendant and said Ewing Mayfield on March 17, 1937. No mention was made in the complaint of the Nevada decree. Defendant and said Ewing Mayfield filed separate answers setting up as defenses the Nevada decree and estoppel. The trial court found against plaintiff on the material allegations of her complaint and found in favor of the defendant on said defenses. Among the findings and conclusions of the trial court were those to the effect that defendant went to the state of Nevada with the intent to establish his residence there and resided in that state continuously for the period of time required by law to give the Nevada court jurisdiction; that defendant established a bona fide residence in the city of Reno, state of Nevada, and lived in said city and state for the period of time required by law prior to the filing of his divorce action; that the decree of the Nevada court "is now final and is valid and binding upon the parties to this action".

[1-3] Plaintiff contends that the evidence was insufficient to support these last mentioned findings but we find no merit in this contention. Defendant testified that he had desired for many years to acquire a ranch and live thereon; that he had discussed his desires with plaintiff on several occasions and that plaintiff would never agree to live on a ranch; that he went to Nevada shortly after their separation for the purpose of buying a ranch or trading his business for a ranch; that he gave up his residence in this state and took his belongings to Nevada; that he did not go to Nevada for the purpose of obtaining a divorce and that he did not make up his mind to get a divorce until after he had arrived there; that he remained in the state of Nevada continuously from the time he arrived there until his return to California after the granting of the Nevada decree; that he took an apartment in Reno and resided there during his stay in Nevada; that he traveled around the state of Nevada spending his time looking at ranches; that he was unable to trade his business for a ranch and did not acquire one. While there was other testimony elicited from defendant on cross-examination for the purpose of casting doubt on the question of defendant's intention in going to Nevada, we believe that the foregoing summary shows that there was substantial evidence to support the above mentioned findings of the trial court. The most that can be said is that under the evidence the trial court might have decided the disputed issue of fact either way and under such circumstances, an Appellate Court may not interfere after the trier of the facts has made its determination. Plaintiff cites and relies upon Warren v. Warren, 127 Cal.App. 231, 15 P.2d 556, but that case is not determinative here. The Appellate Court there upheld the finding of the trial court and the statement in the opinion that a contrary finding could not have been sustained is necessarily dicta. In any event, the facts of that case are quite different from those presented in the record before us.

In view of our conclusion that the findings and conclusions of the trial court relating to the validity of the Nevada decree were sustained by the evidence, it becomes unnecessary for us to discuss the question of whether plaintiff was estopped to question the validity of said decree.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



42 Cal.App.2d 532

KEYES v. HURLBERT (DOUGLAS et al., Interveners).

Civ. 2602.

District Court of Appeal, Fourth District, California.

Jan. 22, 1941.

1. Appeal and error ⇐801(4)

Where there is left any material or vital question for determination, the reviewing court should not dismiss the appeal, but should permit it to be heard on the merits.

2. Appeal and error ⇐801(4)

A reviewing court, as a matter of convenience for the expedition of business, will not grant motion to dismiss, involving an examination of the record, in advance of the hearing on the merits, and, if questions presented on such a motion involve the merits and are such as would be determined upon hearing of the case on the merits, reviewing court may deny the motion with the privilege of renewal at the hearing or

continue the motion until hearing on the merits.

3. Appeal and error ⇐801(4)

Where, in order to make proper determination of issues presented on motion to dismiss appeal, it would be necessary to make an examination of record on main appeal, and an unqualified denial of motion might establish the law of the case in respect to points raised, and District Court of Appeal was convinced that the questions raised should be considered with questions raised on the appeal, the order of submission made in reference to the motion was set aside and motion was ordered replaced on calendar to be further heard and considered in connection with the appeal.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Vincent G. Keyes against Elmer O. Hurlbert, executor, for specific performance of a contract entered into between Andrus Hurlbert, deceased, and others, and the defendant, wherein Lillian Douglas and others intervened. From an adverse decree, interveners appeal. On motion to dismiss appeal.

Order of submission made in reference to motion set aside, and motion ordered replaced on calendar to be further heard and considered in connection with appeal from the judgment.

Irvine P. Aten and Richard Aten, both of Fresno, for appellants.

B. M. Benson, of Fresno, for plaintiffs and respondents.

Dearing & Jertberg, of Fresno, for defendants and respondents.

GRIFFIN, Justice.

The appeal in the above entitled action was from a decree ordering specific performance by the executor, Elmer O. Hurlbert, of a contract entered into between decedent, Andrus Hurlbert, and his two partners, Vincent G. Keyes, the plaintiff and respondent, and Elmer O. Hurlbert, the defendant and respondent. By that judgment it was ordered that the defendant executor make, execute and deliver to the plaintiff a bill of sale covering the interest of the deceased Andrus Hurlbert, in and to a partnership known as "General Transfer Company", and also a deed to certain real property. It is now claimed on this motion to dismiss the appeal that the defendant Elmer O. Hurlbert, as executor of the will and estate of Andrus Hurlbert, deceased, since perfecting this appeal, complied with the terms of said judgment by executing the bill of sale and deed; that he did not appeal from the judgment; that appellants, the interveners, appealed from the decree; that the defendant Hurlbert, as executor, should have received more than $30,828.94, for the share of decedent (Andrus Hurlbert) in the partnership; that after appellants' appeal from the decree the defendant Elmer O. Hurlbert, as executor, filed his first account and report and that therein he reported to the Superior Court the receipt of the said sum above mentioned and the making of a bill of sale and deed to Vincent G. Keyes, as described in the judgment; that an order was made allowing and approving the amount and confirming and approving all of the acts of the executor; that the interveners had participated in the partial distribution that was made out of the funds of the estate, which funds included the sum of $30,828.94. It is therefore argued that appellants cannot accept the fruits of an indivisible judgment or decree and at the same time appeal from the decree, citing Turner v. Markham, 152 Cal. 246, 92 P. 485; In re Estate of Baby, 87 Cal. 200, 25 P. 405, 22 Am.St.Rep. 239; Estate of Shaver, 131 Cal. 219, 63 P. 340; and Estate of Cohn, 36 Cal.App.2d 678, 98 P.2d 521; that by their acts and omissions shown they are now estopped to attack the judgment appealed from herein and that all questions on this appeal have now become moot and settled and that this appeal should be dismissed.

In answer to plaintiff and respondent's motion to dismiss the appeal for the reasons herein stated, interveners and appellants represent that in view of the fact that they have specifically claimed on this appeal that the judgment is void, there cannot be an estoppel against showing that a judgment is void as against public policy or positive law, citing Panzer-Hamilton Co. v. Bray, 96 Cal.App. 460, 274 P. 769; Brown v. Brown, 8 Cal.App.2d 364, 47 P.2d 352; Page v. Superior Court, 76 Cal. 372, 18 P. 385; and Ivory v. Superior Court, 12 Cal. 2d 455, 85 P.2d 894.

In opposition to the motion to dismiss it is further shown that contained in the record on appeal there is a motion by appellants and interveners for an order directing the executor of the above-named estate to

deposit with the clerk of the Superior Court a bill of sale and also a deed conveying the title to the property involved to Vincent G. Keyes for his use and benefit and for the use and benefit of Elmer O. Hurlbert, to abide the judgment of the Appellate Court in the action pending. This motion was made upon the ground and for the reasons that the moving parties were heirs at law and legatees and devisees of said estate and were interveners in the action and were taking an appeal from the decree entered in that action wherein it was ordered that the executor make and deliver the documents above referred to, and they there moved that the delivery of the documents and the property should not be made until the order and judgment therein became final. This motion was based upon all the records on file in that action which is now pending in this court on appeal.

It is further represented that that motion was denied upon the ground that the court had no authority to make such an order, and it is here contended on this motion that the acceptance by appellants of the partial distribution was not intended by them as a compromise or settlement of the action, nor was the acceptance in any way conditioned upon an agreement that this appeal would not be prosecuted; that at no time did the executor or any other party state to appellants that the acceptance would amount to a compromise or settlement of the litigation or an agreement that the appeal would not be prosecuted; that besides appellants, four other heirs and legatees of Andrus Hurlbert, deceased, including the executor, participated in the partial distribution; that appellants did not in any way request or move for said partial distribution.

Interveners and appellants insist first, that there can be no estoppel against showing that a judgment is void; second, that appellants are not bound by the executor's acceptance of plaintiff and respondent's money; third, that appellants' right to appeal in this case cannot be affected by acceptance of partial distribution in an entirely separate proceeding; and fourth, that if appellants are estopped to appeal from the decree of specific performance they nevertheless are not estopped to claim a share of the profits alleged to be due them and earned by the partnership subsequent to the death of Andrus Hurlbert.

[1] It is further claimed that the judgment from which the appeal was perfected entirely ignored an issue pertaining to the profits and that under no circumstance have they waived their right to appeal from the judgment which failed to dispose of that issue, citing Wold v. League of the Cross, 107 Cal.App. 344, 290 P. 460; and Walnut Irrigation Dist. v. Burke, 158 Cal. 165, 110 P. 517. It has been clearly established in this state that where there is left any material or vital question for determination the court should not dismiss the appeal but should permit it to be heard on the merits. Hartke v. Abbott, 106 Cal.App. 388, 289 P. 206.

[2] It is a rule of convenience for the expedition of business in the appellate courts of California that they will not grant a motion to dismiss involving an examination of the record in advance of the hearing on the merits, and if the questions presented on such a motion involve the merits of a case and are such as should be determined upon the hearing of the case upon its merits, the court may deny the motion with the privilege of renewal at the hearing, or continue the motion until the hearing on the merits. Ewing v. Richvale Land Co., 176 Cal. 152, 167 P. 876; Leonis v. Leffingwell, 6 Cal. Unrep. 219, 55 P. 897; and Mannix v. Tryon, 2 Cal.App. 609, 84 P. 278.

[3] To make a proper determination of the issues here presented on this motion to dismiss, it would be necessary for us to make an examination of the record on the main appeal from the judgment. An unqualified denial of plaintiff and respondent's motion to dismiss may establish the law of the case in respect to the points raised. In view of the issue presented on the motion we are convinced that these questions should be considered, together with the questions raised on the appeal from the judgment.

The order of submission made in reference to this motion is hereby set aside and said motion is ordered replaced on the calendar for February 11, 1941, to be further heard and considered in connection with the appeal from the judgment.

We concur: BARNARD, P. J.; MARKS, J.

CONLEY v. APABLASA et al.

Civ. 12836.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1941.

Rehearing Denied Feb. 13, 1941.

Hearing Denied March 20, 1941.

1. Appeal and error ⇐786

Where claim of appellant that she was entitled to a larger amount of money than she actually received in partition action against administrator was predicated solely on assumption that she was wrongfully required to pay expenses of administration, and there was nothing in the record to support such assumption, and no other errors were urged as grounds for reversal, the appeal was without merit and would be dismissed.

2. Appeal and error ⇐133

A minute order granting only in part petition of one who purchased realty involved in partition action, for adjustment of rents, was not an "appealable order", where by its very wording the order indicated that it was nothing more than a memorandum stating that petition had been granted in part, that findings and decree had been signed and filed, and that petition would be further considered at a later date.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Appeal and error ⇐635(1)

If one who appealed from minute order, stating that petition for adjustment of rents for realty involved in partition action had been granted in part, that findings and decree had been signed and filed, and that petition for adjustment of rents would be further considered at a later date, was attempting to appeal from decree mentioned in the minute order, such appeal would be of no avail, where neither the findings nor the decree, if made, were included in the record on appeal.

4. Appeal and error ⇐660(2)

Where matters sought to be added to the record by motion for diminution of the record could not affect the conclusion of the appellate court that purported appeal was required to be dismissed, the motion would be denied.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to partition certain realty by Maria Apablasa Conley against Cayetano J. Apablasa and others. The realty was duly sold to Gerald E. Arbuckle. From the final decree, Maria Apablasa Conley appeals, and from a minute order granting in part the petition of Gerald E. Arbuckle for adjustment of rents, he appeals.

Decree affirmed, and purported appeal of Gerald E. Arbuckle dismissed.

Walter W. Middlecoff, of North Hollywood, and Gerald E. Arbuckle, in pro. per., for appellants.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for respondents.

WOOD, Justice.

Maria A. Conley has appealed from a final decree entered in an action to partition certain real property by which the rights of the parties were determined and by which the distribution of funds received from the sale of such property was ordered. Gerald E. Arbuckle has attempted to appeal from a minute order granting in part his petition for adjustment of rents. Four other appeals from various decrees made during the course of the partition proceeding have been dismissed pursuant to the stipulation of the parties.

The facts which are material to the determination of the present controversy are as follows: In 1929 Concepcion A. Sepulveda, who was the owner of six separate parcels of real property, conveyed an undivided one-half interest in four of the parcels to her six children. In 1931 she died intestate and probate proceedings, which are still pending, were commenced. The present partition action was filed in 1936 by Maria A. Conley against the administrator of the estate of Sepulveda and all other cotenants of such real property. Prior to the trial of the partition suit the probate court entered a decree in the estate proceedings ordering partial distribution of an undivided 2/21 interest in two of the six parcels of land to Maria A. Conley. Subsequently in the course of the partition proceeding all of the parcels of real property were duly sold to appellant Gerald E. Arbuckle. The court in the partition action directed that the share of the proceeds of the sale belonging to cotenants whose interests were still subject to administration should be paid to the administrator of the estate, after deducting

therefrom the proportionate share of the costs of the partition proceeding.

In its interlocutory decree the court determined the fractional interests representing the respective shares of the various claimants to the proceeds of the sale of the real property. So far as is here material the final decree from which Maria A. Conley has appealed provided that the sum of $1,240.01 should be paid to her as her share of the balance of the funds then on deposit in the court and that the sum of $1,210.57 should be paid to the administrator of the estate of Sepulveda. Her motion for a new trial and motion to vacate the judgment were both denied.

[1] Appellant Conley contends that she is entitled to a sum of from $914 to $950 more than she received by such final decree. It is claimed that the court paid such sum to the administrator of the estate of Sepulveda as appellant's share of the expenses of administration in such estate and that such payment was improper for the reason that appellant should not have been required to bear any of the expenses of administration after the entry of the decree of partial distribution. There is nothing in the final decree or the findings of fact and conclusions of law upon which such decree is based which would indicate that any sum of money was being paid to the administrator as appellant's share of the expenses of administration. The amounts directed to be paid by the final decree are merely designated as the respective shares of the various parties. No reference is made to expenses of administration. The claim that appellant is entitled to a larger amount of money than she actually received is predicated solely on the assumption that she was wrongfully required to pay expenses of administration. Since there is nothing in the record to support such assumption and since no other errors are urged as grounds for reversal, we must hold that there is no merit in the appeal.

[2, 3] The purported appeal of Gerald E. Arbuckle from the minute order granting his petition for adjustment of rents must be dismissed, such order being nonappealable. The order recites: "Petition of Gerald E. Arbuckle for adjustment, etc., comes on for hearing. * * * Said petition is granted in part and Findings and Decree are signed and filed. Further consideration as to $588.00 is postponed to October 31, 1938." By its very wording the order indicates that it is nothing more than a memorandum, stating that the petition has been granted in part, that findings and a decree have been signed and filed and that the petition would be further considered at a later date. An appeal will not lie from such minute order. Carpenter v. Golden State Securities Co., 31 Cal.App.2d 494, 88 P.2d 194. If Arbuckle was attempting to appeal from the decree mentioned in the minute order such appeal would likewise be of no avail for neither the findings nor the decree, if made, were included in the record on appeal.

[4] At the time that this appeal was before us for oral argument a motion for diminution of the record was made on behalf of appellant Arbuckle. Since the matters sought to be added to the record by such motion cannot affect our conclusion that the purported appeal must be dismissed, such motion is hereby denied.

For the foregoing reasons the final decree from which Maria A. Conley has appealed is affirmed and the purported appeal of Gerald E. Arbuckle is dismissed.

We concur: MOORE, P. J.; McCOMB, J.



42 Cal.App.2d 499

COUNTY NAT. BANK & TRUST CO. OF SANTA BARBARA v. INVESTMENT CORPORATION OF SANTA BARBARA.

Civ. 12210.

District Court of Appeal, Second District, Division 1, California.

Jan. 21, 1941.

1. Brokers ⇨54

A broker was entitled to his commission when he found a purchaser ready, able, and willing to buy the property on the terms agreed to by the seller.

2. Brokers ⇨71

The right to and the amount of a broker's commission must be determined from the provisions of his contract with his principal.

3. Brokers ⇐54

Where broker's contract authorized him to procure a purchaser of property at $55,000, and seller agreed to pay broker a commission of five per cent. on listed price or any other price or terms or deal that might be offered and accepted by seller, broker earned his commission when county expressed its readiness and willingness to enter into a deal evidenced by a lease and option agreement and that deal was offered to and accepted by seller.

4. Brokers ⇐71

Where broker's contract allowed him not only to offer property for sale or to sell it but also empowered him to lease property, broker was entitled to a commission upon the lease price as well as upon the consideration for the sale when he procured a county to lease for a term and then purchase property.

5. Brokers ⇐71

In absence of any charge of fraud, mistake, or accident, the language of a broker's contract and of a lease and option contract executed by purchaser procured by broker being clear, explicit, certain, and not involving an absurdity, the trial court, in action to recover brokerage commissions, was justified in interpreting the contracts and ascertaining the intention of the parties from the language thereof. Civ.Code, §§ 1638–1640.

6. Evidence ⇐423(1)

Where broker's contract authorized him to procure a purchaser and also empowered him to lease property, seller agreed to pay a commission on listed price or any other price or terms or deal that might be offered and accepted by seller, and lease and option contract executed by purchaser procured by broker provided for the payment of rentals, seller could not, under any exception to the parol evidence rule, show that the lease and option contract was in reality an out and out agreement of sale and that the sum described as rentals was in truth interest on deferred payments on which no commission was to be paid.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by the County National Bank and Trust Company of Santa Barbara against the Investment Corporation of Santa Barbara to recover brokerage commissions on a realty transaction. From a judgment for plaintiff, defendant appeals.

Affirmed.

Alfred W. Robertson and Edward W. Schramm, both of Santa Barbara, for appellant.

Butcher & Haines, of Santa Barbara, for respondent.

WHITE, Justice.

This appeal involves an action brought to recover brokerage commissions on a realty transaction had between appellant and the county of Santa Barbara. Respondent bank is the assignee of one A. F. Krebaum, who was the real estate broker in question. The written agreement relied upon by respondent to recover the commissions earned by the real estate broker was dated January 15, 1935, and was in the following words and figures:

"* * * Investment Corporation of Santa Barbara hereby delegates to A. F. Krebaum, Real Estate Broker, doing business as Krebaum & Krebaum, the sole and exclusive right to sell and offer for sale or lease our property known as the Ambassador Ballroom located on West Cabrillo Boulevard, together with 200' of frontage, for the price of $55,000.00 for a period of 30 days from date hereof. We further agree to pay A. F. Krebaum a commission of 5% on the listed price or any other price or terms or deal that may be offered and accepted by us. * * *"

Following the execution of this agreement and in conformity with prior negotiations brought about by the real estate broker between the board of supervisors of Santa Barbara county and appellant investment company, there was executed, through the efforts of such broker, a lease and option agreement between the county and respondent bearing date January 19, 1935. In effect, this agreement first provided that appellant investment company demised and let to the lessee, county of Santa Barbara, the property in question for a period commencing February 1, 1935, and ending either on December 1, 1938, or on the date of the payment of the purchase price of the property thereafter described in the agreement under what was designated "Option Four", whichever date occurred first. It was, however, provided in the contract that the lease should terminate as to all the involved property on December 1, 1935, unless the option designated "One" was exercised by the

lessee on or before the last-mentioned date, and it was similarly provided that unless "Option Two" and "Option Three" were exercised as therein provided, the lease should terminate as to portions of the property remaining at the time of the failure to exercise any of the last-named options. It was then stipulated in the agreement that the rentals should be as follows:

"(a) For the period commencing with the 1st day of February, 1935, and ending with the date of the payment of the purchase price for the parcel of property hereinafter described under Option One, at the rate of Three Hundred ($300.00) dollars per month, pro-rated for any partial month;

"(b) For the period commencing with the date of said last-mentioned payment, and ending with the date of the payment of the purchase price for the parcel of property hereinafter described under Option Two, at the rate of Two Hundred Twenty-five ($225.00) dollars per month, pro-rated for any partial month;

"(c) For the period commencing with the date of said last-mentioned payment, and ending with the date of the payment of the purchase price for the parcel of property hereinafter described under Option Three, at the rate of One Hundred seventy-five ($175.00) dollars per month, pro-rated for any partial month;

"(d) And for the period commencing with the date of said last-mentioned payment, and ending with the date of the payment of the purchase price for the parcel of property hereinafter described under Option Four, being also the date of the termination of this lease, at the rate of One hundred twenty-five ($125.00) dollars per month, pro-rated for any partial month. * * *"

The agreement further provided that the amount of property described as covered by the lease should be reduced as the successive options were exercised to the balance of the property remaining upon which options had not been exercised. It was stipulated that the total rentals received by appellant investment company amounted to $8,743.35.

The next portion of the agreement pertinent to a consideration of this appeal refers to certain options, the first of which, if exercised by the county of Santa Barbara on or before December 1, 1935, authorized said county to purchase a described portion of the property for the sum of $15,000. The second option, which was required to be exercised by said county on or before December 1, 1936, provided for the purchase of an additional portion of the property for the further sum of $10,000. Option Three, which was required to be exercised by the county on or before December 1, 1937, authorized the purchase of another portion of the property for $10,000, while Option Four, which was required to be exercised on or before December 1, 1938, entitled the county to purchase the balance of the property for the sum of $20,000.

All of the options were exercised by the county of Santa Barbara and the total sum of $55,000 was paid to appellant investment company by such county. Appellant investment company paid the five per cent commission on such $55,000, but refused to pay any commission upon the $8,743.35 received by it under the so-called lease or rental provisions of the agreement. Trial before the court, sitting without a jury, resulted in judgment for the plaintiff, and from such judgment this appeal is prosecuted.

[1-4] Appellant contends that the trial court fell into error in denying to it the right to show that the agreement between appellant and the county of Santa Barbara was not in fact an option and lease, but in reality was an out-and-out agreement of sale wherein the interest on the unpaid purchase price was paid under the guise of rent. Appellant offered to prove by the testimony of two witnesses that such was the understanding of the parties to the agreement. In other words, appellant's position is that it was the understanding of the parties that the purchase price was $55,000, upon which respondent's assignor was entitled to a commission of five per cent, but that the additional sum of $8,743.35, although described in the agreement as rent, was in truth interest on the deferred payments, upon which no commission was to be paid. The trial court's finding against appellant in this regard is sustained by the record. Its answer made no claim of fraud, ambiguity, uncertainty or illegality of the lease and option agreement set forth in the complaint, nor were any such issues set up by way of special plea or affirmative defenses. But even though we assume as true the claim of appellant that the lease and option agreement was framed to evade certain statutory restrictions which prohibited the county of Santa Barbara from purchasing

the property outright, and for that reason instalment payments were provided for and provision made in the contract to designate as rentals what was in fact interest on future payments, nevertheless, there is no testimony that the broker was a party either to the form of the purchase agreement between appellant and the county or that the broker was a party to or had any knowledge of the claimed subterfuge. The broker was entitled to his commission when, as in the instant case, he found a purchaser ready, able and willing to buy the property on the terms agreed to by the seller. 4 Cal.Jur. 583, § 25, and Ten-Year Supp., with cases therein cited. The right to and the amount of the broker's commission must be determined from the provisions of his contract with his principal. In the case at bar the broker's contract authorized him to procure a purchaser of the property at a price of $55,000, and then provided: "We further agree to pay A. F. Krebaum a commission of 5% on the listed price or any other price or terms or deal that may be offered and accepted by us." When, therefore, the county of Santa Barbara expressed its readiness and willingness to enter into the "deal" evidenced by the lease and option agreement, and that "deal" was "offered" to and "accepted" by appellant, the broker had earned his commission. The contract of the broker not only allowed him to offer the property for sale or to sell the same, but also empowered him to lease the property. When, therefore, he procured the county of Santa Barbara to lease for a term and then purchase the property, he was, by the terms of his contract, entitled to a commission on the lease price as well as upon the consideration for the sale.

[5, 6] In answer to appellant's contention that the construction placed upon the contract by the trial court, in holding that by its terms the sum of $8,743.35 constituted rentals, was unreasonable, we might say that if the rentals were intended by the parties to be interest on deferred payments, it would seem singular that the purchaser was to have possession of the property for four years free from any rental for its use and occupation. From whatever angle the situation presented by the facts of this case is viewed, it must be conceded, as the trial court found, that appellant received the sum of $8,743.35 in addition to $55,000, and received each of said sums through the efforts and services of respondent's assignor and as "terms" of and as the result of his efforts to effect a "deal" pursuant to the contract.

Both the agreement of the broker and the lease and option contract appear upon their face to be a complete statement of the undertakings of the respective parties thereto, without any ambiguity or uncertainty as to their several legal obligations. In the absence of any charge of fraud, mistake or accident, the language of each contract being clear, explicit, certain, and not involving an absurdity, the trial court was justified in interpreting it and ascertaining the intention of the parties from the language thereof. Civ.Code, §§ 1638, 1639, 1640. The instant case does not present circumstances which justify the application of any exception to the parol evidence rule.

From the foregoing it follows that the judgment should be, and it is, affirmed.

We concur: YORK, P. J.; DORAN, J.



42 Cal.App.2d 579

FERNHOLTZ v. BISBEE.

Civ. 12240.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1941.

1. Trial ⇐296(3, 4)

Where action by passenger and action by driver of automobile which collided with defendant's automobile were consolidated for purposes of trial, instructions on proof of defendant's negligence required in order to recover, which provided also that plaintiffs could not recover if plaintiffs were guilty of negligence contributing no matter how slightly to happening of accident, did not take from passenger his right to have case tried on theory of joint or concurrent negligence of drivers of the two colliding automobiles, in view of other instructions.

2. Automobiles ⇐244(40)

In action by passenger of automobile which skidded on icy highway and collided with defendant's passing automobile, evi-

dence justified denial of recovery on ground that accident was unavoidable and happened without any negligence on part of either defendant or driver of automobile in which passenger was riding.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Emil Fernholtz against Roy A. Bisbee for damages for personal injuries sustained in a collision of two automobiles. From a judgment for defendant, plaintiff appeals.

Attempted appeal from verdict dismissed, and judgment affirmed.

F. M. Ostrander, of Mercer, for appellant.

Sigurd E. Murphy, of Hollywood, and Bernard E. Allard, of Los Angeles, for respondent.

WHITE, Justice.

This litigation is the outgrowth of an automobile accident which occurred about 8:20 o'clock on the morning of December 28, 1936, at a point about one and one-half miles south of Gorman, on the "Ridge Route" highway between Los Angeles and Bakersfield. Plaintiff, Emil Fernholtz, who is the appellant herein, was riding as a guest in an automobile being driven by Fred Hughes, hereinafter referred to as the Hughes car, and which was traveling in a northerly direction. The highway at the point of collision was covered with ice, and shortly before reaching the point of impact the Hughes car in which appellant was riding skidded, and an automobile driven by the defendant and respondent, Roy A. Bisbee, hereinafter referred to as the Bisbee car, struck the Hughes car. Hughes, driver of the automobile in which appellant was riding, commenced an action to recover damages for personal injuries and property damage against the defendant and respondent Bisbee, which action was No. 416664 in the Superior Court of Los Angeles County. In this action defendant Bisbee filed an answer and also a cross-complaint seeking recovery for personal injuries and property damage sustained by him. Plaintiff and appellant in the instant action filed his complaint in the same court, No. 415691, against defendant and respondent herein, Roy A. Bisbee, but did not name Hughes, the driver of the car in which appellant was riding, as a defendant.

Upon motion of defendant and cross-complainant Bisbee, and over objection of plaintiff and appellant herein, these actions were consolidated for trial by order of the Superior Court. Upon the trial of the cases so consolidated before a jury, three verdicts were returned: (1) In the case now before us a verdict was rendered in favor of defendant and respondent Bisbee and against plaintiff and appellant Fernholtz; (2) in the other action a verdict also was returned in favor of defendant Bisbee and against plaintiff Hughes on the complaint of the latter; while (3) on the cross-complaint therein of defendant Bisbee against plaintiff Hughes, the verdict was in favor of the cross-defendant Hughes and against the cross-complainant Bisbee.

There was no conflict in the evidence as to the icy, slippery and dangerous condition of the highway at the point of the accident, nor was there any evidence of excessive speed by either automobile, but there was a sharp conflict as to the point on or lane of the highway where the accident occurred. Plaintiff contended that when the Hughes car started to skid it came to a complete stop in the center lane of the highway, and that there was sufficient room in the third lane for the Bisbee car to pass the Hughes car in safety without moving over on to the center lane. Defendant Bisbee presented evidence that when he came upon the slippery road he was traveling in second gear; that while so traveling, as he passed Gorman, he first saw the Hughes car when it was about a half mile away; that he was traveling upon the right-hand side of the road in second gear upon an icy and slippery pavement, going between twenty and twenty-five miles per hour; that when he was about two or three car lengths from the Hughes car the latter skidded over on to the lane in which the Bisbee car was traveling; that when the impact occurred the Hughes car was still in motion. Thus, we see, as conceded by appellant, that the factual situation presents the usual conflict in the evidence attendant upon cases of this nature.

The only point presented by appellant is that the trial court erred in giving certain instructions which it is claimed imputed the negligence of the driver of the Hughes car to the guest, Fernholtz, who is the appellant herein. By the first challenged instruction, which is designated "Defendant's Instruction No. 3", the jury was advised that it was incumbent upon plaintiffs to

prove that defendant Bisbee was negligent, and also to prove that such negligence, if any, on the part of the defendant, was the proximate cause of the accident, and "even then plaintiffs cannot recover if you find from a preponderance of the evidence that the plaintiffs were themselves negligent, and that such negligence on their part contributed proximately, no matter how slightly, to the happening of the accident". In defendant's instruction No. 5, the court, after defining the term negligence, proceeded to advise the jury that "before the defendant Bisbee can be held liable in this case, it is necessary that the plaintiffs show by a preponderance of the evidence that the defendant failed to use ordinary care or skill in the operation and management of his automobile; that is, plaintiffs must show that the defendant failed to do some act which a reasonable and prudent person would have done, or that he did some act which a reasonable and prudent person would not have done; *and even then you cannot find for plaintiffs, if you find that the plaintiffs were negligent, contributing proximately, no matter how slightly, to the happening of the accident*". In another instruction the jury was advised, "If you find that the defendant was negligent, proximately causing the accident, then you will determine whether or not the plaintiffs were negligent, and if you find that they were negligent and that their negligence proximately contributed to the accident and to the injuries, if any, then plaintiffs cannot recover, and your verdict must be in favor of the defendant. * * *"

[1] It is appellant's contention that the above-quoted instructions took from him his right to have the case tried on the theory of joint or concurrent negligence of defendants Bisbee and Hughes; that each of these instructions advised the jury that if Hughes was negligent and his negligence contributed in the slightest degree to the accident, then appellant could not recover. In these contentions appellant cannot be upheld, because the theory of joint or concurrent negligence of defendant Bisbee and co-plaintiff Hughes was clearly and correctly set forth in other instructions given by the court. For instance, by appellant's instruction No. 14 the jury was admonished that if it found that appellant was a passenger or guest in the automobile of Hughes and if it found that appellant was not guilty of contributory negligence, that in order to recover from defendant Bisbee it was not necessary that Hughes should be free from negligence. Said the court: "In other words, if you find that plaintiff Fernholtz was a passenger or guest in the Hughes car and was not guilty of contributory negligence, and if plaintiff Fernholtz sustained any injuries or damages by reason of the collision between the Hughes car and the Bisbee car, plaintiff Fernholtz is entitled to a verdict in his favor against defendant Bisbee if you should find that Bisbee was operating his automobile in a negligent manner, *even though you should find that Hughes was also negligent at and immediately prior to the time of the collision.*"

Again, in an instruction offered by appellant, the court stated to the jury: "You are instructed that if you find that plaintiff Fernholtz was a passenger or guest in the car of plaintiff Hughes, and if you further find that both Bisbee and Hughes were negligent in the operation of their respective cars, and if you further find that plaintiff Fernholtz was not guilty of contributory negligence, the *joint negligence* of Bisbee and Hughes would, if it contributed proximately to the injuries, if any, sustained by plaintiff Fernholtz, render defendant Bisbee liable to Fernholtz and Bisbee's liability would not be lessened, as far as Fernholtz is concerned, by the fact that the negligence of Hughes was a contributing cause to the injuries, if any, sustained by Fernholtz."

By the first of the two instructions last referred to, the jury was advised in plain, certain and unequivocal language, that the negligence of Hughes could not be imputed to plaintiff Fernholtz, and by the latter instruction it was clearly admonished that if it found that both Bisbee and Hughes were negligent in the operation of their respective cars and that if plaintiff was without contributory negligence, Bisbee would be liable to plaintiff, and that such liability would not be lessened by the fact that the negligence of Hughes, if any, also contributed to plaintiff's injuries.

In still another instruction the court further advised the jury that if it found that appellant Fernholtz was not guilty of contributory negligence, that "the joint negligence of Bisbee and Hughes would, if it contributed proximately to the injuries, if any, sustained by plaintiff Fernholtz, render defendant Bisbee liable to Fernholtz, and any negligence on the part of Hughes cannot be imputed to or charged against

plaintiff Fernholtz". By the last-quoted instruction the court not only emphasized the rule that if the jury found both Bisbee and Hughes were negligent in the operation of their respective cars, that their joint negligence, if it contributed proximately to the injuries sustained by appellant, would entitle the latter to a verdict against Bisbee, but such instruction also clearly told the jury that any negligence on the part of Hughes could not be imputed to or charged against appellant.

The court also instructed the jury that there were two separate lawsuits being tried by them, one of which was the case of Fernholtz v. Bisbee, which suit, the court advised the jury, was separate and distinct from the other lawsuit in which Hughes was suing Bisbee, and in which defendant Bisbee filed a cross-complaint against plaintiff Hughes. The jury was advised that the two lawsuits were joined or consolidated by order of the presiding judge "only for the purpose of trial, and as a matter of economy and convenience". After defining the reciprocal obligations imposed by law upon the respective drivers of the automobiles in question, the court again cautioned the jury: "But you are instructed that your determination and decision on the question of negligence or contributory negligence as between Hughes and Bisbee cannot affect the companion case known as Fernholtz v. Bisbee."

Other and additional instructions were given in connection with the principles of law just enunciated, and we cannot see how the jury could have been misled or confused, so far as the rights of appellant were concerned. The rules of law applicable to his status as a guest in the Hughes car were clearly and correctly presented to the jury. Both the number and the clarity of the instructions affecting appellant lead us to the conclusion that he suffered no prejudice to his substantial rights.

[2] From a review of the testimony introduced at the trial, coupled with the fact that the jury returned a verdict against plaintiff Hughes on his complaint and a verdict against appellant on his, together with a verdict against Bisbee on the latter's cross-complaint against Hughes, driver of the car in which appellant was riding, it seems only reasonable to conclude that the jury found from the evidence, as it was warranted in doing, that the accident was unavoidable and happened without any negligence on the part of either plaintiff Hughes or defendant Bisbee, and that consequently appellant, who was a guest in the former's car, was not entitled to recover because of the absence of negligence on the part of defendant Bisbee, against whom appellant's complaint was directed.

The attempted appeal from the verdict is dismissed, and for the reasons herein stated the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



42 Cal.App.2d 820

CARPENTER v. CARPENTER et al.

Civ. 12947.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1941.

Appeal and error ⇐801(1)

Where respondent filed motion to dismiss appeal supported by certificate of clerk of Superior Court setting forth facts required by court rule, and where it appeared that all of the grounds stated in motion were supported by certificate and authorities cited, appeal was dismissed. Rules of District Court of Appeal, Second District, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Lorena S. Carpenter against Burt Carpenter and others. From an adverse judgment, defendants appeal.

Appeal dismissed.

Walter H. Odemar, of Los Angeles, for appellants.

Loren A. Butts, of Los Angeles, for respondent.

PER CURIAM.

The respondent having filed a motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds

stated in said motion are supported by the certificate and the authorities cited,

It is hereby ordered that this appeal be, and the same hereby is, dismissed.



42 Cal.App.2d 818

PEOPLE v. PETERS.

Cr. 540.

District Court of Appeal, Fourth District, California.

Jan. 20, 1941.

Criminal law ⇐1182

Where clerk's transcript was filed, but no reporter's transcript nor briefs were filed, nor appearance made in defendant's behalf when cause came on for hearing on appeal, Attorney General's motion for affirmance of the judgment under statute authorizing affirmance if appellant fail to appear was granted. Pen.Code, § 1253.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

E. A. Peters was convicted of violations of the Corporate Securities Act, St.1917, p. 673, and he appeals from an order denying his motion for new trial. On motion by Attorney General for an affirmance of the order under Penal Code, § 1253.

Motion granted and order affirmed.

No appearance for appellant.

Earl Warren, Atty. Gen., and S. L. Heisinger, Jr., Asst. Dist. Atty., of Fresno, for respondent.

BARNARD, Presiding Justice.

The defendant was granted probation after having been convicted of violations of the Corporate Securities Act, St.1917, p. 673. He appealed from an order denying his motion for a new trial. A clerk's transcript was filed on November 9, 1940, and no reporter's transcript has been filed. No briefs having been filed and no appearance having been made in behalf of the defendant when the cause came on for hearing on January 14, 1941, the Attorney General moved for an affirmance of the order under section 1253 of the Penal Code.

The motion is granted and the order is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



42 Cal.App.2d 818

PEOPLE v. LEDFORD.

Cr. 539.

District Court of Appeal, Fourth District, California.

Jan. 17, 1941.

Criminal law ⇐1182

Where clerk's transcript on appeal was filed in office of clerk of District Court of Appeal on November 2, 1940, no reporter's transcript had been presented or filed, case was placed on calendar of January 14, 1941, but no appearance was made for defendant and no brief had been filed in his behalf, judgment was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Proceedings between the People and Donald G. Ledford. From an adverse judgment, defendant appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

Earl Warren, Atty. Gen., for respondent.

MARKS, Justice.

This case comes before us on a motion to affirm the judgment under the provisions of section 1253 of the Penal Code.

The clerk's transcript on appeal was filed in the office of the clerk of this court on November 2, 1940. No reporter's transcript has been presented or filed.

The case was placed on the calendar of January 14, 1941. No appearance was made for defendant and no brief has been filed in his behalf so the motion must be granted.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

42 Cal.App.2d 505

PEOPLE v. LIST.

LIST v. SANDELL (PEOPLE, Intervener).

Civ. 2555.

District Court of Appeal, Fourth District, California.

Jan. 21, 1941.

Hearing Denied March 20, 1941.

1. Crops ⇐5

Generally, growing crops are part of realty until severed or agreed to be severed and pass to grantee under deed of realty, unless reserved in writing. Civ.Code, §§ 658, 660.

2. Vendor and purchaser ⇐196

Accruing rents, falling due after delivery of lessor's deed, conveying leased realty to another, belong to grantee, regardless of whether deed includes words "together with the rents, issues and profits thereof," and such rents cannot be apportioned.

3. Taxation ⇐725

On redemption of land from tax sale to state, redemptioner became entitled to all crops growing thereon, subject to rights of state's tenant therein, and no rights thereto remained in state, so that redemptioner was entitled to money deposited with court clerk by tenant as proceeds of landlord's share of grain crop grown on land by tenant after date of redemption. Pol.Code, §§ 3773, 3817.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Charles W. List against V. I. Sandell to determine plaintiff's ownership and right to an interest in a grain crop or the reasonable value thereof, in which the People intervened, claiming right to property or money in question. Judgment for plaintiff, and intervener appeals.

Affirmed.

Hearing denied; TRAYNOR, J., dissenting.

Earl Warren, Atty. Gen., H. H. Linney and Adrian A. Kragen, Deputy Attys. Gen., and Roger R. Walch, Dist. Atty., of Hanford, for appellant.

John W. Carrigan, of Los Angeles, for respondent.

KLETTE, Justice pro tem.

This is an appeal taken by intervener, the People of the State of California, from a judgment of the Superior Court of Kings County, in favor of plaintiff Charles W. List and against defendant V. I. Sandell, and intervener.

The action was brought by plaintiff, Charles W. List, against defendant, V. I. Sandell, to have the court determine that plaintiff was the owner, and entitled to a one-sixth interest in a certain crop of grain, or a one-sixth interest in the reasonable value thereof. Defendant appeared by answer, disclaiming any title or claim thereto, and admitted he was willing to deliver, or pay, to such person as the court might direct. The People of the State of California, after leave obtained, filed a complaint in intervention, alleging that they were entitled to the property or money in question.

It was stipulated between all the parties that the one-sixth of the proceeds of the crop then sold should be deposited with the clerk of the court, and that one-sixth of the remainder of the crop should be sold by defendant, at the best price obtainable, and the money deposited with the clerk. This was done, and the total money now in the hands of the clerk is $974.73, which is the subject of this action.

A trial was had upon stipulated facts which show: That plaintiff is, and was at all times since 1929, the owner of certain real property described in the complaint, excepting during that time that the title thereof was held by the state of California; that on June 26, 1937, the property was deeded to the state of California, by the tax collector of Kings county, by reason of nonpayment of taxes, theretofore duly levied thereon; that on September 29, 1938, the state controller executed a written lease upon said real property, for the crop year of 1938–1939, to the defendant, for a cash rental of $82, and one-sixth of the grain to be grown thereon; that on May 25, 1939, there was growing, and immature, on said real property, a crop of grain, planted by defendant; that on May 25, 1939, plaintiff redeemed said property, by paying the full amount of all taxes due thereon, and in accordance with law, there was executed and delivered to plaintiff, a certificate of redemption of said real property, by the county treasurer; that at all times subsequent to May 25, 1939, plaintiff was, and is now, the legal owner of said real property, and in possession thereof; that the crop of grain growing on said real property was harvested by defendant between June 15 and July 15, 1939.

The stipulation further specifies the amount of crop raised by defendant, and that defendant is ignorant of the respective rights of the parties, and makes no claim to the rental share of said grain, and is willing to pay and deliver such rental share to any person the court shall direct; that upon the delivery of the money for the one-sixth of the crop, by defendant, to the clerk of the court, the defendant shall be released from all further liability in the matter; that the money so deposited with the clerk shall be held by him, pending the final determination of this action.

Under these stipulated facts, the trial court found in favor of plaintiff, and rendered its judgment that the plaintiff was the owner of said sum of $974.73, and directed that the clerk pay said sum to plaintiff.

[1-3] The general rule is that growing crops are a part of the realty (Huerstal v. Muir, 64 Cal. 450, 2 P. 33; Dascey v. Harris, 65 Cal. 357, 4 P. 204), and remain a part of the realty as long as unsevered (Penryn Co. v. Sherman-Worrell Co., 142 Cal. 643, 76 P. 484, 100 Am.St.Rep. 150), or not agreed to be severed, Civ.Code, secs. 658, 660, and pass to the grantee under deed (Phillips v. Pacific Land & Cattle Co., 116 Cal.App. 290, 2 P.2d 566; Penryn Co. v. Sherman-Worrell Co., supra; Wilson v. White, 161 Cal. 453, 119 P. 895; Fiske v. Soule, 87 Cal. 313, 25 P. 430; Downs v. National Bank, 101 Cal.App. 712, 282 P. 420), unless reserved in writing. Wilson v. White, supra; Fiske v. Soule, supra; Sweet v. Watson's Nursery, 33 Cal.App.2d 699, 92 P.2d 812. Accruing rents, falling due after deed delivered belong to the vendee, where deed includes the words, "together with the rents, issues, and profits thereof" (Garber v. Gianella, 98 Cal. 527, 33 P. 458; Diepenbrock v. Luiz, 159 Cal. 716, 115 P. 743, L.R.A.1915C, 234, Ann.Cas. 1912C, 1084; Marshall v. Swaim, 102 Cal. App. 119, 282 P. 423), and even in the absence of such provisions (Fahrenbaker v. E. Clemens Horst Co., 209 Cal. 7, 284 P. 905), and there can be no apportionment of such rents. Fahrenbaker v. E. Clemens Horst Co., supra. From the authorities cited above, it appears that plaintiff, upon redeeming his property, became entitled to all the crops growing upon the premises, subject to such rights as the defendant, as tenant, might have therein, unless there is something in the peculiar facts of this case, or in the law, which takes this case out of the general rule. We are not able to find any such exception.

Section 3773 of the Political Code gives to the state controller the right and power to lease lands sold to the state for nonpayment of taxes. In case of redemption during the term of the lease, it authorizes the controller to refund to the lessee the unearned portion of any rental paid in advance. It is silent as to the collection of any crop rentals from crops then growing, and unharvested, on the redeemed premises. This section also provides that such lease shall contain a clause providing that upon redemption, the controller is authorized to cancel the lease, as of the date of redemption, and that the lessee shall be entitled to no damage, or reimbursement. This lease did not contain any provision for such cancellation upon redemption, but provided, instead, that the rental would be paid in full, and any claim made by the redemptioner would be adjusted by the controller.

Section 3817 of the Political Code provides that, upon redemption being made, the auditor shall report to the recorder who shall note on the margin of the record of the certificate of sale, or deed, the fact of such redemption, and thereupon such "certificate of sale, or deed, shall become null and void, and all right, title and interest acquired by virtue of the tax sale, shall cease and determine".

When, upon redemption, the rights of the state acquired under a tax sale become null and void, and all right, title and interest, acquired by virtue of the tax sale, shall cease and determine, it leaves no rights remaining in the state, and certainly no rights to the crops growing upon the redeemed property, of which, according to the stipulation of the parties, plaintiff has been the owner, and in possession, ever since redemption was made.

For the reasons stated, we find that the judgment of the trial court should be, and the same is, affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

42 Cal.App.2d 578

EPHRAIM v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11657.

District Court of Appeal, First District, Division 1, California.

Jan. 23, 1941.

1. Judges ⇐51(3)

Under statute requiring that party objecting to judge on ground of his disqualification set "forth the fact or facts constituting the ground of the disqualification of such judge", statements of disqualification are insufficient unless the facts constituting the alleged disqualification are set forth, and mere allegations setting forth the conclusions of affiant do not comply with the statute. Code Civ.Proc. § 170.

2. Judges ⇐51(4)

Where statement of disqualification of judge is legally insufficient, judge sought to be disqualified may disregard it or strike it from the files. Code Civ.Proc. § 170.

3. Judges ⇐51(3)

Where statement of disqualification of Superior Court judge merely set forth conclusions of affiant and did not set forth facts constituting the alleged disqualification, statement did not comply with statute and was insufficient. Code Civ.Proc. § 170.

Original proceeding by W. K. Ephraim for writs of prohibition and certiorari to restrain the Superior Court of the City and County of San Francisco and Frank H. Dunne, Judge, from any further proceedings in a matter pending before the court and judge until determination of the judge's qualifications.

Petition denied.

John J. Redhead, of San Francisco, for petitioner.

PER CURIAM.

The petition for writs of prohibition and certiorari is denied.

[1-3] Petitioner seeks by this proceeding to restrain respondent court and judge from any further proceedings in a matter pending before said court and judge until the question of the judge's qualifications is passed upon as provided in section 170 of the Code of Civil Procedure. That section requires that the statement of a party objecting to the judge on the ground of his disqualification must set "forth the fact or facts constituting the ground of the disqualification of such judge". Under this section it has been held that such statements of disqualification are insufficient as a matter of law unless the facts constituting the alleged disqualification are set forth, and that mere allegations setting forth the conclusions of the affiant do not comply with the section. People v. Berman, 117 Cal.App. 334, 4 P.2d 226; People v. Nolan, 126 Cal.App. 623, 14 P.2d 880; People v. Emmett, 123 Cal.App. 678, 12 P.2d 92; Krebs v. Los Angeles Ry. Corp., 7 Cal.2d 549, 61 P.2d 931. These same cases establish the rule that when the statement of disqualification is legally insufficient the judge sought to be disqualified may disregard it or strike it from the files. An examination of the statement of disqualification filed herein demonstrates that it does not comply with the rule of the above cases in that it contains nothing but conclusions of the affiant. For that reason the trial judge properly disregarded it, and this petition must be denied.



42 Cal.App.2d 820

FOCHT v. COCHRAN et al.

Civ. 12955.

District Court of Appeal, Second District, Division 2, California.

Jan. 23, 1941.

Appeal and error ⇐801(1)

Where respondent's motion to dismiss appeal was supported by certificate of clerk of superior court setting forth facts required by court rule, and grounds stated in motion were supported by certificate and authorities cited, appeal was dismissed. Rules of District Court of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Walter S. Focht against Harold Cochran and others. From an un-

satisfactory judgment, defendants appealed and plaintiff filed a motion to dismiss the appeal.

Appeal dismissed.

I. Henry Harris, Jr., of Los Angeles, for appellants.

Stuart McHaffie, of Los Angeles, for respondent.

PER CURIAM.

The respondent having filed a motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in said motion are supported by the certificate and the authorities cited, it is hereby ordered that this appeal be, and the same hereby is, dismissed.



42 Cal.App.2d 477

BUSH et al. v. ROGERS et al.

Civ. 11307.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1941.

1. Mines and minerals ⇐68(2)

In action to quiet title to mining claims as against defendants' rights under lease from plaintiffs, evidence on question of forfeiture of defendants' rights for noncompliance with provisions of lease for diligent development of claims *held* sufficient to sustain trial court's finding that defendants substantially performed all terms and conditions of lease.

2. Appeal and error ⇐931(3)

In spouses' action to quiet title to mining claims as against defendants' rights under lease from plaintiffs, who contended that lease was invalid because claims were community property and plaintiff wife did not join in lease, it must be assumed, on appeal from judgment for defendants, that, if findings had been made on such question, they would have supported judgment. Civ.Code, § 172a.

3. Husband and wife ⇐267(9)

A wife may be "estopped" by her conduct to attack validity of instrument, executed by husband, because she did not join therein. Civ.Code, § 172a.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

4. Husband and wife ⇐267(9)

Where wife, not joining in husband's lease of mining claims, was present during conversations of husband, his attorney, and lessees concerning development of claims and terms of lease before execution thereof and subsequent conversation respecting prospective sale of leasehold interest, complaint, verified by wife, in spouses' action to quiet title to claims as against lessees, contained no allegation that her claim of ownership was based on community property interest, and she introduced no evidence that she ever denied giving her consent to execution of lease, circumstances were sufficient to show "waiver" of her interest, community or otherwise, in matter of lease. Civ.Code, § 172a.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

5. Estoppel ⇐110

Ordinarily, estoppel must be pleaded.

6. Quieting title ⇐34(1)

In action to quiet title, complaint may be framed in customary brief form, simply alleging that plaintiffs are owners and entitled to possession of property involved and that defendants claim interest therein adverse to plaintiffs without right.

7. Estoppel ⇐110

In spouses' action to quiet title to mining claims, where plaintiffs used brief form of complaint, answer alleged that defendants were entitled to possession under lease from plaintiffs, no amended complaint, alleging invalidity of lease, was filed, objection to introduction of lease in evidence was first made during trial, and subsequently attention was directly called to plaintiffs' claim that lease was invalid on motion to strike out contract on grounds that premises were community property and that plaintiff wife did not join in execution of lease, defendants were not precluded from raising defense of estoppel to deny validity of lease because of failure to plead such defense. Civ.Code, § 172a.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by M. T. Bush and wife against Sterling C. Rogers and others, to quiet title to gypsum mining claims. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Matthew S. Platz, of Bakersfield, for appellants.

Albert D. White, of Long Beach, for respondents.

WARD, Justice.

Plaintiffs, husband and wife, brought this action to quiet title to two gypsum mining claims in Ventura County as against rights asserted by defendants in connection with their twenty-year lease of the property. The complaint in brief form alleges that plaintiffs are the owners and entitled to the possession of the premises, real estate and mining claims, and that defendants claim an interest therein adverse to plaintiffs, but that said claim is without any right or validity whatever. Defendants Rogers and Mosher filed a general denial, and in addition alleged that they were in rightful and lawful possession of the premises by virtue of a lease executed between plaintiffs and themselves. The answer of defendant Prince is similar except that he claims to be the owner of the Mosher interest through sale and assignment. The findings recite that on June 1, 1936, the mining claims stood of record title in the sole name of M. T. Bush as locator; that he and Josephine Bush entered into a written twenty-year lease of the property with Rogers and Mosher; that Josephine Bush was personally present when the lease was executed and that she consented to its execution; that the lease is a valid and binding agreement upon the parties; that Prince is the assignee of the Mosher interest, and that the defendants have on their part substantially performed all of the terms and conditions of the lease. Judgment was entered for defendants, and plaintiffs appeal.

Plaintiffs contend that the lease was invalid because the mining claims were community property and plaintiff wife did not join in the lease as required by Civil Code, sec. 172a, also that defendants' rights have been terminated by notice of forfeiture for failure to comply with provisions of the lease in regard to diligent development of the claims.

[1] If plaintiffs' contention with regard to the forfeiture is correct, the controversy is at an end. We will therefore first consider that question, and the evidence pertaining thereto. The lease provided:

"* * * that said Lessees do hereby covenant and agree with said Lessor as follows, to-wit:

"1. To on or before 90 days from date hereof, to enter upon said above described Gypsum claim and continuously open up and develop the same in order that the greatest amount of Gypsum may be taken out on a commercial basis.

"2. To work and develop said Gypsum claims continuously in such workman-like manner as the maximum tonnage of said Gypsum may be removed and sold; and that any failure to work said Gypsum claims with sufficient force for a period of 90 days consecutively may be by said Lessor considered a violation of this covenant and a termination of this lease."

The evidence shows that defendants immediately upon the execution of the lease made surveys, built a trail, tested the ground for quality and area and to determine the status of the deposit; installed a metal chute and laid pipes for a distance of four hundred feet; caused assays to be made of powder and rock, and expended over $1,000 for materials and labor. There was a period when the roads were impassable on account of weather conditions, and this, together with the impracticability of mining gypsum when dampened (by rain), caused a delay in working the mine. However, gypsum was mined on the claims and sold. On the question of forfeiture, the court from the evidence presented found for the defendants. We are unable to interfere with the finding that they substantially performed all of the terms and conditions of the lease.

With regard to appellants' contentions that a mining claim, the location of which was perfected during marriage, is community property, regardless of the fact that it was located and stands in the name of the husband alone, and second, that the lease was invalid because the wife did not join therein as required by section 172a of the Civil Code, respondents contend that where a wife participates in negotiations preliminary to the making of a lease, makes no objection thereto, and by her actions indicates her approval of its execution, her consent is established and she is estopped to deny its validity.

If respondents' position is correct, it will not be necessary to decide in this case whether the location of a mining claim by the husband alone during coverture constitutes community property.

[2] Appellants assert that the evidence is insufficient as a matter of law to constitute an estoppel, and that this defense is not available to respondents because they did not plead it. It should be noted that there is no direct finding on community rights of the wife herein, or on the question of estoppel. It must be assumed that had findings been made thereon, they would have supported the judgment. Creason v. Creason, 123 Cal.App. 455, 11 P.2d 451; Bliss v. Sneath, 119 Cal. 526, 51 P. 848.

[3, 4] Under Civil Code, sec. 172a, a wife by her conduct may be estopped to attack the validity of an instrument because she did not join therein. Vierra v. Periera, 12 Cal.2d 629, 86 P.2d 816; Mark v. Title Guarantee, etc., Co., 122 Cal.App. 301, 9 P.2d 839; Rice v. McCarthy, 73 Cal.App. 655, 239 P. 56. Mrs. Bush was present during a conversation between defendant Mosher and her husband about ten days before the execution of the lease, at which the development of the claim under the proposed lease was discussed. She was present also in the office of her husband's attorney during a general discussion of its terms on the day of and just prior to its execution, and she was present also during a conversation held in the month of November relative to a prospective sale of the leasehold interest. Mrs. Bush verified the complaint in this quiet title action. No allegation appears therein that her claim of ownership was based upon a community property interest, and there is no evidence by her, although she was present at the trial, that she ever denied giving her consent to the execution of the lease.

There is no intention herein to hold that a wife's failure to sign a lease necessarily implies that she consents to its execution by her husband. However, the circumstances of this transaction are sufficient to show a waiver on the part of the wife of her interest, community or otherwise, in the matter of a lease on the property.

[5-7] The matter of appellants' contention that respondents are precluded from raising the defense of estoppel because they did not plead it, necessitates a consideration of the pleadings. Ordinarily an estoppel must be pleaded, but there are exceptions to this rule. A quiet title action may be framed in the customary brief form, simply alleging that plaintiffs are the owners and entitled to possession, and that defendants claim an interest, adverse to plaintiffs, which is without right. Plaintiffs used the simple form. Defendants answered, alleging they were entitled to possession by virtue of a lease. In the matter of pleading, it was not necessary at this point to anticipate that plaintiffs would claim the lease to be invalid under the provisions of section 172a. The discussion by the parties, as the evidence shows, related primarily to the question of the sufficiency of the work performed by defendants under the terms of the lease. After answer, no amended complaint was filed alleging the lease to be invalid. It is true that at the opening of the trial, plaintiffs' counsel referred to the property as community property, and stated it was necessary that the wife join in the execution of the lease, "and we may show it as the case progresses a little farther". Plaintiffs' counsel also stated that prima facie proof of location was all that was necessary, but that additional matters might be taken up, depending upon the defense. For the first time during the trial, an objection was made to the introduction of the lease, and subsequently on a motion "to strike out the contract on the ground it is shown that this is community property and the wife has not joined in the execution of the lease", attention was directly called to the fact that plaintiffs were relying upon the claim that the lease was invalid. In the pleadings in this case, plaintiffs relied upon ownership; in the evidence, particular attack was leveled at non-performance by defendants of the terms of the lease.

In Kenny v. Christianson, 200 Cal. 419, 424, 425, 253 P. 715, 717, 50 A.L.R. 1297, in discussing the necessity of a plea of estoppel as applied to a quiet title proceeding, the court said: "* * * the defendant is not required in his pleadings to anticipate such other contentions as the plaintiff may seek to rely upon when her main reliance for her right of recovery has failed her, and which do not appear upon the face of her complaint. In such cases the defendant may await the assertion by the plaintiff in her proof of such additional foundation for her right of recovery and may then oppose the same with his evi-

dence of an equitable estoppel." California S. F. Corp. v. Riverside F. Co., 111 Cal.App. 151, 295 P. 555; Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 P. 1017, 45 P. 252.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.



42 Cal.App.2d 467

SANTA MONICA ICE & COLD STORAGE CO. v. ROSSIER et al.

Civ. 11553.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1941.

Hearing Denied March 17, 1941.

1. Appeal and error ⇐1010(1)

A trial court's fact finding, supported by substantial evidence, will not be disturbed on appeal.

2. Injunction ⇐56

Ice distributors, leaving ice company's employ to work for competitor thereof, notifying such company's customers of proposed change, urging them to patronize competitor, and using company's route books in new employment, thereby disclosing company's trade secrets and confidential information obtained by them, in course of their employment by such company, were guilty of breach of trust entitling company to injunction against such activities. St.1937, p. 260, § 2860.

3. Injunction ⇐56

An employee's disclosure of employer's trade secrets and other confidential information obtained by employee in course of employment is breach of trust, and equity court will restrain employee's threatened disclosure or use thereof to employer's detriment, regardless of character of secrets, if peculiar and important to employer's business. St. 1937, p. 260, § 2860.

4. Trade-marks and trade-names and unfair competition ⇐77

A partnership, employing competing corporation's employees for purpose of discovering and using trade secrets, obtained by them while in corporation's service, and using such information to corporation's damage, may be enjoined from so doing.

5. Equity ⇐423

An equity court has power to make its decrees effective, and when it has jurisdiction of parties to, and subject-matter of suit, its decree will be complete in order to terminate litigation, if possible.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by the Santa Monica Ice and Cold Storage Company against Wayne Rossier and others for an injunction against disclosure and unlawful use of trade secrets and confidential information obtained by some of defendants while in plaintiff's employ. Judgment for plaintiff, and defendants appeal.

Affirmed.

M. Tellefson, of Culver City, and William A. Sherwin, of Los Angeles, for appellants.

Donald J. Dunne, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

For a number of years the plaintiff had been engaged in the sale of ice in the city of Santa Monica through distributors who were paid a salary and commission. The defendants, Rossier, Matheson and Matheson, as co-partners, were selling ice out of Culver City under the trade name of Pure Ice Company. The defendants, Jacobs, Sr., Jacobs, Jr., and Tanner, were employees of plaintiff. In March, 1938, the three last named defendants left plaintiff's employment and engaged to work for the partnership in competition with plaintiff. The Santa Monica district had been divided by plaintiff into two working territories designated in the evidence as route No. 1 and route No. 2. While employed by plaintiff, Jacobs, Jr., had worked route No. 1, Tanner had worked route No. 2, and Jacobs, Sr., had worked both. Jacobs, Sr., was the father of Jacobs, Jr., and the father-in-law of Tanner. In an effort to avoid a charge of unfair competition the partnership assigned Jacobs, Jr., to route No. 2 and Tanner to route No. 1, while Jacobs, Sr., worked with both in both territories. Before leaving the employment of plaintiff, Jacobs, Jr., notified his customers of the proposed change

and asked them to patronize Tanner. Jacobs, Sr., took Tanner through the district and urged his former customers to give him their trade. At the beginning of their new employment one or more of these defendants was accompanied by Rossier, to whom their former customers were designated. In some instances when the party had been a customer of the employee accompanying Rossier the latter personally made the deliveries. The plaintiff was able to show that, because of these activities of the several defendants, it had lost a large number of its customers. Its application for an injunction to restrain these activities was granted, and all defendants appeal. They attack the judgment both as to the restraint placed upon the three former employees of the plaintiff, and as to that placed upon the partnership which gave them their new employment.

The gravamen of the action is the alleged disclosure and unlawful use of trade secrets and confidential information obtained by the former employees through the good will and personal contacts fostered by their employers. Particular emphasis is laid on the "route books" which it is charged these employees made use of in their new employment. The respondent states the character and value of these books as follows: "Each of the distributors has a particular established trade route. The names and addresses of plaintiff's customers are kept in specially prepared loose leaf volumes, containing the names and addresses of the customers, the days upon which deliveries of ice are to be made and other information such as whether the customer is a cash customer or charge customer, together with any special information respecting the habits, customs and preferences of the customer. Each driver is furnished with such a volume (known as a route book) covering the particular territory and route which has been assigned to such driver. A duplicate of the list is kept in the office of the Company and from time to time is checked with the route book so as to add new customers who may from time to time be acquired. These lists have been compiled and are maintained at the expenditure of a substantial sum of money by the Company and enable the plaintiff to keep a check upon its business and to increase and extend it where possible."

The trial court found that the appellants constituting the partnership employed the other appellants for the purpose of learning the trade secrets of respondents and that all the appellants were working in co-operation for the purpose of taking away the business of respondent; that the secrets and other information obtained by the former employees of respondent through use of the "route books" and otherwise was disclosed one to the other "so that each of the said defendants would be able to go forth and solicit the business of plaintiff's customers whether on the route theretofore served by respective defendants personally or the route of the other defendants and to turn the business and trade secured thereby over to the Pure Ice Company; that in furtherance of said scheme and plan the said defendants in this paragraph named exchanged their respective trade routes and territories in the manner herein alleged for the purpose and with the object of attempting to evade their duties and obligations to plaintiff arising by reason of their employment by plaintiff and the knowledge and information acquired by them while in the course of their employment by plaintiff and for the further purpose of evading the principles of justice, right and equity established by law for the protection of the trade secrets of plaintiff as the former employer of defendants, and each and all of them."

[1] There is substantial evidence to support this finding as well as all others merging into the judgment. Appellants are not able to contend otherwise. Their references to minor conflicts in the evidence have no bearing in face of the rule that a finding will not be disturbed on appeal when supported by substantial evidence. In short, the appellants rest their case on the specious argument that each of the former employees was soliciting in the territory heretofore served by another. But the evidence is plain that the three worked in co-operation, one soliciting for the other and the three for all. We attach no importance to the fact that some deliveries were made to "card customers" —parties displaying a card showing that ice was wanted. These cards had all been left with the customers by these former employees after they had been first solicited as customers.

[2, 3] The case comes squarely within the rule stated in 28 Am.Jur., p. 304, as follows: "The disclosure by an employee of trade secrets and other confidential

information obtained by him in the course of his employment is a breach of trust, and it is well settled that a court of equity will restrain any threatened disclosure or use thereof to the detriment of the employer. The character of the secrets, if peculiar and important to the business is not material. They may be secrets of trade, secrets of title, secrets of process of manufacture, or any other secrets of the employer important to his business." This principle is carried into the State Labor Code, section 2860, St.1937, p. 260, reading: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

The same principle is found in 14 Cal. Jur., p. 198, 199, reading: "If a person establishes a trade or business which depends for its continuance upon keeping secret the names of customers or other valuable information known to such person, no agent or employee having been intrusted with such secrets in the course of his employment, may thereafter utilize his secret knowledge against the interests or to the prejudice of such person. * * * This rule rests also upon the broad general principle that an agent has no right to employ, as against his principal, materials which the agent has obtained only for his principal and in the course of his agency. Accordingly, in proper cases, an injunction will issue to protect the rights of a principal as against his agent who has taken an unfair advantage of the confidential relationship which exists between them".

The leading case in this state on the subject, Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 P. 1180, 44 L.R.A.,N.S., 1159, Ann.Cas.1914C, 628, has been followed repeatedly, and no authority to the contrary is cited. The later cases, such as Gloria Ice Cream, etc., Co. v. Cowan, 2 Cal.2d 460, 41 P.2d 340, and Langendorf United Bakeries v. Phillips, 5 Cal.2d 150, 53 P.2d 363, complete an unanimous adherence to the rule.

[4, 5] The suggestion that the partnership is not subject to the remedy sought is not sound. The evidence showed that it employed the other appellants for the purpose of discovering and using the trade secrets which these employees had obtained while in the service of respondent. It appeared that the partnership was using this information to the damage of respondent. In Pasadena Ice Company v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995, Gloria Ice Cream, etc., Co. v. Cowan, supra, and Langendorf United Bakeries v. Phillips, supra, the injunctions ran against the new employer restraining him from using the information obtained by the new employee as agent of his former employer. In this manner the remedy to which the plaintiff has been found to be entitled to is made effective and complete. It is a cardinal rule of equity that the court has power to make its decrees effective and that when it has jurisdiction of the parties and of the subject matter its decree will be complete in order to terminate the litigation if possible. 10 Cal.Jur., p. 559; 21 Cor.Jur., p. 134; Rolapp v. Federal Bldg., etc., Ass'n, 11 Cal.App.2d 337, 343, 53 P.2d 974. We find no error in the record.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



42 Cal.App.2d 819

TAYLOR v. DOOLEY.

Civ. 12933.

District Court of Appeal, Second District, Division 2, California.

Jan. 23, 1941.

Appeal and error ⇐801(1)

Where motion to dismiss appeal was supported by certificate of clerk of superior court setting forth facts required by rules of District Court of Appeal, and it appeared that all the grounds stated in the motion were supported by the certificate and authorities cited, appeal was dismissed. Rules of the District Court of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action between George H. Taylor and Ruth Dooley. From an adverse judgment, George H. Taylor appeals.

Appeal dismissed.

Henry K. Elder, of Los Angeles, for appellants.

Marcus L. Roberts, of Los Angeles, for respondent.

PER CURIAM.

The respondent having filed a motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in said motion are supported by the certificate and the authorities cited,

It is hereby ordered that this appeal be, and the same hereby is, dismissed.



42 Cal.App.2d 472

WALKER et al. v. ETCHEVERRY et al.

Civ. 2538.

District Court of Appeal, Fourth District, California.

Jan. 17, 1941.

Hearing Denied March 17, 1941.

1. Death ⇐41

In action by infants, by and through their mother as guardian ad litem, for death of father, failure to join the mother as widow resulted in "misjoinder of parties" plaintiff, since death statute gives single joint cause of action so far as heirs are concerned. Code Civ.Proc. § 377.

See Words and Phrases, Permanent Edition, for all other definitions of "Misjoinder of Parties".

2. Appeal and error ⇐1170(1)

Misjoinder of parties plaintiff does not of itself necessitate reversal of judgment for plaintiffs unless the party complaining has been misled to his prejudice or the error otherwise appears to have been injurious. Code Civ.Proc. § 475; Const. art. 6, § 4½.

3. Appeal and error ⇐1170(1)

In action by infants, by mother as guardian ad litem, for father's death, wherein misjoinder resulting from failure to join mother as widow was apparent on face of amended complaint and must have been known to defendants more than six months before date of trial, and no issue of misjoinder was raised until trial, and judgment roll only was before reviewing court, such misjoinder did not result in "miscarriage of justice" and was not prejudicial. Code Civ.Proc. §§ 377, 475; Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

4. Trial ⇐400(1)

In cause tried without a jury, court had statutory power to change or add to findings if there was evidence to support such action, irrespective of whether second amended complaint was filed. Code Civ.Proc. § 662.

5. Appeal and error ⇐907(2)

Where evidence was not before reviewing court, reviewing court must assume in absence of showing to the contrary that there was evidence to support finding added by trial court sitting without a jury. Code Civ.Proc. § 662.

6. Appeal and error ⇐1170(3)

In action by infants, by their mother as guardian ad litem, for death of father, permitting the filing of amended complaint, alleging that mother was not dependent upon father at time of accident and did not claim damage but joined as plaintiff merely to comply with statute so as to prevent misjoinder, did not result in "miscarriage of justice" and was not prejudicial. Code Civ.Proc. §§ 377, 475, 662; Const. art. 6, § 4½.

7. Judgment ⇐597

A widow, by bringing death action as guardian ad litem for children, was barred by "estoppel" from thereafter bringing an action in her own right. Code Civ.Proc. § 377.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

8. Action ⇐53(2)

Since there can be but one action under statute for wrongful death, widow could not bring a second action for her own damage after bringing action for death as guardian ad litem for children. Code Civ.Proc. § 377.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Thomas E. Walker and others, by and through their mother, Roxie Walk-

er, as guardian ad litem, against Filbert Joe Etcheverry and others, to recover for death of Thomas W. Walker. From a judgment for plaintiffs, and an order on motion for new trial adding to findings already made, defendants appeal.

Affirmed.

See, also, 39 Cal.App.2d 188, 102 P.2d 758.

Borton, Petrini, Conron & Borton, of Bakersfield, and Farnsworth, Burke & Maddox, of Visalia, for appellants.

Bradley & Bradley, of Visalia, for respondents.

KLETTE, Justice pro tem.

This action was instituted by plaintiffs and respondents Thomas E. Walker, Leon Walker, and Clara Mae Walker, minors, by and through their mother, Roxie Walker, now Roxie Goree, as guardian ad litem, to recover for the death of their father, Thomas W. Walker, through the alleged negligence of Filbert Joe Etcheverry and Mariana Etcheverry, defendants and appellants. An amended complaint was filed by plaintiffs, to which a general demurrer was interposed by defendants. This demurrer being overruled, an answer to the amended complaint was duly filed. The case was then regularly set for trial on June 27, 1939, on which day defendants and appellants, by leave of the court, filed an unverified amendment to their answer, alleging for the first time, misjoinder of parties plaintiff, because all of the heirs of Thomas W. Walker were not joined as plaintiffs, in that Roxie Walker, the widow of Thomas W. Walker, was not joined.

Trial was had on that date before the court, sitting without a jury, and judgment was rendered in favor of the three minor children of deceased, for $4,740. Findings and judgment were filed August 7, 1939, and a motion for a new trial was made and set for hearing on August 28, 1939.

On September 6, 1939, a second amended complaint was filed, which for the first time, contained the following allegation: "That said plaintiff, Roxie Goree, formerly Roxie Walker, was not at the time of said accident dependent upon said Thomas W. Walker, the deceased, and does not claim nor has sustained damage by reason of the death of said Thomas W. Walker, but joins herein as party plaintiff as an heir of said deceased for the purpose of complying with the provisions of Section 377 of the Code of Civil Procedure of the State of California."

On the same day the court denied the motion for a new trial, and in its order recited the filing of the second amended complaint, by leave of the court, and stated that Roxie Goree, formerly Roxie Walker, was a necessary party plaintiff to the action, and ordered an addition to the findings already made, as follows: "That said plaintiff, Roxie Goree, formerly Roxie Walker, was not at the time of said accident dependent upon said Thomas W. Walker, deceased, and that she does not claim nor has she sustained damage by reason of the death of said Thomas W. Walker."

This appeal is taken from the judgment made and entered August 7, 1939, from the judgment and decision as modified by the "Order on Motion for New Trial", and from the "Order on Motion for New Trial", dated September 6, 1939.

Orders were made by the trial court, on motion, terminating proceedings for preparation of transcript on appeal, and denying relief from default. An appeal was taken from these orders, which were affirmed. Walker v. Etcheverry, 38 Cal.App.2d 611, 101 P.2d 709. Motion was then made to dismiss the appeal, which was denied. Walker v. Etcheverry, 39 Cal.App.2d 188, 102 P.2d 758. The case is therefore before the court on the judgment roll alone.

It appeared on the face of both the petition for appointment of guardian ad litem and the amended complaint, that Roxie Walker, now Roxie Goree, was the mother of the minor plaintiffs, and the widow of Thomas W. Walker, for whose death said minors were seeking damages. It also appeared from the amended complaint that the widow was not seeking any damage for herself.

[1] Section 377 of the Code of Civil Procedure gives a cause of action to the heirs or personal representatives of a person whose death has been caused by the wrongful act or negligence of another. It has been held that so far as the heirs are concerned, a single joint cause of action is given. Daubert v. Western Meat Co., 139 Cal. 480, 69 P. 297, 73 P. 244, 96 Am.St. Rep. 154; Salmon v. Rathjens, 152 Cal. 290, 92 P. 733.

[2] While we must conclude there was a misjoinder of parties plaintiff in this action, that fact does not, of itself, necessitate a reversal of the judgment on

appeal, unless the party complaining has been misled to his prejudice, or the error otherwise appears to have been injurious. There are many cases to this effect, of which the following are a few of the more recent. Mayer v. West, 96 Cal.App. 31, 273 P. 849; House v. Pacific Greyhound Lines, 35 Cal.App.2d 336, 95 P.2d 465; Union Oil Co. v. Domengeaux, 30 Cal.App. 2d 266, 86 P.2d 127; Moon v. Marker, 26 Cal.App.2d 33, 78 P.2d 460; sec. 475, Code Civ.Proc.

[3] The judgment roll only being before us, there is of course nothing which shows that defendants and appellants have been misled to their prejudice, or that the error otherwise appears to have been injurious. Indeed, it is difficult to see how the appellants could have been misled, prejudiced, or injured, when such misjoinder was apparent on the face of the amended complaint, and must have been known to them, more than six months before the date of trial, and no issue was raised upon that point until the trial.

This brings us to the final point of the case, as to whether the court erred in permitting the second amended complaint to be filed, and in adding to its findings, at the time of denying the motion for a new trial.

[4-6] In section 662 of the Code of Civil Procedure, relating to motions for new trial, it is provided: "In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings". This power the court had, whether the second amended complaint was, or was not filed, if there was evidence to support such finding. The evidence is not before us, and in the absence of a showing to the contrary, we must assume that there was evidence to support this added finding. It it unnecessary, therefore, to pass upon the question as to whether it was error to permit the filing of the second amended complaint.

Section 475 of the Code of Civil Procedure provides: "No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

If we were to assume that it was error for the court to permit the filing of the second amended complaint, and to make the added finding, where can appellants show that they have been prejudiced thereby, or sustained substantial injury, or that a different result would have been probable, if such error had not been made.

[7, 8] The widow, by bringing this action, as guardian ad litem for the children, was estopped from thereafter bringing an action in her own right. Girard v. Irvine, 97 Cal.App. 377, 275 P. 840. By the amendment, in the second amended complaint, she disclaimed any right to damage, and the added finding held she was not entitled to any. This was not harmful to appellants, but favorable to them. Since there can be but one action under section 377, supra, the widow could not bring a second action for her own damage. Daubert v. Western Meat Co., supra; Salmon v. Rathjens, supra. The failure to name the widow as plaintiff was not to the disadvantage of appellants, for, had she been named, the effect would have been, as said in Salmon v. Rathjens, supra [152 Cal. 290, 92 P. 736], "to enhance rather than to diminish the damage".

The court concludes that the errors, if any, that appear in the record, have not been prejudicial to appellants, have not caused them to suffer any substantial injury, and that a different result would not be probable, had such errors not occurred. Such errors have not resulted in a miscarriage of justice, within the meaning of section 4½ of article VI of the Constitution of California.

The judgment and orders appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

42 Cal.App.2d 493

OLSON et al. v. FOSTER et al.

Civ. 12197.

District Court of Appeal, Second District, Division 1, California.

Jan. 21, 1941.

Rehearing Denied Feb. 13, 1941.

1. Trusts ⇐169(1)

The superior court has power to appoint trustees of a private trust when the office becomes vacant or upon misconduct of a trustee.

2. Pleading ⇐249(3)

Where original complaint named defendants therein, both personally and as trustees, whereas amended complaint named them only in their representative capacity, there was not a change of the character of the cause of action, as against contention that amended complaint was filed in an effort to state a cause of action in equity rather than at law for sole purpose of depriving defendants of their right to trial by jury.

3. Pleading ⇐249(3), 252(1)

Where original complaint to recover value of legal services was filed against defendants personally and as trustees of certain trusts and amended complaint named defendants only in their representative capacity, the nature of the suit remained the same and the amended complaint merely dismissed the action as to the defendants sued personally.

4. Jury ⇐14(5)

Where amended complaint filed against trustee sought to recover judgment for legal services rendered in behalf of certain trusts and to impress upon trust property a lien, complaint stated a cause of action in equity, so that court properly proceeded to try issues without a jury.

5. Jury ⇐14(5)

Original complaint naming defendants therein both personally and as trustees and seeking to establish reasonable value of legal services rendered for benefit of trust estates, stated a cause of action in equity rather than a cause of action at law as to which defendants would have been entitled to a jury trial.

6. Jury ⇐14(5)

Amended complaint against trustees in their representative capacity seeking value of legal services rendered and also to charge amount thereof against trust properties and decree directing payment from trust fund stated a cause of action in equity as to which defendants were not entitled to jury trial.

7. Trusts ⇐250

Creditors when required by their contract of employment to look solely to trust estate for compensation may proceed in equity for satisfaction of such claims out of trust estate.

8. Jury ⇐14(5)
Trusts ⇐211

Where contract employing plaintiffs as attorneys was made by defendants as individuals at a time when defendants were only unit holders in a trust but where following defendants' appointment as trustees and while acting in that capacity, defendants recognized plaintiffs as their attorneys and as attorneys for all unit holders and accepted benefits of plaintiffs' legal services, such conduct of trustees amounted to a "ratification" of the contract so that attorneys' action to enforce rights under the contract was one in equity as to which defendants were not entitled to jury trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

9. Trusts ⇐211

Where contract employing plaintiffs as attorneys was made by defendants as individuals, at a time when they were only unit holders in a trust, it was within the scope of defendants' authority, after their appointment as trustees, for defendants as trustees to avail themselves of plaintiffs' legal services under the existing agreement and in doing so they bound the trust property to compensate plaintiffs for such services. Civ.Code, § 2267.

10. Trusts ⇐211

Where contract employing plaintiffs as attorneys was made by defendants as individuals at a time when defendants were only unit holders in a trust but after defendants' appointment as trustees they made substantial payment to plaintiffs on account of the employment contract, there was a "ratification" of the contract by the trustees rendering trust property liable for services rendered by the attorney. Civ.Code, § 2267.

11. Trusts ⇐250

Action by attorneys to establish reasonable value of services rendered for benefit of trust estate, to recover value of services, to

charge the amount thereof against trust property and to obtain decree directing payment from trust funds was properly brought in a court of equity notwithstanding legal relief ensued as an incidental part of judgment rendered.

12. Jury ⇐13(3)

In an equity proceeding a jury trial is not a matter of right.

13. Trial ⇐374(2)

Even though a court may, in the exercise of its discretion, call a jury to assist in the trial of a case in equity, the court is not bound by findings of the jury.

14. Trusts ⇐263

In action against trustees of four trusts to recover reasonable value of services rendered for benefit of trust estate and to impress charge upon trust property for amount thereof, findings declaring that services were rendered and fixing value of services and balance due was not objectionable on ground that they failed to find value of services to each of the trusts where contract of employment related to all of the trusts, and partial payments were made on behalf of all the trusts and services were performed as to all the trusts.

15. Trusts ⇐240

Where contract of employment of attorneys related to all four trusts for which trustees were acting, partial payments were made to attorneys by trustees on behalf of all trusts and services were performed as to all trusts, and all of the trusts in behalf of which trustees negotiated the employment contract received benefits therefrom, the liability imposed upon the trusts for the attorneys' services was both joint and several. Civ.Code, § 1659.

16. Contracts ⇐184

The statute providing that where all parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several does not require that several obligees to a promise shall receive benefits in equal proportions but only that the several obligees receive some benefit from the contract. Civ.Code, § 1659.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by C. L. Olson and others against F. E. Foster and others, personally and as trustees for holders of participating interest in certain trusts, to recover for value of legal services. By supplemental and amended complaints, defendants were sued only as trustees of certain trusts and trust estates and in addition to seeking recovery of amount of fees allegedly due, plaintiff sought to impress trust property and assets with a lien. From an adverse judgment, defendants appeal.

Affirmed.

Paul R. Hutchinson, of Los Angeles, for appellants.

C. L. Olson and Olson & Ahlport, all of Los Angeles, for respondents.

WHITE, Justice.

C. C. Julian was the lessee of two oil and gas leases. He undertook to drill and operate four oil wells on them, setting up a separate trust as to each, being wells one, two and three on one lease, and well eleven on the other. A bank was made passive trustee to hold title and act as depositary and distributor of funds on them. He was active trustee to operate them. He sold participating interests in the separate trusts to different persons known as unit-holders.

[1] In an action pertaining to the title to the leases and other matters, Redfield, Foster and Penn intervened. Respondents were there attorneys. Later R. S. Brenneman was substituted for Redfield. In that action the court appointed these interveners as the trustees in place of C. C. Julian, pursuant to the power of the superior court to appoint trustees of a private trust when the office becomes vacant or upon the misconduct of the trustee. Respondents were retained by the interveners before they intervened and before they were appointed trustees. They continued to represent them thereafter in all matters pertaining to their intervention.

Subsequent to the completion of the litigation just mentioned, respondents filed an action to recover the value of their legal services against appellants "personally and as trustees for the holders of participating interests in Julian Wells 1, 2, 3 and 11, Santa Fe Springs oil district, Los Angeles County, California", wherein judgment was prayed for against the aforesaid defendants named therein for the value of respondents' services when the same was determined by the court. An attachment was also issued following the filing of this com-

plaint. Appellants herein, as defendants in that case, filed an answer, and the cause was set for trial. Promptly upon service of the "setting card" upon them, defendants made demand for a jury, and the necessary jury fees were deposited and remained on deposit at all times thereafter. The case was accordingly set for trial before a jury. Thereafter respondents, obtaining leave of court, filed a supplemental and amended complaint, to which a demurrer was interposed and overruled, following which an answer was duly filed. When the cause was called for trial the court, over appellants' objection and notwithstanding compliance by them with all statutory requirements, ruled that they were not entitled to a jury trial as a matter of right, and proceeded to try the cause without a jury. It should here be noted that by their supplemental and amended complaint respondents sued appellants only "as trustees of certain trusts and trust estates known and described as Julian Wells One, Two, Three and Eleven, Santa Fe Springs Oil District, Los Angeles County, California", and in addition to seeking a recovery of the amount of fees allegedly due them, sought to impress the trust property and assets with a lien therefor. Following trial, judgment was rendered in favor of respondents and provided further that respondents have a lien upon and against the moneys, funds, properties and estates of said trusts and each of them.

[2-4] As a first ground of appeal, it is urged that the amended complaint fails to state a cause of action. In support of this claim it is argued that the original complaint was an action at law and not in equity; that the amended complaint was filed in an effort to state a cause of action in equity rather than at law for the sole purpose of depriving appellants of their right to a trial by jury. In this contention we do not agree with appellants. The original complaint named the defendants therein both personally and as trustees, while the amended complaint named them only in their representative capacity. This does not change the character of the cause of action. The nature of the suit remained the same, and the amended complaint merely dismissed the action as to certain defendants sued personally in the original pleading. Seeking as it does to recover judgment for services rendered in behalf of certain trusts and to impress upon the trust property a lien, the amended complaint filed against the trustees clearly stated a cause of action in equity, for reasons to be hereinafter pointed out. The demurrer was properly overruled, and the action of the court in proceeding to try the issues without a jury was correct.

[5-7] We are not in accord with appellants' claim that the original complaint set up a cause of action at law. It was clearly brought in equity to establish the reasonable value of services rendered for the benefit of a trust estate, and while it named the defendants individually, it also joined them in their capacity as trustees. That the amended complaint, which in addition to seeking the value of services rendered also sought to charge the amount thereof against the trust properties and a decree directing payment from the trust funds, stated a cause of action in equity, is beyond question. That creditors such as were respondents here, when required by their contract of employment to look solely to the trust estate for compensation, may proceed in equity for the satisfaction of such claims out of the trust estate, is firmly established as the law of this state. Cullinan v. Mercantile Trust Co., 80 Cal.App. 377, 252 P. 647.

[8-10] Appellants' next contention is that the action is not one in equity because the contract upon which it is predicated was made at a time prior to the appointment of appellants as trustees by the court and was never ratified or adopted by them as their contract subsequent to their appointment as such trustees, and that the contract is "vague, indefinite and insufficient upon its face". True, the contract was made by appellants as individuals and at a time when they were only unit-holders and interested parties, but it was alleged in the amended complaint and remained unchallenged by the answer thereto that following their appointment as trustees and while acting in that capacity appellants continued to recognize respondents as their attorneys and as the attorneys for all the unit-holders, and accepted and received the benefits of respondents' legal services in contemplation of and with full knowledge and approval of the terms, conditions and provisions of the employment agreement. Such conduct on the part of appellant trustees certainly amounted to a ratification of the existing contract. It was within the scope of their authority as trustees for appellants to avail themselves of respondents' services under the existing agreement, and

in so doing they bound the trust property to compensate for such services. Civ.Code, § 2267. It further appears that such ratification also took the form of making substantial payments by the trustees to respondents on account of the employment contract following the appointment of appellants as such trustees. We find nothing "vague, indefinite or insufficient" upon the face of the contract, while a review of the findings made by the trial judge indicates that he experienced little, if any, difficulty in construing and interpreting the agreement in question.

[11-13] Considering the nature of the rights involved in the instant litigation, as indicated by the pleadings and the facts, though legal relief ensued as an incidental part of the judgment herein rendered, nevertheless the gist of the action is for the enforcement of rights against a trust and rights against trust properties, both cognizable in equity, and the proceeding was properly brought in a court of equity. Cullinan v. Mercantile Trust Co., supra. It is a well-established rule in this state that in an equitable proceeding a jury trial is not a matter of right, and even though a court may in the exercise of its discretion, call a jury to assist in the trial of the matter, nevertheless the court is not bound in such a case by the findings of the jury. 15 Cal.Jur. 331, § 11; Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589; Pomeroy v. Collins, 198 Cal. 46, 243 P. 657; Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034; Ballou v. Avery, 175 Cal. 641, 166 P. 1003; Bettencourt v. Bank of Italy, 216 Cal. 174, 13 P.2d 659.

[14-16] Finally, appellants challenge the sufficiency of the findings as being deficient in that they fail to find on the value of respondents' services to each of the trusts of which appellants were trustees. This claim is without merit. As admitted by appellants, the findings declare that the legal services were rendered by respondents as alleged. Then follows a finding as to the value of such services and the balance due respondents. The contract of employment related to all the trusts, and the partial payments made to respondents by appellants on account of the contractual services were made on behalf of all the trusts, while the services were performed as to all the trusts. Each and all of the trusts in behalf of which the trustees negotiated the employment agreement received benefits therefrom, and consequently it must be held that the liability imposed upon the trusts was both joint and several. Civ. Code, § 1659. The cited section does not require that several obligees to a promise shall receive benefits in equal proportions, but only that the several obligees receive some benefit from the contracts.

For the reasons herein set forth, the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



COMMERCIAL DISCOUNT CO. v. COWEN.*

Civ. 2418.

District Court of Appeal, Fourth District, California.

Jan. 17, 1941.

Rehearing Denied Feb. 13, 1941.

Hearing Granted March 17, 1941.

1. Replevin ⇐8(3, 4)

To sustain an action for recovery of specific personalty, plaintiff must have the right to immediate and exclusive possession of the personalty at the time of the commencement of the action, although it is not essential that he should show that he ever had actual possession of it.

2. Replevin ⇐8(4)

A plaintiff who seeks recovery of specific personalty must have a general or special property in the personalty, entitling him to right of immediate and exclusive possession, but it is not essential that he be the absolute owner.

3. Chattel mortgages ⇐172(1)

A chattel mortgage which provides that on default mortgagee may immediately take possession of the property and sell it to pay the debt, gives mortgagee a "special interest" in the mortgaged property and the right to its immediate possession, sufficient to maintain an action for its recovery should the mortgagor after demand refuse to surrender possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Interest".

* Subsequent opinion 116 P.2d 599.

4. Assignments ⇐1

The word "assign" in the ordinary legal sense means to transfer title or ownership of property and is usually but not always used in connection with the transfer of a thing in action, and may be used to indicate an act whereby title to property is conveyed by one living person to another.

See Words and Phrases, Permanent Edition, for all other definitions of "Assign".

5. Assignments ⇐1

In legal phraseology, the word "transfer" is commonly used to denote the passing of title in property, usually realty, or an interest therein from one person to another. Civ.Code, § 1039.

See Words and Phrases, Permanent Edition, for all other definitions of "Transfer".

6. Assignments ⇐1

The word "transfer" in its ordinary use has a very general meaning, including the removal of a thing from one place or person to another, the changing of its control or possession, or the conveyance of title to it, and a transfer of property may be effected by delivery of its possession to another.

7. Assignments ⇐1

Where a document is prepared by one skilled in the law, the word "transfer" may be synonymous with the word "convey" and connote the passing of title by legal instrument. Civ.Code, § 1039.

See Words and Phrases, Permanent Edition, for all other definitions of "Convey".

8. Appeal and error ⇐1008(3)

When a contract is susceptible of two or more reasonable interpretations, it is the province of the trial judge to construe it.

9. Appeal and error ⇐1008(3)

If interpretation placed by trial judge on contract is reasonable, the trial judge's decision will not be disturbed on appeal, even though there is another equally reasonable interpretation.

10. Appeal and error ⇐1008(3)

Where contract relating to liquidation of indebtedness, provided that assets of debtor's business should be immediately "assigned and transferred" to creditor in case of default, trial judge's construction of contract to mean that debtor would execute instrument conveying title to creditor, and not that debtor would give immediate possession to creditor, which precluded creditor from maintaining claim and delivery action to recover the assets because of absence of right to immediate possession which was "condition precedent" to maintenance of such an action, was reasonable, and could not be disturbed on appeal, even though another equally reasonable construction might have been placed on the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

11. Contracts ⇐170(1)

Where terms of contract are uncertain and capable of more than one reasonable construction, the practical construction put upon it by the parties furnishes one of the most reliable means of arriving at their intention when executing it.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action in claim and delivery by the Commercial Discount Company against O. L. Cowen to recover possession of certain property. From judgment for defendant, plaintiff appeals.

Affirmed.

Chapman & Chapman, of Los Angeles, for appellant.

Fred A. Wilson, of San Bernardino, for respondent.

MARKS, Justice.

Plaintiff brought this action in claim and delivery to recover all motor vehicles, machinery, furniture, office and garage furnishings, fixtures, equipment, cash and checks, and all accounts, notes and contracts receivable at defendant's place of business in Barstow, California. It was alleged that plaintiff was entitled to the immediate possession of this property, and had demanded immediate possession from defendant which had been refused. Among other things, the answer put in issue plaintiff's right of possession and its demand for immediate possession. The trial court found in favor of defendant on these issues and entered judgment for him. This appeal followed.

The determination of this appeal rests largely on the interpretation to be placed on a contract entered into by the parties

on March 15, 1937. This contract recites that defendant had three places of business in connection with his motor vehicle business. One was located in San Bernardino, a second in Rialto and a third in Barstow.

Defendant had become indebted to plaintiff in the sum of $53,000 which it was desired to liquidate. He had a prospective sale or plan of liquidation of the business in San Bernardino and Rialto. He agreed to open an escrow within ten days, having as its object the liquidation of the assets of those places of business. The term of the escrow was fixed at thirty days. A period of sixty days after the closing of the escrow was given within which to proceed with the liquidation, with an option of terminating it at an earlier date given to plaintiff should the operations prove unprofitable.

A separate section of the contract dealt with the Barstow business. It opens as follows:

"4. It is understood and agreed that the operations of the said O. L. Cowen business now located at Barstow, California, shall not be included in the proposed escrow and during the life of this Agreement, said operations at Barstow shall remain the property of the said O. L. Cowen, subject, however, to the following terms and conditions:

"In the event of any breach or prior termination of this Agreement, for any reason whatsoever, except by payment in full by the said second party, any and all of the assets of said Barstow operations shall be immediately assigned and transferred to First Party herein for liquidation in any manner and under any process which said First Party may desire; the net proceeds of said liquidation to be credited by said First Party to the indebtedness of said O. L. Cowen, as aforesaid." Then follows details of the plan for liquidation of the Barstow business which are not material here.

[1, 2] It is well settled in California that "To sustain an action for the recovery of specific personal property the plaintiff must have the right to immediate and exclusive possession of such property at the time of the commencement of the action, although it is not essential that he should show that he ever had actual possession of it. While plaintiff must have a general or special property in the thing sought entitling him to such right of possession, it is not essential that he be the absolute owner: a special property therein entitling him to such right of possession is sufficient. But whether the right in the property is general or special, it must entitle the plaintiff to immediate and exclusive possession." 5 Cal.Juris. 160.

[3] This special property in personalty, with the right to its immediate possession which gives the right to bring an action of this kind, is illustrated by the cases involving chattel mortgages which provide that on default a mortgagee may immediately take possession of the mortgaged property and sell it to pay the debt. It is held that such an agreement gives a mortgagee such special interest in the mortgaged property, and the right to its immediate possession, sufficient to maintain an action for its recovery should the mortgagor, after demand, refuse to surrender possession to the mortgagee. Plaintiff relies strongly on such cases. See Commercial & Savings Bank of Stockton v. Foster, 210 Cal. 76, 290 P. 583; Riverside Portland Cement Co. v. Taft, 192 Cal. 643, 221 P. 357; Tuohy v. Linder, 144 Cal. 790, 78 P. 233.

The theory upon which these decisions rest is that the mortgage and the covenant of the mortgagor to deliver possession of the mortgaged property to the mortgagee for the purpose of sale immediately upon default and demand for possession, gives the mortgagee a special interest and right of immediate possession that will support an action for its possession, after refusal of a demand for possession. The question here is: Does the promise of defendant that the Barstow property "shall be immediately assigned and transferred" to plaintiff amount to a covenant to deliver possession of that property to plaintiff or is it a promise to do some other act which, when performed, but not before, will give plaintiff the right of possession and special property necessary to maintain this action? The answer to this question depends upon the meaning to be given to the words "assigned" and "transferred" which are used in the contract as the measure of defendant's immediate duty under it.

[4] The word assign, in the ordinary legal sense, means to transfer title or ownership of property. Burkett v. Doty, 176 Cal. 89, 167 P. 518. The word is usually, but not always, used in connection with the transfer of a thing in action. It may be used to indicate an act whereby

title to property is conveyed by one living person to another. 3 Cal.Juris. 233, et seq.; Offer v. Superior Court, 194 Cal. 114, 228 P. 11.

[5, 6] Section 1039 of the Civil Code provides that, "Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." See Scholle v. Finnell, 173 Cal. 372, 159 P. 1179; Chambers v. Lamb, 186 Cal. 261, 199 P. 33; In re Estate of Potter, 188 Cal. 55, 204 P. 826. In legal phraseology it is commonly used to denote the passing of title in property, usually realty, or an interest therein from one person to another. In re Okahara, 191 Cal. 353, 216 P. 614; In re Estate of Steehler, 195 Cal. 386, 233 P. 972. In re Estate of Peabody, 154 Cal. 173, 97 P. 184, it was said that while the word "transfer" as used in the Civil Code indicates the passing of title from one person to another, in its ordinary use it has a very general meaning, including the removal of a thing from one place or person to another, the changing of its control or possession or the conveyance of title to it. It is also true that a "transfer" of property may be effected by delivery of its possession to another. In re Estate of Dunphy, 147 Cal. 95, 81 P. 315.

Applying these definitions to the words used in the contract before us, we find, if we regard the words "transferred and assigned", as used in their legal sense, that defendant promised to execute a conveyance of title to the property in question to plaintiff and not to deliver immediate possession to it. Under such circumstances, the right of possession usually follows, but ordinarily does not precede the passing of title. If we adopt the meaning of the words when used in their legal sense we find that defendant promised to execute a document conveying the title of the property to plaintiff, but did not promise to deliver immediate possession to it. On the other hand, if we give to the word "transfer" its meaning in ordinary use, it might mean either the delivery of possession to plaintiff or the conveyance of title to it.

[7] A further rule of construction of assistance to us is announced in Re Estate of Spreckels, 162 Cal. 559, 123 P. 371, where it is held, in effect, that when a document is prepared by one skilled in the law the word "transfer" may be synonymous with the word "convey" and connote the passing of title by a legal instrument. Cheda v. Bodkin, 173 Cal. 7, 158 P. 1025. The contract in question was evidently prepared by one skilled in the law.

[8, 9] It is well settled that when a contract is susceptible of two or more reasonable interpretations it is the province of the trial judge to construe it. If the interpretation which he puts upon it is reasonable, even though there is another equally reasonable, his decision will not be disturbed on appeal. Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668; In re Estate of Mallon, 34 Cal. App.2d 147, 93 P.2d 245.

[10] Here, the trial judge construed the contract to mean, not that defendant would give immediate possession of the Barstow property to plaintiff for the purpose of sale and liquidation, but that he would execute an instrument conveying title to plaintiff; that the right of possession would not precede the execution of this document. Under the authorities cited this construction was reasonable and cannot be disturbed here even though he might have placed another equally reasonable construction on the contract.

[11] Support is given the construction put upon the contract by the trial judge by the demand served on defendant by the attorney for plaintiff. He did not demand the immediate possession of the property, but made a demand "for an immediate delivery to said company of your duly executed bill of sale covering the Barstow business". Where the terms of a contract are uncertain and capable of more than one reasonable construction, the practical construction put upon it by the parties furnishes one of the most reliable means of arriving at their intention when executing it. Skousen v. Herz, 135 Cal. App. 116, 26 P.2d 498.

The right to the immediate possession of the property in question was a condition precedent to maintaining this action. Under the findings, plaintiff had no such right of immediate possession. As these findings are supported by the evidence, we cannot disturb the judgment here.

Judgment affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

42 Cal.App.2d 585

HONTOU et al. v. ORVIS.

Civ. 6411.

District Court of Appeal, Third District, California.

Jan. 23, 1941.

1. Appeal and error ⇐931(1)

On appeal the facts must be viewed in the light most favorable to the respondent in support of the judgment.

2. Automobiles ⇐150

All drivers of vehicles on a public highway must keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully on the highway, and failure to keep such lookout or failure to see that which may be readily seen, if the driver is looking, constitutes negligence as a matter of law.

3. Automobiles ⇐150

The rule with respect to the lookout required of drivers of vehicles on a public highway to avoid collision with any other vehicle or person lawfully on the highway had no application to action for death of rider of horse which collided with automobile driven by defendant, where, until automobile was almost alongside of the horse, the horse was 10 feet off the highway.

4. Appeal and error ⇐999(3), 1008(1)

In an action for damages resulting from an automobile striking some object on the highway, the question whether the motorist, in looking, sees all that he should have seen, is a fact question for the court or jury.

5. Appeal and error ⇐1008(1)

In action against motorist for death of horseman in collision between automobile and horse, when horse, which motorist contended was 10 feet off the highway, suddenly plunged over onto the highway, the question whether motorist was negligent was solely for the trier of facts, though motorist testified that he did not see the horse until it was about 20 feet away. Vehicle Code, § 532, St.1935, p. 184.

6. Appeal and error ⇐1008(1)

In action against motorist for death of horseman in collision between automobile and horse, when horse, which motorist contended was 10 feet off the highway, suddenly plunged over onto the highway, whether motorist violated the section of the Vehicle Code providing that the driver of any vehicle approaching any ridden animal shall exercise proper control of his vehicle and reduce speed or stop as may appear necessary, or as may be requested by the rider, was for the finder of the facts. Vehicle Code, § 532, St.1935, p. 184.

7. Automobiles ⇐201(2)

Even if that section of the Vehicle Code requiring the driver of any vehicle approaching any horse-drawn vehicle, or any ridden animal, to exercise proper control and reduce speed or stop as may appear necessary, or as may be requested, is violated by a motorist, it does not follow that the motorist is liable for damage or injury arising from collision, but it must be further proved that the violation of the statute contributed directly to the damage or injury. Vehicle Code, § 532, St.1935, p. 184.

8. Appeal and error ⇐1008(1)

In action against motorist for death of horseman in collision between automobile and horse, when horse, which motorist contended was 10 feet off the highway, suddenly plunged over onto the highway, whether motorist's violation of statute requiring the driver of any vehicle approaching a ridden animal to exercise proper control of his vehicle and to reduce speed or stop as may appear necessary or as may be requested, contributed directly to the collision, was for the trier of the facts. Vehicle Code, § 532, St.1935, p. 184.

9. New trial ⇐164

On motion by plaintiffs for a new trial, trial court was authorized under statute to set aside the findings made by the court and adopt new findings more favorable to the defendant in lieu thereof, notwithstanding that plaintiffs did not ask the court to set aside the findings and adopt other findings. Code Civ.Proc. § 662.

10. New trial ⇐164

The statute authorizing a court to set aside its findings and adopt new findings on motion for new trial gives that power when a motion for new trial is made by either party, and the right to adopt other findings thereupon arises, and is not dependent on any other or further application to the trial court. Code Civ.Proc. § 662.

11. New trial ⇐164

The statute authorizing a trial court to set aside findings and adopt new findings in lieu thereof on motion for new trial is a

remedial statute and should be liberally construed. Code Civ.Proc. § 662.

12. New trial ⇐164

The statute authorizing a trial court to set aside findings and adopt new findings in lieu thereof on motion for new trial constitutes a grant of power to the trial court to correct judicial errors, to readjudicate the case on the facts, and to make a new decision and judgment. Code Civ.Proc. § 662.

13. New trial ⇐164

The obvious purpose of the statute authorizing a trial court to set aside findings and adopt new findings in lieu thereof, on motion for new trial, was to give to the trial court, on denying motion for a new trial, the broad power to change its findings and to modify its judgment and thus avoid the necessity of a new trial. Code Civ.Proc. § 662.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Mary Hontou and others against C. D. Orvis to recover for the death of the husband and father of the plaintiffs. From a judgment in favor of the defendant, the plaintiffs appeal.

Judgment affirmed.

Burke & Rawles, of Ukiah, and John B. Harman, of Fort Bragg, for appellants.

Honey & Mayall, of Stockton, and James E. Busch, of Ukiah, for respondent.

TUTTLE, Justice.

This action was brought to recover damages arising out of a collision between an automobile and a horse which Frank Hontou was riding. The latter died as a result of injuries received, and the surviving widow and four children are plaintiffs herein. The trial was by the court, and findings were entered in favor of respondent upon all issues. The appeal is taken from the judgment rendered pursuant to the findings.

[1] Viewing the facts in a light most favorable to respondent, as we are bound to do on appeal, in support of the judgment, the record shows the following circumstances: On the morning of October 25, 1938, the deceased was riding his horse northerly along the right side of the right-of-way of State Highway No. 101, and at a point about a mile from the city of Ukiah. The time was 8:50 a. m., and the weather was dry and clear. Respondent was driving his automobile on the right side of said highway, northerly, and therefore approached the horse from the rear. He was proceeding at a speed of about 45 miles per hour. The first time that he saw the horse it was 10 feet or more off the paved portion, and about 20 feet away. He saw the horse jumping and plunging. It finally plunged over on the highway and against the right front of his car. He was unable to turn out to the left because of a passing car. The deceased was thrown from his horse and received injuries which resulted in his death. The foregoing is a summary of respondent's testimony. His version of the occurrence is corroborated by the driver of a school bus, who saw the entire affair, as he was approaching the scene about 100 yards behind respondent. We quote a portion of his testimony.

"A. Well, I was just—oh, about 100 yards from where this accident happened, and I seen the horse going alongside of the road; I don't know how long I had seen the horse before the accident happened, but the horse evidently just broke and run, run kind of catty-cornered across the road like it was trying to head the car off, and from what I seen, why the horse hit the front fender with its front legs, and its rear end flew around and hit the door of the car, and at that time Mr. Hontou left the horse and went clear over the top of the car. * * *

"Q. And when you first saw the horse and rider at the side of the road, was the horse acting up in any way? A. I couldn't tell you that; I didn't pay any attention to the horse. I seen the horse. I don't generally pay much attention to them until I get up closer to them.

"Q. Was there anything unusual about the horse that attracted your attention? A. Not that I noticed.

"Q. When you say when he acted as though he was trying to head the car, did he rear up or go around? A. He came out of there just like he was either scared or else like a horse does when you spur them and try to head a steer or something, he went out of there as hard as he could go, catty-cornered.

"Q. Where he started this wheeling motion, was that from out on the dirt? A. Out on the edge of the road, I don't know where it was, on the dirt, or where it was, but by the side of the road was where the horse was when I first seen it.

"Q. That motion from there over to the car, was that a rapid motion? A. Yes, very rapid."

[2] It is the contention of appellants that respondent was guilty of negligence as a matter of law; hence the finding that he was free from negligence was not supported by the evidence. They point out that he testified that he did not see the horse and rider until he was within twenty feet of them. They urge that as he did not see the horse before he was within twenty feet of it, he was guilty of negligence, under the rule that—"All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking, would constitute negligence as a matter of law." Berlin v. Violett, 129 Cal. App. 337–340, 18 P.2d 737, 738.

The foregoing statement of the law is approved in Holibaugh v. Ito, 21 Cal.App. 2d 480, 69 P.2d 871. They also rely upon section 532 of the Vehicle Code, St.1935, p. 184, which reads as follows: "The driver of any vehicle approaching any horse drawn vehicle, any ridden animal or any live stock shall exercise proper control of his vehicle and shall reduce speed or stop as may appear necessary or as may be requested by any person driving or riding any animal or by any person in charge of any such live stock in order to avoid frightening and to safeguard any such animal or live stock and to insure the safety of any person driving or riding such animal or in charge of such live stock."

[3-5] In respect to the first contention, respondent states that appellants start with an incorrect premise, in that they assume that the horse was upon the highway at all times. The criticism is well taken. We must take the evidence most favorable to the prevailing party, and, as we have seen, there is testimony to the effect that deceased was riding 10 feet off the highway, in the dirt. While it was unquestionably the duty of respondent to keep a vigilant lookout ahead on the highway on which he was traveling, we know of no rule or law which requires a driver to continually scan the entire right-of-way, at the expense of keeping a proper lookout on the portion of the road on which he was traveling. To require the driver to take his eyes off the highway and cover the range of the entire right-of-way would be to invite disaster. None of the cases cited by appellants involves the failure to see objects which were not upon the highway. Furthermore, in such cases, the question of whether one who looks, sees all that he should have seen, is one of fact for the court or jury. Prato v. Snyder, 12 Cal.App.2d 88, 55 P. 2d 255. Here, the court found, impliedly, that respondent saw all he should have seen, the horse not being on the highway, but 10 feet to the side thereof, and the question as to whether or not he was negligent, was one solely for the trial court.

[6-8] As to the second contention of appellants, relating to section 532 of the Vehicle Code, it was a question for the trial court as to whether it was "necessary" for respondent to reduce his speed or stop. He was traveling at a lawful rate of speed, and the horse was some distance off the highway. We do not believe that it can be said, as a matter of law, that said section was violated, and even if it had been, it does not follow that defendant would be liable. It must be further proved that the violation of the statute contributed directly to the injury. 19 Cal.Jur. p. 636, sec. 67. That, also, was a fact for the trial court, whose finding adverse to plaintiffs must be sustained.

Appellants refer to the cases of Furtado v. Bird, 26 Cal.App. 152, 146 P. 58, and Eddy v. Stowe, 43 Cal.App. 789, 185 P. 1024, as being the only two cases they could find which involved collisions between automobiles and persons on horseback. Neither of these cases is of any assistance in the instant case. In the Furtado case, the evidence showed that the defendant was driving at an excessive rate of speed, and ran down the plaintiff when he was riding a horse completely off the main traveled portion of the highway, and on the side of the road. In the instant case, just the reverse is true: the horse and rider ran from a position of safety on the side of the road, onto the highway into defendant's car.

The discussion of the facts in the case of Eddy v. Stowe, contained in appellants' brief, clearly shows the inapplicability of this case, as it appeared that the drivers of the offending vehicles knew that the plaintiff's horse was frightened, in time to have slowed down, stopped, or otherwise

avoid a collision. In the instant case the facts show conclusively that from the time decedent's horse went out of control, it bolted and ran across the highway and into the side of defendant's car with such rapidity as to make any attempt on defendant's part to avoid the animal an impossibility.

[9-12] The third contention made by appellants is that the trial court did not have the power, on motion for new trial, to set aside the findings and adopt new findings in lieu thereof. The general power to thus proceed is given under section 662, Code of Civil Procedure. Appellants state that they merely moved for a new trial, and did not ask the court to set aside the findings and adopt other findings. The point is without merit. The statute gives the power when a motion for new trial is made by either party. The right to adopt other findings thereupon arises, and is not dependent upon any other or further application to the court. Appellants contend, however, that the second findings were more favorable to defendant than the first. Assuming that this is true, there is nothing in the section which restricts the action of the trial court or which limits the scope of the second findings. The statute is a remedial one, and should be liberally construed. In 8 Cal.Jur.Supp. page 544, sec. 103a, it is said: "The statute constitutes a grant of power to the trial court to correct judicial errors, to readjudicate the case on the facts, and to make a new decision and judgment. In proper circumstances, the trial court may change or add to its findings of fact, modify the judgment, grant a new trial as to part of the issues, or reopen the case for further proceedings."

[13] In Spier v. Lang, 4 Cal.2d 711–714, 53 P.2d 138, 140, it is stated: "The obvious purpose of the statute, discerned from the language employed, was to give to the court, on denying the motion for a new trial, the broad power to change its findings and to modify its judgment and thus avoid the necessity of a new trial. This was to subserve the ends of justice and to prevent unnecessary delays in cases where the court deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law. Where the question of the extent of the power of the court under the section has previously been considered, the reviewing courts have felt no hesitancy in holding that the trial court had such a broad power under the provisions of the section."

The case of Del Barrio v. Sherman, 16 Cal.App.2d 407, 60 P.2d 559, relied upon by appellants, holds that where the defendant alone moves for a new trial in respect to a money judgment, the trial court has no power under said section to increase, by modification, the amount of such judgment. No authorities are there cited which thus restrict and limit the power of the court. The statute makes no limitation of the power. The case can, however, be distinguished upon the ground that the second judgment imposes a more onerous burden upon plaintiff than the first. Here, the judgments are identical—"that plaintiff take nothing".

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



42 Cal.App.2d 512

WOLD v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12702.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1941.

Hearing Denied March 20, 1941.

1. Workmen's compensation ⇐1724

The determination of whether compensation claimant's injury is "permanent" is question of fact to be ascertained from the evidence.

2. Workmen's compensation ⇐1939

The percentage of disability of compensation claimant is matter for determination of the Industrial Accident Commission in the exercise of its sound discretion based upon fair view of all circumstances.

3. Workmen's compensation ⇐1644

Evidence sustained award granting compensation for 78 per cent. permanent disability, to nurse who became afflicted with poliomyelitis in the course of her employment, as against contention of nurse that she was entitled to compensation based on 100 per cent. permanent disability.

4. Workmen's compensation ⇐1939

Where there is substantial evidence to support finding and order of Industrial Accident Commission, the district court of appeal may not substitute its views for those of the commission and annul the award.

5. Workmen's compensation ⇐1939

Where findings of Industrial Accident Commission are based upon reports of medical experts which are in substantial conflict, the district court of appeal may not disturb the findings and conclusions of the commission.

Proceeding under the Workmen's Compensation Act by Amanda Eleanor Wold, claimant, opposed by the County of Los Angeles, employer. The Industrial Accident Commission awarded compensation for 78 per cent. permanent disability and the claimant petitions for review, contending that she is entitled to 100 per cent. permanent disability.

Affirmed.

Spencer C. Olin, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

WOOD, Justice.

While petitioner was employed on June 9, 1934, as a nurse in a hospital operated by the county of Los Angeles she became afflicted with poliomyelitis, an injury arising out of and in the course of her employment. She was then 27 years of age.

Petitioner filed with the Industrial Accident Commission an application for adjustment of her claim against the county for compensation and on January 30, 1936, a hearing was had before the Commission. On June 9, 1939, the Commission filed its findings and award finding that petitioner had a 62 per cent permanent disability and awarding her compensation in the sum of $3,417.77, payable $13.78 per week; also reimbursement of $124.50 for dental care, and medical care for life. Petitioner was granted a rehearing on December 19, 1939, and on April 15, 1940, the Commission filed its decision finding that petitioner had a 78 per cent permanent disability entitling her to $13.78 per week for 240 weeks and thereafter a life pension of $3.82 per week plus other advantages of the value of $10 a month, together with reimbursement of $124.50 for dental care, and medical care for life. Petitioner now seeks to annul the award, claiming that the findings are not supported by the evidence. She contends that the Commission's finding that she is entitled to 78 per cent permanent disability is arbitrary and is not supported by the evidence and that the evidence adduced before the Commission sufficiently establishes that she is entitled to 100 per cent permanent disability.

[1-3] The determination of the question as to whether petitioner's injury is permanent is a question of fact to be ascertained from the evidence. The percentage of such disability is a matter to be determined by the Commission in the exercise of its sound discretion, based upon a fair view of all the circumstances. Although the reports of some of the physicians bear out petitioner's contention that she is totally and permanently disabled the record discloses ample evidence to support the findings of the Commission.

After a rehearing had been granted the Commission appointed on February 16, 1939, two medical examiners to examine petitioner, Dr. Francis M. McKeever, an orthopedist, and Dr. John B. Doyle, a neurologist. Dr. McKeever reported, in part: "From an orthopedic viewpoint she is able to carry on some form of light work." Dr. Doyle stated in part: "There will be no permanent disability." On June 23, 1939, Dr. Doyle in a further report stated in part: "She is now capable of looking after herself." Dr. Eugene Ziskind on November 8, 1939, reported in part: "In view of the absence of organic findings, we can give no prognosis as to disability."

Dr. Paul E. McMaster and Dr. William T. Grant were appointed as medical examiners by the Commission on February 7, 1940. In a report dated February 14, 1940, Dr. McMaster stated in part: "It is my opinion that this patient will show some improvement over a prolonged period of time so that she would be able to engage in some light work. I do not believe that this patient will have total permanent disability but will very likely, from an orthopedic standpoint, have some partial permanent disability in the form of muscular weakness." Dr. Grant in answer to a specific question reported as follows: "I do not feel that there is any permanent disability."

Although there is a substantial conflict in the opinions of the physicians as to the extent of the disability suffered by peti-

tioner, there is little if any conflict in the fact petitioner is in need of permanent medical care, but this she has been given by the award of the Commission.

[4, 5] If there is substantial evidence to support the finding and order of the Commission this court may not substitute its views for those of the Commission and annul the award. Hartford A. & I. Co. v. Industrial Accident Commission, 202 Cal. 688, 262 P. 309, 58 A.L.R. 1392. Where as here the findings of the Commission are based upon the reports of medical experts which are in substantial conflict the court may not disturb the findings and conclusions of the Commission. Brandon v. Industrial Accident Commission, 211 Cal. 341, 294 P. 1064.

The award is affirmed.

We concur: MOORE, P. J.; McCOMB, J.



42 Cal.App.2d 521

TAKAKO INAI et al. v. EDE et al.

Civ. 6432.

District Court of Appeal, Third District, California.

Jan. 22, 1941.

Hearing Denied March 20, 1941.

1. Automobiles ⇐12

The statute providing that no person shall leave standing any vehicle upon improved portion of highway, when it is practical to park such vehicle off such portion of such highway, is intended to protect safety of the general public, regardless of their means of using the highway. Vehicle Code, § 582, St.1935, p. 190.

2. Automobiles ⇐173(4)

Where motorist parked his automobile so that rear of automobile extended more than 3½ feet onto paved portion of highway in violation of statute, at time when it would have been practical to park automobile completely off paved portion, thereby causing pedestrians walking close to their left-hand edge of highway to go out on highway far enough to pass around the obstruction, and pedestrians were struck by the parked automobile when another automobile skidded across highway and struck parked automobile, motorist who parked automobile in violation of statute was guilty of actionable negligence. Vehicle Code, §§ 564, 582, St. 1935, pp. 188, 190.

3. Negligence ⇐56(1)

"Proximate cause" is that cause which in natural and continuous sequence, unbroken by any sufficient intervening cause, produces the injury and without which the injury would not have occurred.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

4. Negligence ⇐61(2)

Where separate and distinct negligent acts of two persons are in substantially simultaneous operation and contribute to cause an injury, each is "proximate cause" of the injury.

5. Negligence ⇐56(1), 136(25)

The question of causation is one of fact, depending upon the circumstances, and is ordinarily for the jury to determine.

6. Automobiles ⇐201(5), 245(62)

Where motorist parked his automobile so that rear of automobile extended more than 3½ feet onto paved portion of highway in violation of statute, at time when it would have been practical to park automobile completely off paved portion, thereby causing pedestrians walking close to their left-hand edge of highway to go out on highway far enough to pass around the obstruction, and pedestrians were struck by the parked automobile when another automobile skidded across highway and struck parked automobile, motorist who parked automobile in violation of statute was guilty of a "continuing negligence", and whether such negligence was "proximate cause" of pedestrians' injuries was for jury. Vehicle Code, §§ 564, 582, St.1935, pp. 188, 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Negligence".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Takako Inai and another against Charles Ede and Takeo Takeuchi for injuries sustained by plaintiffs when struck by defendant Takeuchi's automobile which had been struck by defendant Ede's

automobile. The complaint against defendant Takeuchi was based on his alleged negligence in parking his automobile partially on the highway. From a judgment in favor of defendant Takeuchi after sustaining of a demurrer to an amended complaint without leave to amend, the plaintiffs appeal.

Reversed with directions.

Ralph H. Lewis and Schwab & Schwab, all of Sacramento, for appellants.

Chas. V. Barfield, of San Francisco, for respondent.

PULLEN, Presiding Justice.

This appeal is from a judgment in favor of defendant Takeo Takeuchi, after the sustaining of a demurrer to an amended complaint without leave to amend.

It is alleged therein that a state highway runs between Colfax and Emigrant Gap, and at the point of the accident here involved the paved portion of such highway was twenty feet wide; that its course was north and south with a five per cent grade dipping toward the south. At the time and place in question, and for a considerable distance north and south thereof, the highway was covered with snow, ice and slush, and was wet and slippery. That Takeo Takeuchi so parked his automobile on the easterly side of the highway that the rear of his car extended more than three and one-half feet from the easterly edge of the pavement into the line of traffic upon the easterly half thereof, although at that time it was practical to have parked the car completely off the paved portion of the highway. There were many people in this area (it being a popular spot for snow sports) and by reason of the angle at which the Takeuchi car was parked, pedestrians along the easterly edge of the highway were, in order to pass the Takeuchi car, compelled to walk out onto the paved portion of the highway more than three and one-half feet from the easterly edge. Plaintiffs were pedestrians going southerly along the easterly edge of the highway, and just as they were passing around the Takeuchi car, a car traveling southerly and being operated by Charles Ede, slipped or skidded across the highway, because of the snow and ice upon the highway, and struck the Takeuchi car, which in turn struck plaintiffs, causing the injuries here complained of. It is also alleged that the slushy, icy, wet and slippery condition was known to Takeuchi, and that because thereof, and because of the grade in the highway, and because of the narrowness of the pavement he was bound to have anticipated the danger. Do these allegations state a cause of action against Takeuchi? In other words did the admitted negligence of Takeuchi in parking his car as he did, proximately contribute to the injuries of plaintiffs?

Two questions are presented: Was the alleged negligent parking of respondent's car a proximate cause of the injury, and did the parking of respondent's car under the circumstances here existing constitute actionable negligence?

[1, 2] Disposing first of the latter contention as to whether Takeo Takeuchi was guilty of actionable negligence: Respondent Takeo Takeuchi was guilty of a violation of section 582 of the Vehicle Code, St. 1935, p. 190, which provides that no person shall leave standing any vehicle upon a paved or improved or main traveled portion of the highway when it is practical to park such vehicle off such portion of such highway.

It is alleged in the complaint that at the time and place in question it was practical to park respondent's automobile completely off the paved portion of the highway, and that there were then and there numerous automobiles so parked. Respondent claims this statute was enacted for the benefit and protection of other motorists in order that there might be unobstructed passage for motor traffic traveling over that half of the highway which such forbidden parking might impede or obstruct. However, plaintiffs also were lawfully upon the highway and entitled to use the same, and to the full protection of all the laws affecting traffic thereon. In McKay v. Hedger, 139 Cal. App. 266, 34 P.2d 221, 225, it is so held, the court saying: "The enactment in question [section 138 of the California Vehicle Act, now section 586 of the Vehicle Code] was undoubtedly passed for the benefit of all persons lawfully using the public streets." It is the safety of the general public, regardless of their means of using the highways, that the legislature was protecting when it enacted the statute in question.

Here it is alleged plaintiffs were walking southerly along the easterly edge of the highway, thereby complying with section 564 of the Vehicle Code, in that they were walking close to their left-hand edge of the highway, and by reason of the projecting car of respondent, were compelled to go out onto the highway far enough to pass around

the obstruction. Plaintiffs were therefore of a class for whose benefit the statute was enacted, and Takeo Takeuchi in parking his car in such a manner as to force plaintiffs onto the highway was guilty of actionable negligence.

[3, 4] The next question, and one fraught with some difficulty, is whether the negligent parking of the car by respondent was the proximate cause of the injury. The courts have often attempted to state what is meant by proximate cause (termed "legal cause" in the Restatement of the Law) and the definition most frequently given is that proximate cause is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred. Again it is said a "person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind". Williams v. San Francisco, etc., Ry. Co., 6 Cal.App. 715, 93 P. 122, 123. Also the negligence of defendant need not be the sole cause of the injury; it is enough that it be a cause, for if the separate and distinct negligent acts of two persons are in substantially simultaneous operation and contribute to cause the injury, "each is and both are the proximate cause".

The negligence of Takeo Takeuchi did not cease the instant he left his car projecting into the highway. By permitting his car to remain standing as it was, he was guilty of a continuing negligence, and that negligence was active up to the very instant of this accident.

In Pastene v. Adams, 49 Cal. 87, defendant had negligently piled lumber near the street. While plaintiff was walking close to the pile, another person drove his truck in such a manner as to strike a projecting timber, causing the timber to fall upon plaintiff. The court held the negligent piling of the lumber was a continuing negligence, and concurring with the negligence of the driver of the truck, was a direct and proximate cause of the injury to plaintiff. Here the negligent parking of the car of Takeo Takeuchi was likewise a continuing violation of the Vehicle Code and was a concurring negligence with the negligence of Ede, the driver of the oncoming car.

In Carroll v. Central Counties Gas Co., 74 Cal.App. 303, 240 P. 53, a pipe line of defendant carrying gas was parallel to and 5 feet distant from a bridge. An automobile which plaintiff was driving on the bridge skidded, going through the guard rail, and in falling, struck and broke the pipe line, and the escaping gas becoming ignited by the fire from the exhaust of the automobile, injured plaintiff. The defendant company claimed it was not bound to anticipate the chain of events which led up to the accident. It was held, however, that the negligent act of installing unprotected gas mains near the bridge was an act of negligence which the company, in the exercise of ordinary care, ought to have anticipated, although it might not have foreseen the particular injury which did happen.

The court there also held that one who is himself free of negligence may rely upon the presumption that others will exercise due care, and such a one is not negligent if he fails to anticipate danger which can come only from a violation of law upon the part of another, but one guilty of negligence may not excuse himself by reliance upon such a presumption.

In Marton v. Jones, 44 Cal.App. 299, 186 P. 410, defendant maintained a barbed wire fence near a sidewalk in violation of an ordinance. Plaintiff, walking along the sidewalk, slipped on some gravel and fell against the fence. Defendant admitted the negligent maintenance of the fence but claimed the gravel was an independent intervening cause. In holding defendant liable, the court, however, said that the act of a third person contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer if such act ought to have been foreseen.

Respondent cites us to the case of Mounts v. Tzugares, 9 Cal.App.2d 327, 49 P.2d 883. There a truck owned by defendant Tzugares, traveling in a westerly direction, stopped on the north side of the highway. While so parked on the highway a car traveling west swung out around the parked truck and struck a car approaching from the east which had also swung out to pass a slower moving east-bound car. The highway was forty-three feet wide at the point of collision; it was daylight and the highway was dry. It was held the position of the parked truck did not contribute to the accident. In the instant case the highway

was not so wide by twenty feet,—there was a five per cent grade at the point where the Takeuchi car was parked and the highway was covered with snow and slush and very slippery. These facts, we believe, are sufficient to deferentiate the instant from the cited cases.

Respondent also cites Klarquist v. Chamberlain & Proctor, 124 Cal.App. 398, 12 P.2d 664, 665. There a contractor was lawfully building a sidewalk, and because of barriers around the work plaintiff was compelled to walk into the street, where he was struck by a negligently operated car. There the contractor was constructing a necessary public work, under the authority of a municipality—and the contractor was therefore not bound to have anticipated the reckless act of a third person. There plaintiffs attempted to invoke the rule applicable to concurrent and negligent causes of injury, under which, liability of the defendant contractor would arise from the fact it should have anticipated the negligence of the driver in leaving his regular course, but the court said "* * * their argument fails to convince us that liability of one legally constructing a necessary public way, under the authority of a municipality, who cannot be said to have anticipated the reckless act of a third party, should be predicated upon or measured by the same rules". If, however, after completing its work of laying the sidewalk, the contracting company had then negligently placed a pile of gravel in the street alongside the sidewalk and had negligently permitted it to remain there unguarded, and a truck had, by reason thereof, been thrown from its course and struck a pedestrian, undoubtedly the company would have been liable, or at least put upon its defense.

That an obstruction lawfully placed upon a highway is subject to an entirely different rule than an unlawful obstruction, as we have here, is clearly stated in Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 P. 881, 883:

"An individual who erects an unlawful obstruction to the free use of a highway, in its nature a nuisance, by reason of his wrongful act, is charged in law as an insurer against accident to a person properly traveling the highway and meeting injury by reason of such unlawful obstruction. [Citing cases.] But where the highway is obstructed under license and by authority, the person responsible for such obstruction is chargeable only with ordinary care to see that such obstruction does not become a cause of injury to any person lawfully traveling the highway." See, also, Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.2d 781.

[5, 6] Can a court say as a matter of law that the negligence of Takeo Takeuchi in parking his car in such a manner as to permit a portion thereof to project about three and one-half feet onto the highway, in violation of a statute, under the conditions then existing, did not in any sense contribute proximately to plaintiffs' injuries? The question of causation is one of fact depending upon the circumstances of each particular case and is ordinarily for the jury to determine. (19 Cal.Jur. p. 562.) In Fishman v. Silva, 116 Cal.App. 1, 2 P.2d 473, 475, it is said:

"It is the unquestioned law of this state that, where one is injured by the concurring negligence of two persons, each is and both are the proximate cause of the injuries, and the injured party may recover from either or both at his election. * * *

" 'Whether or not the negligence of either driver was a proximate cause of the collision and resultant injuries and whether or not the negligence of each concurred with that of the other is a question of fact to be decided by the jury' or by the court where no jury is present, and where there is evidence to support the determination so made it cannot be disturbed, even though the facts would warrant a different conclusion."

"Whether cause in fact exists is often difficult to determine," says Mr. Charles E. Carpenter in an article in Rules for Determining Proximate Cause in volume XX of California Law Review, at page 399, "but where reasonable men can differ as to its existence or non-existence, it is a question for the jury to determine under appropriate instruction." In this treatise by Mr. Carpenter, beginning in the Law Review of March, 1932, will be found a very informative discussion of the rules for determining Proximate Cause.

The judgment is reversed and the trial court directed to overrule the demurrer and respondents given a reasonable time to answer.

We concur: THOMPSON, J.; TUTTLE, J.

42 Cal.App.2d 568

PEOPLE v. GEORGE.

Cr. 3410.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1941.

Hearing Denied Feb. 20, 1941.

1. Arson ⇐4

To constitute the crime denounced by statute providing that a person who willfully and maliciously sets fire to any dwelling house, either the property of himself or of another, shall be guilty of arson, there must be both a willful and a malicious act, and unless one burns his own property with "malice", that is, with the wish to injure another person or do a wrongful act, he cannot be convicted. Pen.Code, § 7, subd. 4; § 447a.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

2. Arson ⇐40

Whether accused's act in burning his own dwelling was willful and malicious within arson statute was a question of fact to be determined by jury from all the evidence. Pen.Code, § 447a

3. Arson ⇐2

The statute, providing that any person who willfully and maliciously burns his own or another's dwelling is guilty of arson, is a proper exercise of the "police power". Pen. Code, § 447a.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

4. Nuisance ⇐1, 59

Every holder of property, however absolute and unqualified may be his title, holds it under implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to rights of community.

5. Arson ⇐2
Constitutional law ⇐250, 257

The statute denouncing as a felony the willful and malicious burning or setting fire to any dwelling, including one's own, is not an arbitrary interference with the owner's property rights in violation of "due process of law" and "equal protection" clauses of Federal Constitution. Pen.Code, § 447a; U. S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Equal Protection of the Laws".

6. Criminal law ⇐13

The statute denouncing as a felony the willful and malicious burning or setting fire to any dwelling, including one's own, is not too indefinite to constitute a reasonable standard of conduct. Pen.Code, § 447a.

7. Statutes ⇐228

The general terms of a statute are subject to implied exceptions, founded on rules of public policy and maxims of natural justice, so as to avoid absurd and unjust consequences.

8. Constitutional law ⇐70(3)

It is strictly within the province of the legislature to determine whether the public is to be served by defining certain acts as crimes.

9. Arson ⇐2
Constitutional law ⇐250, 257

The statute denouncing as a felony the willful and malicious burning or setting fire to any dwelling, including one's own, is not invalid as arbitrary and capricious and as not based on a distinction affecting the public health or safety, and it is, therefore, valid under the "equal protection" and "due process" clauses of Federal Constitution. Pen. Code § 447a; U.S.C.A.Const. Amend. 14.

10. Constitutional law ⇐210

A law need not affect every person exactly alike in order to avoid the prohibition against inequality by the equal protection clause of the Federal Constitution. U.S.C.A. Const. Amend. 14.

11. Constitutional law ⇐211

Under the "equal protection" clause of the Federal Constitution, the Legislature may make a reasonable classification based on substantial difference and which has a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation. U.S.C.A. Const. Amend. 14.

12. Constitutional law ⇐211

The "equal protection" clause of the Federal Constitution does not forbid discrimination with respect to things that are different. U.S.C.A.Const. Amend. 14.

13. Constitutional law ⇐70(1)

Enactment of laws for the protection of society is for the legislature and not for the courts, unless a constitutional right is clearly violated by the statute.

14. Constitutional law ⇐48, 70(3)

The courts must view a statute, such as the one denouncing as a felony the willful and malicious burning or setting fire to any dwelling, including one's own, as intended to promote the general welfare and protect the public interest, and court cannot go behind findings of Legislature and determine that there did not exist conditions which would justify the enactment. Pen.Code, § 447a.

15. Constitutional law ⇐211

It is only when, beyond reasonable doubt, all rational men would agree that factual background does not warrant the enactment of a statute ostensibly designed to preserve the general welfare, that court can say that a statute is arbitrary and capricious so as to violate equal protection clause of Federal Constitution. U.S.C.A.Const. Amend. 14.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Samuel George was convicted of arson and of burning insured property, and he appeals from the judgment and order denying his motion for a new trial.

Affirmed.

Hearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant and his codefendant Farrell were accused by information of the crime of arson (count 1) and of burning insured property (count 2). Count 1 is based upon section 447a of the Penal Code while count 2 is based upon section 548 of the Penal Code. Both defendants were convicted. Motion for a new trial was granted as to Farrell but from the order denying his motion and from the judgment, appellant has appealed.

The sole ground of appeal is that the conviction for the burning of his own dwelling is a violation of his right to dispose of his property and deprives him of equal protection of the laws guaranteed by the due process clause of the fourteenth amendment to the Constitution of the United States.

The defendants were owners of a residence known as 3006 5th avenue, in the city of Los Angeles. Prior to July 5, 1940, the dwelling was occupied by tenants who on that day, pursuant to the request of appellant, vacated the premises. On the evening of July 10, 1940, about 11 o'clock p. m., one Nelson, occupant of the house on the adjoining lot observed a man and woman going into the rear of the premises of appellant's property from the alleyway; saw them deposit by the garage two packages of the size of five gallon tins wrapped in newspaper and then return to the alley. His description of the man who had deposited the packages tallied with that of appellant. After Nelson had retired, some eight minutes later, on peering through the window of his bedroom, he saw the same two persons return and quietly make two or three trips on tiptoe to the back door of the same dwelling. Ten minutes later, an explosion occurred and the dwelling was instantly in a mass of flames. Nelson had seen the appellant on four occasions before the day of the fire and pointed out appellant in the courtroom as resembling the man who had made the nocturnal entries into the rear of his tenantless house. Appellant was identified in the courtroom by two witnesses as the man who ran from the scene of the fire under a very strong street light. The explosion caused an immense fire in the two bedrooms, living room and dining room. Within a short time after the fire was extinguished, an investigator of the arson bureau of the Los Angeles Fire Department found that various seams and joints of the floor in the dwelling were charred in various locations and the baseboards throughout the entire dwelling were blistered. At other points the timbers were completely burned or charred. The investigator detected an odor like that of kerosene through the entire building. Plaintiff had taken out insurance on this property in the sum of $3,000, which was in effect on the day of the fire. The property had been purchased in August, 1937, by appellant and his codefendant at a price of $3,000 with a down payment of $200. On the day of the fire they still owned it and there was due on the purchase price the sum of $2,000.

Inasmuch as the appeal is aimed to establish the unconstitutionality of section 447a of the Penal Code, we shall confine

our discussion to that proposition since the validity of section 548, which denounces as a felony the burning of any property to defraud the insurer—the crime charged in count 2, is conceded.

Section 447a of the Penal Code reads as follows: "Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling-house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not less than two nor more than twenty years." Appellant contends that the quoted section was enacted solely for the protection of dwelling houses from destruction by fire; that it is unreasonable and arbitrary in that it makes it unlawful for a man to burn his own unoccupied dwelling, inanimate property, and that the section indicates no intention of the legislature to protect human beings or to safeguard public property.

In 1929 section 447 of the Penal Code was repealed. That section denounced as arson the burning of the property of another, a crime at common law. It was then no offense to burn one's own dwelling. Under that section, it was necessary in charging arson to aver ownership of the building in another or that another rightfully occupied the building. Contemporaneously with the repeal of section 447, the legislature enacted as a part of the title on "Crimes Against Property" and as a part of the chapter on "Arson", sections 447a, 448a and 449a, which forbade respectively the wilful and malicious burning of any dwelling house; the burning of a stable, barn or garage, etc.; burning of a crib, stack of hay, etc., belonging to another and of a value in excess of $25.

[1-7] In making his claims appellant has ignored the presence of three words in the statute, to-wit, "willfully and maliciously". Unless one burns his own property with malice, that is with a wish to injure another person or to do a wrongful act (Pen. Code, sec. 7, subd. 4) he could not be fairly accused of violating the section. Likewise though he may have every wish to do a wrongful act, an accidental burning of his own property would not be a violation. To constitute the crime denounced by the section, it must be both a wilful and a malicious act. Consequently, if he sets fire to property which he, himself, has created or constructed, with the intention to injure another, he has done the act denounced by the section as a crime against property and as an act of arson. If defendant's house stood in such close proximity to that of his neighbor as would permit a flame from his own house to extend to and ignite the latter, or if his house contained chattels belonging to his neighbor, or if his neighbor had insured defendant's property against destruction by fire, then there could be no doubt that setting fire to his own house would necessarily have been with an intent to injure another. Whether the act of burning his own house was wilful and malicious was a question of fact determined by the jury from all the evidence in the case. It is the wilfulness and malice of the act inhibited by the section which is a limitation upon his right to dispose of his own dwelling and which makes the statute a proper exercise of police power. "Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." Cooley's Constitutional Limitations, 8th ed., vol. 2, p. 1224. Where a statute denounces as a felony the "willful and malicious" burning, or setting fire to any dwelling it is not an arbitrary interference with the owner's property right. Neither is the statute too indefinite to constitute a reasonable standard of conduct. Love v. State, 107 Fla. 376, 144 So. 843. "Society would be without protection in circumstances such as these were it not possible to provide for prevention of willful and malicious burning of dwellings. * * * There does not seem to be a suggestion of any doubt as to the constitutionality of the law." Voss v. State, 204 Wis. 432, 236 N.W. 128, 130. Where the statute is found in the chapter defining "offenses against property" it does not offend the Constitution. People v. Chimovitz, 237 Mich. 247, 211 N.W. 650, 651. "The general terms of a statute are subject to implied exceptions founded on the rules of public policy, and the maxims of natural justice, so as to avoid absurb and unjust consequences." Lewis' Sutherland Statutory Construction, 2d ed., 741.

[8] Appellant contends that his right to the equal protection of laws, as guaranteed by the fourteenth amendment, is violated

by the judgment and the statute under which the indictment was drawn. He argues that there is no logical difference between a dwelling house and a pile of lumber or trash or other combustible material distinguishable in the matter of public interest. But it is strictly within the province of the legislature to determine whether the public interest is to be served by defining certain acts as crimes. In view of the frequently reported burning by owners of their dwellings and outhouses, it cannot be said that the legislature was unreasonable or arbitrary in forbidding the owner of a dwelling to destroy his property with intent to injure another. Moreover, because of the close proximity of most dwellings to buildings that house human beings or that house property of substantial value, the legislature acted well within the scope of its power in denouncing such an act as a crime. Unless we can say, therefore, that the legislature exceeded its constitutional limitations in declaring that the malicious destruction by a party of his own dwelling is a felony, the statute is valid.

[9-15] Appellant contends that the classification of the dwelling by section 447a is arbitrary and capricious and that such classification is not based upon a distinction which affects public health or safety. But loss need not affect every man, woman and child exactly alike in order to avoid the constitutional prohibition against equality. Under the equal protection guaranty of the fourteenth amendment, the legislature may make a reasonable classification which is based upon substantial differences and which has a "reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved. The equal protection clause does not forbid discrimination with respect to things that are different." 12 American Jurisprudence, sec. 469, p. 131; Kookee Coke Co. v. Taylor, 234 U.S. 224, 34 S.Ct. 856, 58 L.Ed. 1288. The enactment of laws for the protection of society is for the legislature and not for the courts unless a constitutional right is clearly violated by the statute. The courts must view such a statute as section 447a as intended to promote the general welfare and to protect the public interest. It is beyond our province to go behind the findings of the legislature and determine that there did not exist conditions which would justify the enactment. It is only when, beyond reasonable doubt, all rational men would agree that the factual background did not warrant the enactment of a statute which was ostensibly designed to preserve the general welfare that we can say that a statute is arbitrary and capricious. If it be not thus rendered void, it is the fruitage of the proper exercise of police power. In the Matter of the Application of Miller, 162 Cal. 687, 696, 124 P. 427. Therefore, it cannot be said upon a review of the statute and the authorities that the code section under consideration denies appellant equal protection of the laws guaranteed by the Federal Constitution.

The order and judgment are affirmed.

We concur: WOOD, J.; McCOMB, J.



42 Cal.App.2d 574

Ex parte CLARK.

Cr. 1748.

District Court of Appeal, Third District, California.

Jan. 22, 1941.

Rehearing Denied Feb. 6, 1941.

1. Larceny ⇐32(2)

A complaint charging that defendant willfully and unlawfully took and attempted to carry away from immediate possession of lawful owner merchandise of value of $16 was defective in failing to state to whom the property taken belonged. Pen.Code, §§ 484, 1426.

2. Larceny ⇐32(2)

Although defendant in prosecution for theft was entitled to have name of owner of property taken set forth in complaint, failure to set forth that fact in complaint, which alleged crime of theft in charging defendant with unlawfully taking property of another, did not thereby deprive police court of jurisdiction. Pen.Code, §§ 484, 1426.

3. Habeas corpus ⇐30(2)

Although a writ of habeas corpus will lie when complaint under which conviction was had wholly fails to state a public offense, the

writ cannot be made to serve office of a demurrer.

4. Habeas corpus ⇐30(2)

A complaint charging that defendant willfully and unlawfully took and attempted to carry away merchandise from immediate possession of lawful owner thereof, but failing to state name of owner of property, was not so defective as to entitle defendant to release on habeas corpus after conviction. Pen.Code, §§ 484, 1426.

5. Habeas corpus ⇐30(2)

A defendant convicted under complaint charging the unlawful taking and attempting to carry away merchandise from immediate possession of lawful owner was not entitled to release on habeas corpus on ground that complaint was so fatally defective that it would not constitute a bar to a subsequent prosecution for same offense. Pen.Code, §§ 484, 1426.

Proceeding by Mildred Clark to obtain a writ of habeas corpus.

Writ dismissed, and the petitioner remanded.

A. B. Reynolds, of Vallejo, for petitioner.

Philip Lynch, Dist. Atty., and Kenneth I. Jones, Deputy Dist. Atty., both of Fairfield, for respondent.

PULLEN, Presiding Justice.

Petitioner was convicted in the Police Court of the City of Vallejo on a complaint charging that she did "on or about the 8th day of October, A. D. 1940, at and in the City of Vallejo * * * then and there wilfully and unlawfully steal, take and attempt to carry away from the immediate possession of the lawful owner thereof, merchandise of the value of sixteen dollars". To this complaint defendant entered a plea of not guilty and at the opening of the trial interposed an objection to the introduction of evidence, and after conviction, moved in arrest of judgment. The objections and motion were denied, and she was sentenced to imprisonment in the county jail.

Having been delivered into custody of the sheriff under such judgment she now seeks to be discharged by this court on habeas corpus, contending that the complaint in the justice court did not state facts constituting a public offense.

The argument of counsel revolves around the two following sections of the Penal Code,—the one defining theft, and the other, the necessary averments of such offense. "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another * * * is guilty of theft." Section 484 of the Penal Code. Section 1426 of the Penal Code provides in part, "all proceedings * * * before a * * * police court * * * for a public offense * * * must be commenced by complaint * * * setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of. * * * In charging theft, it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

[1] While the complaint before us was defective in that it did not set forth all of the facts essential to a proper description of the crime,—it not appearing to whom the property taken belonged,—it did allege the element of the crime of theft in that it charged petitioner with unlawfully taking the property of another.

[2-4] Petitioner was entitled to the name of the owner of the property taken, but the failure to set forth that fact did not thereby deprive the police court of jurisdiction. It has frequently been held that while a writ of habeas corpus would lie when the complaint wholly failed to state a public offense, the writ cannot be made to serve the office of a demurrer. Petitioner, however, protected her right to appeal from the judgment of conviction by appropriate objections to the introduction of evidence and by a motion in arrest of judgment.

In Re Ah Sing, 87 Cal. 423, 25 P. 552, petitioner had been convicted of visiting a gambling house, a misdemeanor. His release was sought by habeas corpus, it being urged the justice court was without jurisdiction because the time of the offense was not set out in the complaint. The court held this defect did not affect jurisdiction and the petitioner was remanded.

In Re Hartman, 9 Cal.2d 583, 71 P.2d 921, a complaint in the justice court failed to allege the township or even the county in which the offense was committed. This error or omission was presented to the court upon a writ of habeas corpus, but there also the petitioner was remanded.

To the same effect was the holding in Re Kaster, 52 Cal.App. 454, 198 P. 1029, where the court refused to discharge the petitioner where the complaint failed to set forth the township.

It is seen from the foregoing that the omission to allege time in one instance and place in another is not ground for the issuance of the writ. It would appear from in Re Meisner, 30 Cal.App.2d 290, 86 P.2d 124, 125, that the failure to mention the name of the owner of the property did not go to the question of jurisdiction. In that case petitioner was charged as follows: "Said defendants * * * did * * * steal and take property not belonging to them, to wit, scrap iron which was located on railroad property adjacent to W. L. Plaugher's property on West Elm Street". Petitioner entered a plea of guilty and then sought his release on habeas corpus on two grounds, that the complaint failed to state the offense was committed within the jurisdiction of the court and that it failed to state a public offense in that the complaint did not specifically allege the property stolen was the property of another. Upon the first point, while the criminal jurisdiction of a city or justice court is strictly limited, and although the complaint failed to state the offense was committed within the jurisdiction of the court, the evidence dehors the record, and the plea of petitioner was a sufficient answer. As to the failure to allege the property taken was personal property of another, the allegation that petitioner stole property not belonging to him was sufficient, the plea of guilty negatived the claim that the property was abandoned.

In the application of Hayward, 62 Cal. App. 177, 216 P. 414, for a writ of habeas corpus, the court points out that such a writ may not be used as a demurrer or for the purpose of correcting errors. "The writ of habeas corpus is not intended to review the regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law." In re Kowalsky, 73 Cal. 120, 14 P. 399.

[5] Another point urged by petitioner is that the complaint is so fatally defective that it would not constitute a bar to a subsequent prosecution for the same offense.

This objection is answered in Re Martin, 51 Cal.App. 706, 197 P. 365, where it is said: "If it is true, as alleged, that petitioner is being again prosecuted for an offense for which he was once in jeopardy, he may upon the trial of his case plead such conviction and establish the identity of the cases by evidence; the burden being on him." People v. Faust, 113 Cal. 172, 45 P. 261. Ex parte Winston, 160 Cal. 18, 116 P. 390. As early as Ex parte Turner, 75 Cal. 226, 16 P. 898, 899, where it was feared by petitioner the date of the offense might become material, the court said: "But, if the petitioner should ever have the misfortune to require evidence in support of such a plea of former conviction, he will be entitled to the whole record, and not simply to the judgment." In re Ring, 28 Cal. 247. Some objection was also therein made to the sufficiency of the judgment. The court further said: "To entitle the petitioner to a discharge we must necessarily assume that the record of conviction fails to show the commission of any offense. To reach this conclusion we should have to resort to a hypercritical, overnice, and technical examination of the commitment, convert the writ of habeas corpus into a writ of error, and defeat the ends of justice."

The writ is dismissed and the petitioner remanded.

We concur: THOMPSON, J.; TUTTLE, J.



42 Cal.App.2d 596

PEOPLE v. DALLAS.

Cr. 1747.

District Court of Appeal, Third District, California.

Jan. 24, 1941.

Rehearing Denied Feb. 8, 1941.

1. Automobiles ⇐355(8)

Evidence *held* sufficient to sustain conviction for failing to stop automobile involved in an accident and to render assistance to pedestrian who was struck by the machine and instantly killed. Vehicle Code, §§ 480, 482(a), St.1935, pp. 170, 171.

2. Automobiles ⇐355(1)

Evidence *held* sufficient to sustain conviction of driving automobile on left side of

the roadway at a point less than 100 feet from intersecting highway, resulting in death of pedestrian struck by automobile. Vehicle Code, § 530(b) 2, St.1939, p. 2198.

3. Criminal law ⇐1023(12)

An order denying accused's motion in arrest of judgment is not appealable. Penal Code, § 1237.

4. Indictment and Information ⇐110(47)

A count of an information alleging substantially in language of statute, that defendant's automobile was involved in an accident causing death to a pedestrian and that defendant "did wilfully fail to immediately stop" automobile and wilfully neglected to render aid, as required by Vehicle Code, sufficiently alleged defendant's knowledge of facts alleged. Vehicle Code, §§ 480, 482(a); St.1935, pp. 170, 171; Penal Code, §§ 950–952.

See Words and Phrases, Permanent Edition, for all other definitions of "Did Wilfully Fail to Immediately Stop".

5. Criminal law ⇐1167(5)

Any error in overruling a demurrer to a count of an information was immaterial where accused was acquitted of that charge.

6. Automobiles ⇐351

Under Vehicle Code provision prohibiting driving of automobile on left side of roadway, "when view is obstructed on approaching within 100 feet of * * * any intersection", count of information charging that defendant's wilful driving of automobile on left side of highway within 100 feet of an intersection while passing another automobile, was the proximate cause of death of pedestrian struck by defendant's automobile was sufficient, as against demurrer, without alleging that defendant's view of the "bridge, viaduct, or tunnel" which he was approaching was obstructed. Vehicle Code, § 530(b) 2, St.1939, p. 2198.

7. Automobiles ⇐335

A paragraph of Vehicle Code prohibiting driving on left side of roadway "when the view is obstructed upon approaching within 100 feet of any bridge, viaduct, tunnel, or when approaching within 100 feet of or when traversing any intersection or railroad grade crossing", prohibits driving of vehicle on left side of highway within 100 feet of an intersection, regardless of whether it is hidden from view of operator of car; the provision as to obstructed view of "bridge, viaduct, or tunnel" relating to another offense. Vehicle Code, § 530(b)2, St.1939, p. 2198.

8. Automobiles ⇐351

A count of an information charging unlawful and willful violation of Vehicle Code provision prohibiting driving of an automobile on the left side of roadway at a point less than 100 feet from an intersecting highway, constituted an allegation of negligent operation of the automobile. Vehicle Code, § 530(b) 2, St.1939, p. 2198.

9. Automobiles ⇐351

A count of an information charging willful and unlawful violation of Vehicle Code provision prohibiting driving automobile on left side of roadway at a point less than 100 feet from an intersecting highway and that such negligence proximately resulted in killing of pedestrian, charged "negligent homicide" within statute defining that offense. Vehicle Code, § 500, St.1935, p. 173; § 530 (b) 2, St.1939, § 2198.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligent Homicide".

10. Criminal law ⇐1177

Defendant could not complain that he was convicted of two counts of an information, each of which was based on same facts resulting in death of a pedestrian arising out of separate violations of Vehicle Code, where, in pronouncing judgment, trial court determined that the sentences under each count should run concurrently. Vehicle Code, §§ 480, 482(a), St.1935, pp. 170, 171; § 530(b) 2, St.1939, p. 2198.

11. Criminal law ⇐878(3)

Where accused was convicted under count of information charging failure to stop automobile after accident and failure to render assistance to pedestrian struck and killed by automobile, and under a count, charging that he drove machine on left side of roadway at point less than 100 feet from intersecting highway, resulting in death of same individual, and accused was sentenced to imprisonment under each count, the sentences to run concurrently, the conviction under the first count was sufficient to uphold the sentence, even if the conviction under the other count was erroneous. Vehicle Code, §§ 480, 482(a), St.1935, pp. 170, 171; § 530(b) 2, St.1939, p. 2198.

12. Criminal law ⇐1186(4)

Where record does not disclose a miscarriage of justice in convicting defendant of

offenses with which he is charged, any error in some of instructions is not "reversible error". Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Reversible Error".

13. Automobiles ⇐357

Even though section of Vehicle Code requiring driver of vehicle involved in accident resulting in injury or death to stop and fulfill requirements of another section to render reasonable assistance to person injured, defines two separate offenses, it was not error, in prosecution for failure to stop after accident and render aid, for court to fail in its instructions to distinguish between the two offenses, where evidence clearly showed that accused had knowledge, or as a reasonable person should have had knowledge, that his automobile had struck and injured pedestrian, and pedestrian was instantly killed, so that no assistance could have been given him, and jury could, therefore, not have been misled. Vehicle Code, §§ 480, 482(a), St.1935, pp. 170, 171.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Ernest Dallas was convicted of failing to stop his automobile and to render assistance after it struck and killed a pedestrian, and of driving his automobile on the left side of the roadway at a point less than 100 feet from an intersecting highway, resulting in the death of the same individual. From the judgment and from an order denying his motion for a new trial, he appeals.

Affirmed.

Rutherford, Rutherford & Rutherford, of Napa, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was convicted on two separate counts of an information. The first one charged him, under section 480 of the Vehicle Code, St.1935, p. 170, with failing to stop his automobile, after it was involved in an accident, to render assistance to a pedestrian who was struck by his machine and instantly killed. The third count charged him with driving his machine on the left side of a roadway at a point less than one hundred feet from an intersecting highway, contrary to section 530(b)2, of the same Code, St.1939, p. 2198, resulting in the death of the same individual. The defendant was acquitted of the offense of "negligent homicide" as defined in section 500 of that Code, with which he was also charged in the second count of the information. He was sentenced to imprisonment in San Quentin state prison for the respective terms prescribed by law, upon each of the offenses of which he was convicted. It was, however, provided that the two sentences should run concurrently. The defendant demurred to each count of the information on the ground that it failed to state a public offense. He also moved to arrest the judgment. His motion for a new trial was denied. From the judgment which was rendered and from the order denying a motion for new trial this appeal was perfected.

It is conceded the evidence supports the charges of the offenses of which the defendant was convicted, but a reversal of the judgment is sought on the ground that each count fails to state a public offense, and that the court erred in instructing the jury.

The notice of appeal was given from the judgment rendered; from the order denying the motion for new trial and from the order denying the motion in arrest of judgment.

[1, 2] The defendant is a married man 27 years of age. At 8 o'clock on the evening of July 21, 1940, he was driving an automobile in a southerly direction at the rate of forty miles or more an hour, along "Silverado Trail" a highway in Napa county, within one hundred feet of its intersection with Spring street. Seated in the rear seat of his machine was a friend by the name of Cullison, who had been previously convicted of a felony, and a girl sixteen years of age. Another young girl fifteen years of age was seated by the side of the defendant in the front seat. They overtook another machine driven by Melvin Collins, which was traveling ahead of their car at the rate of about thirty miles an hour. Collins was accompanied by a friend named Drapinski. Just before the accident occurred both occupants of the Collins car saw a man walking in the same direction along the extreme left side of the highway, nearly opposite their machine. Drapinski testified that the defendant's automobile overtook their car and "shot" by them on to the left side of the highway,

traveling at about "twice our speed". He thought that the pedestrian, Giovanni Musanti, was walking along the shoulder of the roadway, just beyond the paved portion of the highway. Collins exclaimed, "My God, they are going to hit this man." As the defendant's machine struck the pedestrian, the occupants of the Collins car distinctly heard a "sickening thud" and they saw his body thrown over the hood of defendant's car to the left-hand side, a distance of ten feet or more from the paved portion of the highway.

The speed of the defendant's machine was slackened slightly, but it continued on its course without stopping. Collins and Drapinski followed for a short distance and they procured the number of the defendant's car. They then returned to the scene of the accident and found the body of the deceased lying in the grass several feet from the pavement. Musanti was apparently dead. They immediately drove to Napa and notified the sheriff's officers of the "hit-and-run" accident.

The defendant testified that he was traveling forty miles an hour when he passed the Collins car, but he claimed that he did not see the pedestrian walking along the left-hand side of the highway. He said that they did feel a dull thud and heard the crashing of glass at the time of the accident and that someone said he wondered what they had hit. But they did not stop their machine until they reached a point at the "Triangle", three blocks beyond the point where the accident occurred. The defendant then turned his car around and drove back to see what his machine had hit, but he claims that they saw no object at that place which they could have struck. He did not stop his machine, but continued to drive about for half an hour. After that they once more returned to the scene of the accident. When they arrived the second time at that point they found two other machines parked there. The defendant then stopped, and he was immediately confronted by Deputy Sheriff Karl Graham, who had been previously notified of the accident by Collins. The body of Musanti lay in the grass sixteen feet from the edge of the concrete pavement. He was dead. The defendant was taken in custody, and he was subsequently charged with the crimes of which he was convicted. The left-hand front lamp of the defendant's machine was broken off and smashed. There was a large dent in his left front fender. He claimed he did not see the body of the deceased as it was hurled over the hood of his machine at the time he admits that he felt the bump.

There is an abundance of evidence to support the judgment of conviction of the offenses charged in both the first and the third counts of the information. There is no doubt the defendant wilfully failed to stop his automobile when the accident occurred, and that he deliberately refrained from attempting to render assistance to Musanti, after he knew that his machine had struck and either injured or killed his victim. The circumstances which were adduced in evidence warranted the jury in finding that the defendant knew his automobile violently struck a pedestrian at the side of the roadway, and that the victim was probably seriously injured. Collins and Drapinski, who were riding in the other car, clearly saw the pedestrian walking along the shoulder of the highway. Drapinski said their car was traveling thirty miles an hour, and that the defendant's machine passed them at nearly twice that rate of speed. If that be true, the defendant passed the Collins car on the left side of the highway at the rate of sixty miles an hour. The defendant was evidently paying little attention to the highway along which he was traveling. He and his male companion were taking two young girls out for a ride. They had been previously drinking beer, although there is no evidence that any of them were intoxicated. It is not unreasonable to assume the defendant's attention was diverted from reasonable scrutiny of the highway. Both Collins and Drapinski saw the accident and clearly observed the body of the deceased hurled over the hood of the defendant's car. They also heard a "sickening thud" when the pedestrian was struck. The left front lamp of the defendant's car was broken off and smashed. His left front fender was badly damaged. The defendant and all the occupants of his car admitted they felt the thud when the machine came in contact with the body of the pedestrian. They knew they had struck some object for they twice returned to the scene of the accident, but failed to immediately stop even to ascertain whether assistance was necessary or could be rendered. It seems impossible that the defendant and his companions could have failed to see the body of the deceased as it was hurled over the hood of their machine. The force of the

blow, the sound of the contact with the body, the crashing of the lamp, and the sight of the form as it was thrown over the hood of their machine to the left side of the highway must have warned them of the nature of the accident.

In this case the jury was specifically instructed, at the request of the defendant, that, unless the evidence proved he knew or by the exercise of reasonable care should have known, his machine struck and either injured or killed a pedestrian, they could not find him guilty of failing to stop his car or of neglecting to offer to render assistance. We are convinced the defendant did know, as every occupant of his machine must have known, that his automobile hit and injured a pedestrian. The jury so found.

[3] The defendant's attempt to appeal from the order denying his motion in arrest of judgment was ineffectual. A multitude of authorities hold that no appeal lies from that order. Sec. 1237, Pen.Code; People v. Martin, 188 Cal. 281, 205 P. 121, 21 A.L.R. 1399; People v. Pettinger, 94 Cal.App. 297, 271 P. 132; 8 Cal.Jur. 493, sec. 508.

[4] There is no merit in the contention that the first count of the information fails to state a public offense because it does not allege the defendant had knowledge of the fact that his automobile struck and either injured or killed a pedestrian. That count is couched in substantially the language of section 480 of the Vehicle Code. It sufficiently complies with sections 950, 951 and 952 of the Penal Code. It alleges that the defendant's machine, at a specified time and place, was "involved in an accident causing injuries and death to another person, to-wit: Giovanni Musanti" and that the defendant "did wilfully fail to immediately stop said motor vehicle * * * and (he wilfully neglected) to render aid as provided in section 482(a) of the Vehicle Code". The allegation that the defendant "did wilfully fail to stop his car" is equivalent to a statement that he knew his machine had injured or killed a man and that he deliberately refrained from stopping to render aid. That very criticism of an information couched in almost the identical language of this challenged count was determined adversely to this defendant's contention in the case of People v. Odom, 19 Cal.App.2d 641, 66 P. 2d 206. The demurrer to the first count of the information was properly overruled.

[5] It is immaterial that the demurrer to the second count was overruled, for the defendant was acquitted of that charge.

[6, 7] The demurrer to the third count was also properly overruled. That count charged the defendant in substantially the language of section 530(b)2 of the Vehicle Code with wilfully driving his automobile at a specified time and place, in passing another machine "on the left side on Silverado Trail, a public highway, within one hundred (100) feet of an intersection, to-wit: The intersection of Spring street and Silverado Trail", in violation of the section above mentioned, which "unlawful act was the proximate cause of the death of one Giovanni Musanti". It was not necessary to also allege that at the point where the defendant unlawfully drove his machine onto the left side of the highway, his view of the "bridge, viaduct or tunnel" which he was approaching was obstructed. That suggested omission has reference to an entirely different offense contained in the same paragraph. It may be conceded that section is susceptible of the construction placed upon it by the appellant, but we think the legislature intended thereby to prohibit the driving of a vehicle on to the left side of a highway within one hundred feet of an intersection, regardless of whether it was hidden from the view of the operator of the car, for the reason that such conduct would increase the hazard of a collision with some other machine which might be approaching around the corner on the same side of the highway. The portion of the designated section which is applicable to count three of the information reads as follows: "No vehicle shall at any time be driven to the left side of the roadway * * * 2. * * * when approaching within one hundred feet of or when traversing any intersection or railroad grade crossing."

The preceding offense has reference to the approach of intersecting highways. It has no reference to the approach of a "bridge, viaduct or tunnel". It is not necessary that the view of the intersection shall be obstructed in order to constitute an offense by driving the vehicle on to the left side of the highway.

[8, 9] The charge of wilfully and unlawfully violating that statute constituted an allegation of negligent operation of the automobile. Since it is also alleged that the negligent manner of driving the machine proximately resulted in the killing of

Giovanni Musanti, it constituted a charge of "negligent homicide" as that crime is defined in section 500 of the Vehicle Code.

[10] The defendant may not complain that he was convicted of two counts of an information, each of which is based upon the same facts resulting in the death of an individual, since in pronouncing judgment the court determined that the sentences under each count should run concurrently. People v. Anderson, 75 Cal. App. 365, 371, 242 P. 906; People v. Sharp, 58 Cal.App. 637, 209 P. 266.

[11] The defendant's term of imprisonment is not extended by virtue of the fact that both offenses grow out of the same facts. Nor would the term of his sentence be affected even though he was wrongfully convicted of the offense charged in the third count. The conviction of the offense charged in the first count is sufficient upon which to uphold the sentence which was pronounced against the defendant. There was no prejudicial error in overruling the demurrer to the several counts of the information.

The defendant has challenged as erroneous seventeen of the twenty-eight instructions which were given to the jury at the request of the prosecution. He has also challenged three instructions offered by himself which were modified by the court. We have carefully examined each instruction in view of the asserted errors. It would be an unwarranted task to attempt to analyze each separate instruction. It is true that some of the instructions are not prepared with the skill which might have been exercised. The fact that the defendant was being tried on three separate offenses at the same time created a more difficult task in drawing instructions applicable to each count, which, nevertheless, should be free from criticism. After carefully reading the entire charge we are of the opinion the jury was very fully and fairly charged, and that it was not misled by any of the challenged instructions. We are of the opinion that any inaccuracies which the charge may contain do not constitute reversible error.

[12] Even though certain instructions, with respect to the third count, may be considered erroneous provided the appellant's theory that section 530(b)2 makes it unlawful to drive on the left side of a roadway within one hundred feet of an intersection only when that intersection is hidden from the driver's view, still the verdict of conviction of the offense charged in the first count is valid, and the judgment should not be reversed on that account. The record does not disclose a miscarriage of justice in convicting the defendant of the offenses with which he was charged. Even though it be deemed that some of the instructions are erroneous, they do not constitute reversible error in view of article VI, section 4½, of the Constitution.

[13] Conceding that section 480 of the Vehicle Code, read in connection with section 482(a) of the same Code, defines two separate offenses, namely, (1) failing to "immediately stop such vehicle at the scene of such accident", and, (2) neglecting to "render to any person injured in such accident reasonable assistance", it was not error under the circumstances of this case for the court to fail in its instructions to distinguish between those two offenses. The evidence is uncontradicted that the defendant neglected to immediately stop his car at the scene of the accident, in spite of the fact that there is an abundance of evidence to show he had knowledge, or as a reasonable person should have had knowledge, that his machine struck and injured a pedestrian. The victim of that accident was found dead by the roadside within half an hour of the time of the accident. There is no evidence that he was not instantly killed. The defendant concedes that Musanti was instantly killed. The record of this case leaves no room to assert that any or all of the jurors may have concluded the defendant failed to render necessary aid to an injured man. Since he was dead, it may be conceded no assistance could have been given to him. It may therefore not be reasonably said the verdict is void because the jurors may not have all agreed upon the defendant's guilt of the same offense. Under the uncontradicted evidence in this case we are bound to assume the jurors all agreed that he was guilty on the first count of failure to stop his machine after striking a pedestrian so as to enable him to ascertain whether he had killed or merely injured a human being, and whether he could render assistance to the stricken man. There is no substantial merit in the criticism of the instructions.

If the defendant is correct in asserting that it is unlawful under section 530(b)2 of the Vehicle Code only when the opera-

tor of an automobile drives on "the left side of the roadway" within one hundred feet of an intersection when the driver's view of the intersection is obstructed, and that the verdict on the third count is therefore void because there is no evidence that the intersection was not visible within one hundred feet, that fact would not alter the judgment of conviction of the first count of the information for failure to stop his car and offer to render assistance to his victim. The sentences on both counts run concurrently. The invalidity of the verdict on the third count is ineffectual to reverse the judgment which is perfectly valid as to the first count. There is no uncertainty regarding the guilt of the defendant of the offense charged in the first count. All jurors united in finding him guilty of both the first and the third counts. Judgment on the first count should be affirmed regardless of whether the verdict on the third count be deemed valid or invalid. We think both convictions are valid. The motion for new trial was properly denied.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



42 Cal.App.2d 482

PEOPLE v. WILDE.

Cr. 460.

District Court of Appeal, Fourth District, California.

Jan. 20, 1941.

Hearing Denied Feb. 17, 1941.

1. Criminal law ⇐1086(13)

Where record did not show entry of judgment on verdict of guilty of grand theft, an appeal from the judgment was not properly before appellate court.

2. Criminal law ⇐1023(8)

An order denying a motion to quash a count in an information is not an "appealable order."

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Criminal law ⇐1023(8)

An order denying a motion in arrest of judgment is not an "appealable order."

4. Criminal law ⇐1023(13)

Where appeal from a judgment of conviction was not properly before appellate court because record did not show that a judgment had been entered and orders denying certain other motions were not appealable, the only appeal which appellate court could consider was that from order denying defendant's motion for a new trial.

5. Embezzlement ⇐10

Where client turned over pension checks to attorney for investment without any restriction against investments in realty, and over a period of years client made no objection when he knew attorney was investing in realty, and made use of the investments in that form in numerous instances, there was no fraudulent appropriation prior to client's demand for return of money.

6. Embezzlement ⇐10

Where there was no fraudulent appropriation by attorney of client's money left for investment up to client's demand for return of money, which had been invested in realty, client was not entitled, by the demand, to set aside the original right he had given attorney to invest the money in realty and thereby make amount immediately due in cash, and make attorney's inability to comply with demand "grand theft" by embezzlement.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

7. Embezzlement ⇐11(1)

Under theory of "constructive conversion" by attorney of client's money left with him for investment, there must be not only a demand by client, but a failure of attorney to make proper compliance with that demand.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Conversion".

8. Embezzlement ⇐10

Where attorney authorized by client to invest pension checks without restriction against investment in realty, invested money in realty, he was not required, on demand, to return a corresponding sum of money, but a proper demand and a sufficient compliance therewith involved his turning over the things in which money had been invested,

and his offer to do so, or in the alternative, if reasonable time were given him to convert investments into cash and return it in that form precluded his conviction of grand theft by embezzlement.

Appeal from Superior Court, San Diego County; Benjamin F. Warmer, Judge.

W. C. Wilde was convicted of grand theft by embezzling money belonging to his client, and from the judgment and from orders denying defendant's motion to quash the information as to a certain count thereof, and denying his motions for a new trial and in arrest of judgment, he appeals.

Order denying motion for a new trial reversed, with directions to grant the motion. Appeal from the other orders and the judgment dismissed.

Thomas Whelan and Vincent Whelan, both of San Diego, for appellant.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and James B. Abbey, Dist. Atty., and William P. Mahedy, Deputy Dist. Atty., all of San Diego, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with grand theft on the theory that he had embezzled certain sums of money belonging to one Michael J. White.

Prior to 1929, the defendant, who is a lawyer, had acted as attorney for White in the probating of his wife's estate, and had also assisted him in obtaining a pension based upon his services in the Spanish-American War. It appears without dispute that over a period of nearly ten years, beginning in 1929, White turned over to the defendant various sums of money for investment purposes. In May, 1939, White wrote to the defendant saying he was about to retire and asking him where his money was invested. The defendant replied, telling him that his money was invested in four certain parcels of real property which stood in White's name, asking him whether he would himself look after these properties or whether he desired defendant to continue doing so, and offering to furnish information about names of tenants, amounts of rentals, taxes, water bills, etc. White replied, asking the defendant to continue paying the water bills and collecting rents for the following month. During the next month, at his request, the defendant furnished White with itemized lists of all amounts which he had received from him or for him.

On August 8, 1939, an attorney retained by White called the defendant on the telephone and made a "flat demand" for the return of White's money, which he estimated at $10,000. The defendant told this attorney that he did not have the money, that White's money was invested in these four parcels of real property, and that these stood in White's name, but offered to sell the properties and obtain the money if given time in which to do it. On August 9, 1939, the defendant delivered to this attorney deeds to the four parcels of real property which then stood in the name of White. At that time the attorney told the defendant that they wanted the cash, that he knew the defendant did not intend to pay, and that if he did not immediately pay over the amount due in cash he was going to have him indicted, prefer charges against him before the Bar Association, and sue him.

On August 12, 1939, this attorney brought an action against the defendant and his wife, attaching all properties standing in their names, including their bank account. On August 26, 1939, this criminal action was brought, charging the defendant with six counts of grand theft, each count charging that on August 8, 1939, the defendant unlawfully and fraudulently appropriated for his own use, and not in the due and lawful execution of his trust, a certain sum of money, the property of Michael J. White. Thereafter, some time in October, 1939, the parties entered into a settlement agreement pursuant to which White conveyed the four parcels of real property to the defendant's wife and the defendant paid to White $12,000 which White admitted to be the full amount due him, with interest.

[1-4] This criminal action was continued, however, an information being filed in the superior court on November 24, 1939. A motion to quash and set aside the information was granted as to the first five counts thereof and the action proceeded to trial before a jury on the sixth count. This count charged the appropriation on August 8, 1939, of $3,216.17 in lawful money belonging to White, that amount being made up of one hundred

twelve pension checks, none of which was for over $40, which White had turned over to the defendant over a period beginning in September, 1929, and ending in December, 1937. The jury returnd a verdict of guilty on this count and the defendant has appealed from an order denying his motion to quash the information as to the sixth count, from an order denying his motion for a new trial, from an order denying his motion in arrest of judgment, and from the judgment. The record does not show the entry of a judgment, probably because an application for probation was pending at the time this appeal was taken. Since an appeal from the judgment is not properly before us and orders denying a motion to quash and denying a motion in arrest of judgment were not appealable orders (People v. Williams, 8 Cal.App. 595, 97 P. 684; People v. Williams, 184 Cal. 590, 194 P. 1019), the only appeal which may here be considered is the one from the order denying a new trial.

The first and main point presented is whether the evidence is sufficient to sustain the verdict of conviction. It was and is appellant's contention that he was authorized to and did invest White's money in the four parcels of realty for which he obtained deeds in White's name and which White later conveyed to appellant's wife in connection with the settlement agreement. The respondent however, contends that the appellant was not specifically authorized to invest White's money in real estate, that while the appellant honestly believed that he was entitled to so invest these trust funds that use was in fact unauthorized, and that the appellant's refusal or failure to pay over the amount due in cash after demand made on August 8, 1939, constituted a constructive conversion as of that date which is sufficient to support the verdict.

Of the four deeds which were turned over to White's attorney on August 9, 1939, one conveyed a lot from a man named Perrault to White, being dated February 2, 1931, and recorded February 28, 1931. Another conveyed two other lots from Perrault to White, being dated November 30, 1931, and recorded July 6, 1937. Another conveyed a lot from one Amo to White, being dated April 1, 1931, and recorded July 6, 1937. The fourth conveyed a lot from Perrault to White, being dated August 29, 1938, and this deed was not recorded. The respondent contends that these grantors, Perrault and Amo, were "dummies" and that these four properties at all times belonged to the appellant's wife. There is evidence that appellant's wife originally had some interest in these properties.

White testified that he turned over these various amounts, including the pension checks, to the appellant for investment, that he thought possibly they were to be invested in first mortgage loans "or something that way", but that absolutely nothing was said by him or the appellant as to how the monies were to be invested. All parties involved lived in San Diego, and White testified that he frequently visited the appellant and his wife on Sundays, and that on numerous occasions they took him around to look at these properties and others owned by the appellant. While he testified that he had not told the appellant to invest his money in real estate, at another time he testified that he had told the appellant to do this. He further testified that he thought the appellant was using this money to build houses and improve houses on his own properties, and was satisfied at the time, that from 1930 to 1938 he knew that the appellant had been using his money in this way and was satisfied, and that he knew that the appellant was investing his money in property which stood in the appellant's name and that this was satisfactory to him.

While testifying as to this knowledge and approval White insisted, at the trial, that he had never known that any of the real property in question had been deeded to him. However, it fully appears that each year from 1931 to 1938 White claimed a veteran's exemption in connection with the taxes on one of these properties, stating in the affidavits that he was the owner thereof. He admitted on the stand that the appellant had told him that this property had been conveyed to him, although he claimed he understood that this was only for the purpose of claiming the tax exemption. Moreover, White lived on another of these properties from the time it was deeded to him in 1931, up to the time of the settlement, in October, 1939, without paying any rent. It further appears, without conflict, that in 1934 when the federal government was attempting to reduce or cancel his pension, on the ground that his income had been too great in the year 1933, White signed and

submitted to the government a statement claiming that he had lost certain amounts during 1933 on three or four of the parcels of real estate here in question, in order to show that his income for 1933 was not sufficient to prevent a continuance of his pension.

[5, 6] Assuming that the jury believed the statement of the complaining witness that he did not know that any of these properties had been deeded to him, in spite of the strong evidence to the contrary, that fact becomes immaterial, since it appears, without dispute, that he had turned the money over to the appellant for investment without providing that it should not be invested in real estate, and since he made no objection over a period of years when he knew the appellant was putting the money into an investment of that kind. He was not only satisfied therewith at the time, but he himself made use of and claimed the benefit of the investment in that form in at least eight or nine instances scattered through the entire period. Under these circumstances there was no fraudulent appropriation of the money up to the time of the demand, the money had then been invested in real property, and whether or not the complaining witness knew the properties had been deeded to him he was not entitled by a demand to set aside the original right he had given to invest the money, and make the amount immediately due in cash.

The respondent admits and insists that it "conclusively" appears from the evidence "that in appropriating White's money to purchase the four pieces of property, title to be vested in White's name, appellant did so honestly believing that the trust so authorized him"; that up to the time of the demand there had not been a fraudulent conversion; that "there was therefore no proof of fraudulent conversion until the demand and refusal of August 8, 1939"; that "the entire theory of the case of the prosecution was constructive conversion, namely, that the appropriation accompanied by fraudulent intent did not take place until the demand and refusal which was well within the three-year period"; and that "we are without then, a fraudulent conversion until the demand was made and appellant refused to comply. When he refused, he ipso facto appropriated to his own use" the money in question. The respondent particularly relies upon the case of People v. McEnerney, 112 Cal.App. 609, 297 P. 568, in which the defendant received certain funds as the administrator of an estate and failed to show what he had done with the money when a demand was made upon him several years later, and where it was held that there was a constructive conversion at the time of the demand. In that case, the defendant was not authorized to invest the funds and he failed to account for them upon demand. The distinction is obvious between that case and the one now before us where the appellant was authorized to invest the funds and where he accounted and turned over the proceeds before and at the time the demand was made.

[7, 8] Even under the theory of a constructive conversion there must not only be a demand but a failure to make a proper compliance with that demand. Having invested these funds as he was supposed to do the appellant was not required to immediately turn over a corresponding sum of money, but both a proper demand and a sufficient compliance therewith involved his turning over the things in which the money had been invested. He not only did this, but offered, if it was desired and reasonable time were given, to convert the investments into cash and return it in that form. The absence of a fraudulent intent up to the time of the demand is conceded and we are unable to find any evidence either showing such an intent at that time or disclosing a failure to comply with a proper demand that he turn over the things in which the money had been invested. In our opinion, the evidence is not sufficient to support the verdict and the motion for a new trial should have been granted.

Because of the views herein expressed it is unnecessary to consider the other points raised by the appellant.

The purported appeal from the judgment, the appeal from the order denying the motion to quash the information, and the appeal from the order denying the motion in arrest of judgment are dismissed. The order denying the motion for a new trial is reversed and the trial court is directed to grant said motion.

We concur: MARKS, J.; GRIFFIN, J.

42 Cal.App.2d 551

BECK v. SIROTA.

Civ. 12772.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1941.

Hearing Denied March 20, 1941.

1. Negligence ⇐32(1), 56(1), 65, 82

In determining whether defendant in personal injury action by invitee was negligent, and, if so, whether his negligence was the sole proximate cause of invitee's injuries and whether invitee was negligent, and, if so, whether his negligence contributed to his injuries, jury were privileged to consider the defendant's statutory obligation to an invitee on his premises as well as his contractual duty.

2. Automobiles ⇐244(3)

In action against operator of automobile parking station by employee of one engaged in washing outside walls of building adjacent to parking station, for injuries sustained in fall from scaffold when electric light cord hanging from scaffold was caught on automobile which one in charge of parking station was driving from where it was parked almost beneath scaffold, pursuant to agreement between operator of station and one engaged in washing walls, verdict in favor of injured employee was sustained by substantial evidence.

3. Appeal and error ⇐996

Merely because it might have been inferred that defendant in personal injury action was not negligent or that plaintiff was negligent, or that plaintiff's negligence contributed to his injuries, was not sufficient to upset verdict for plaintiff.

4. Appeal and error ⇐996

In personal injury action, it was for the jury to choose between the contradictory statements or contradictory inferences and, by such choice of the jury, the District Court of Appeal was bound.

5. Appeal and error ⇐1001(1)

A reversal is proper only where there is no substantial evidence in support of the verdict.

6. Appeal and error ⇐1002

In dealing with appeals involving a conflict of testimony, the reviewing court is not privileged to upset the findings of a jury merely because there are several witnesses in support of a fact as against one witness whose testimony convinced the jury.

7. Appeal and error ⇐996

The jury is the exclusive judge of the weight and value of the inference that may be drawn from the evidence, and a usurpation by an appellate court of the power to determine the facts is contrary to law.

8. Appeal and error ⇐996

The fact, that some inference other than that which the jury drew from the evidence in the case is possible, is not sufficient to warrant interference with the jury's verdict by the appellate court.

9. Negligence ⇐4

"Ordinary care" is a relative term, and the amount of care must be in proportion to the danger to be avoided and the consequences reasonably to be anticipated.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary Care".

10. Automobiles ⇐155

Where operator of automobile parking station agreed with one engaged in washing outside walls of building adjacent to the parking station, that automobiles underneath the scaffold would be moved, the obligation imposed on operator of parking station to use due care not to injure one on scaffold was enlarged by reason of the dangerous nature of the objects to be moved.

11. Negligence ⇐68

A person is justified in assuming that he is not exposed to a danger which can come to him only from a breach of a duty owed him by another.

12. Automobiles ⇐155

Where operator of automobile parking station agreed with one engaged in washing outside walls of building adjacent to parking station that automobiles underneath the scaffold, being used in washing the building, would be moved, the obligation of operator of parking station to use due care not to injure anyone on the scaffold was "ex contractu" and "ex delicto", and operator of parking station owed duty to exercise reasonable care in removing the automobiles. Civ.Code, § 1708.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Contractu" and "Ex Delicto".

13. Automobiles ⇐155

One in charge of automobile parking station, in moving automobile parked almost beneath scaffold being used in washing outside walls of building adjacent to parking station, in accordance with agreement of operator of automobile parking station that the automobiles would be so removed, had the duty in the exercise of "ordinary care" to ascertain before driving automobile away whether it was likely to be hooked to a looped electric light cord suspended from the scaffold. Civ.Code, § 1708.

14. Automobiles ⇐206

One who was engaged in washing outside walls of building from a scaffold had the right to presume that operator of automobile parking station adjacent to the building, who had agreed that automobiles would be moved from beneath the scaffold, and his agents would perform their duty by removing the automobiles in such a manner as would avoid injuring him.

15. Negligence ⇐68

Generally, every person has a right to presume that every other person has performed his duty and has obeyed the law.

16. Negligence ⇐68

In absence of reasonable grounds to think otherwise, it is not negligence for one to assume that he is not exposed to danger which can come to him only from a violation of law or duty by some other person.

17. Appeal and error ⇐996

Where jury determined under proper instructions that plaintiff was not guilty of contributory negligence, their finding on that point would not be disturbed so long as reasonable minds might have differed on the question as to whether the acts of the plaintiff constituted negligence on his part.

18. Automobiles ⇐240(3)

In action against operator of automobile parking station by employee of one engaged in washing outside walls of building adjacent to station for injuries sustained in fall from scaffold when electric light cord hanging from scaffold was caught on automobile which one in charge of station drove from almost beneath scaffold pursuant to agreement between operator of station and one engaged in washing walls, there was not a "fatal variance" between allegata and probata, because it was alleged that automobile was parked below scaffold when it was parked three feet to one side of scaffold, where pleadings were broadened by allegations of answer.

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

19. Appeal and error ⇐1170(5)

Since the purpose of an allegation is to apprise the defendant of the claims of the plaintiff, and of the facts he intends to prove, the failure of a complaint to indicate all facts to be relied on is cured where one trial has already occurred and the facts adduced at the second trial are identical with those presented at the first. Const. art. 6, § 4½.

20. Appeal and error ⇐989

If a cause of action has been stated and proved, appellate courts are concerned with the facts established, provided the adversary party has had full opportunity to present his evidence and his argument to the trial court.

21. Automobiles ⇐246(39)

In action against operator of automobile parking station by employee of one engaged in washing outside walls of building adjacent to station for injuries sustained in fall from scaffold when electric light cord hanging from scaffold was caught on automobile which one in charge of station was driving from where it was parked almost beneath scaffold, pursuant to agreement between operator of station and one engaged in washing walls, instruction that operator of station was required to use such care as an ordinarily prudent person would have used where movement of "any" automobile at station would endanger safety of workmen was not erroneous, where no issue arose with respect to any automobile except the automobile on which light cord caught.

22. Automobiles ⇐155

Where operator of automobile parking station agreed to move automobiles away from wall adjacent to parking station while wall was being washed, agreement required operator of station to remove automobiles in such close proximity to operations of workmen as to imperil the safety of any automobile, and hence operator of station would not be relieved from liability for injuries sustained by workman when electric light cord hanging from scaffold was caught on automobile, causing workman to fall from scaffold, merely because automobile was not directly below scaffold. Civ.Code, § 3533.

23. Trial ⇐260(1)

Refusal to give defendant's requested instruction was not error where everything embraced within that instruction was contained in other instructions which were read to the jury.

24. Appeal and error ⇐1064(1)
Trial ⇐234(7)

The giving of plaintiff's instruction that, where there is other evidence that conflicts with presumption of exercise of ordinary care, it is jury's duty to weigh the evidence against the presumption, to determine which, if either, preponderates, was not prejudicial error, where plaintiff because of his injuries was prevented from giving a clear narrative of the events concerning the accident.

25. Trial ⇐194(1), 240, 260(1)

Trial court properly refused to give requested instructions which were argumentative or which commented on the effect of the evidence, or which repeated the contents of instructions given.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Paul Beck against Ben Sirota, to recover for personal injuries sustained by the plaintiff while working as a wall cleaner. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Hearing denied; EDMONDS, J., dissenting.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

Frances J. Gabel and J. L. Kearney, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals from a judgment of $10,000 pursuant to verdict for personal injuries suffered by plaintiff September 14, 1937, while working as cleaner of a wall. The judgment followed the second trial.

The bases of the appeal are: (1) The insufficiency of the evidence; (2) fatal variance between plaintiff's pleading and proof; (3) error in giving certain instructions; (4) errors in refusing certain instructions.

(1) On December 14, 1937, one Bates had a contract to wash the walls of the building occupied by the Southern California Gas Co., located near the corner of Eighth and Flower street in the city of Los Angeles. Plaintiff was one of his workmen. Defendant operated a parking station on the north side of the building and the witness Welch was in charge of the parking station at the time of the occurrence that resulted in plaintiff's injuries. Prior to commencing the washing of the building, Bates contracted with the defendant to have the cars moved away from the wall after 8 p. m. so that it would be safe for his men to work there and to prevent injuries to the cars by chemicals used in washing the building. Welch knew of the contract between Bates and defendant and pursuant thereto, and at plaintiff's request, undertook to move some 10 or 12 cars parked along the north wall, prior to plaintiff's beginning work at about 8 o'clock in the evening. In order to apply the chemicals to the building, plaintiff stood upon a scaffold which hung from the roof. Having mounted the scaffold, he took the 150-foot cord which had been plugged into an outlet on the sixth floor, turned on the five 100-watt bulbs and then lowered the looped cord to the ground 39 feet below. In order to see that it was safe to move the cars, Welch walked between the building and the cars to inspect them and removed all cars standing directly below the scaffold, including car No. 7. After checking out a customer, he returned to remove car No. 6. He stepped on its running board and looked toward the building wall but saw no cord suspended. He entered the car with the windows closed, gunned the motor, pulled forward about 15 feet when he felt a sharp tug on the vehicle. He stopped the car and learned that the light cord hanging from the scaffold had become attached to the rear bumper and had jerked down the scaffold throwing plaintiff to the ground.

Plaintiff was about 25 years of age, had worked at his trade for eleven months, washing buildings and cleaning machinery and tanks. He sustained a broken back, broken feet and a split of the crotch. He was confined in the hospital for ninety-six days; walked on crutches for six or seven weeks and was suffering from pain in his feet and back at the time of the trial two years subsequent.

Appellant claims that by reason of the fact that car No. 6 was 3 feet west of the scaffold he was not required to remove it to accommodate Bates and his workmen. This is answered by the fact that the parties themselves construed their agreement to mean that he should remove car No. 6 to another part of the lot and that construction is evidenced by the fact that Welch, without any specific order or special agree-

ment, was attempting to remove the car at the time he dragged plaintiff from the scaffold. Whether car No. 6 was partially under the scaffold or entirely out is of no moment. The best that can be said for appellant is that the car was at the wall and in close proximity to the area directly under the scaffold. This would have subjected the car to the spray of the chemicals used by the cleaners. At the same time it was reasonable to anticipate that ropes and cords would be suspended from the scaffold and would contact the cars below. The removal of car No. 6 was undertaken pursuant to the contract as well as from a sense of duty to an invitee. In his attempt, Welch failed to exercise reasonable care in that he failed to go around it as he had done prior to moving the cars directly beneath the scaffold. The knowledge of the average person that ropes and cords may sway and swing when suspended from an elevation of 40 feet was sufficient to put Welch on notice that the suspended cord was likely to attach to some part of an automobile within 5 feet of the point perpendicularly below the position where plaintiff had stood as he let down the cord. This operation of plaintiff was done with care as a task to be performed in the course of cleaning the wall. The use of electric lights by plaintiff was known to defendant and his employees. In view of the fact that the scaffold had to be raised and lowered, it was readily to be understood that the cord would necessarily hang below the scaffold when the latter was above the earth. Furthermore, the consciousness of Welch that the loop of the cord might have caught on to a car was evidenced by his careful inspection of the cars removed prior to his moving car No. 6. His anticipation of danger was further demonstrated by his mounting the running-board of car No. 6 to ascertain whether it could be moved with safety.

[1] The jury had to determine (1) whether defendant was negligent, and, if so, (2) whether his negligence was the sole proximate cause of plaintiff's fall. In making a finding upon these questions, they had to consider (3) whether plaintiff was negligent and, if so, (4) whether his negligence contributed to his injuries. In determining these questions, the jury were privileged to consider the defendant's statutory obligation to an invitee upon his premises as well as his contractual duty.

[2-8] That there was substantial evidence to support the verdict is established by the foregoing recitals. Merely because it might have been inferred that defendant was not negligent or that plaintiff was negligent and that his negligence contributed to his injuries, is not sufficient to upset the verdict. It was for the jury to choose between the contradictory statements or contradictory inferences and by such choice this court is bound. Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; People v. Crownover, 34 Cal.App.2d 7, 92 P.2d 929. By thus choosing they decided that defendant was negligent and that his negligence was the sole proximate cause of plaintiff's injuries. A reversal is proper only where there is no substantial evidence in support of the verdict. Ibidem. In dealing with appeals involving a conflict of testimony, the reviewing court is not privileged to upset the findings of a jury merely because there are several witnesses in support of a fact as against one witness whose testimony convinced the jury. People v. Crownover, supra. The jury is the exclusive judge of the weight and value of the inference that may be drawn from evidence and a usurpation by an appellate court of the power to determine the facts would be contrary to law. Also the fact that some inference other than that which the jury drew from the evidence in the case is possible is not sufficient to warrant the interference with the jury's verdict by the appellate court. Hamilton v. Pacific Electric Ry. Co., 12 Cal.2d 598, 86 P.2d 829.

[9-11] Ordinary care is a relative term. The same quantum of care that might have been exercised by defendant in removing a farm wagon from the wall is much less than that which was imposed upon defendant in moving a dangerous instrumentality, such as a modern automobile. The amount of care must be in proportion to the danger to be avoided and the consequences reasonably to be anticipated. Thus was the obligation placed upon defendant enlarged by reason of the dangerous nature of the objects to be moved. 19 Cal.Jur., 579. A person is justified in assuming that he is not exposed to a danger which can come to him only from a breach of a duty owed him by another. 45 Cal.Jur., 954.

[12-16] Defendant's obligation was two-fold, ex contractu and ex delicto. Although the contract with plaintiff's employer imposed upon him the necessity of exercising reasonable care, the same obligation obtains by virtue of statute. De-

fendant owed the duty to plaintiff as an invitee to exercise reasonable care in removing the automobiles. Civ.Code, sec. 1708; 45 C.J., 838; 19 Cal.Jur., 618. Such care imposed the task of ascertaining whether before driving a car away from the space it occupied against the wall it was likely to be hooked to a looped cord suspended from the scaffold. Less than that would have been less than ordinary care. But that obligation was increased by virtue of the contract he had made with plaintiff's employer to move the cars "so it would be safe" for plaintiff and his fellow workmen on the scaffold. 1 R.C.L., 321. His promise was coincidental with his statutory obligation. Jones v. Kelly, 208 Cal. 251, 280 P. 942. Plaintiff had a right to presume that the defendant and his agents would perform their duty by removing the machines in such a manner as would avoid injuring the cleaners. It is a general rule that every person has a right to presume that every other person has performed his duty and obeyed the law. In the absence of reasonable grounds to think otherwise, it is not negligence for him to assume that he is not exposed to danger which can come to him only from a violation of law or duty by such other person. Robbiano v. Bovet, 218 Cal. 589, at page 597, 24 P.2d 466; Harris v. Johnson, 174 Cal. 55, at page 58, 161 P. 1155, L.R.A.1917C, 477, Ann.Cas.1918E, 560; Moreno v. Los Angeles Transfer Co., 44 Cal.App. 551, 186 P. 800; Medlin v. Spazier, 23 Cal. App. 242, 137 P. 1078.

[17] The jury having determined under proper instructions that plaintiff was not guilty of contributory negligence, their finding upon that point will not be disturbed so long as reasonable minds might have differed upon the question as to whether the acts of plaintiff under the circumstances constituted negligence on his part. Seller v. Market Street Railway Co., 139 Cal. 268, 271, 72 P. 1006; Hamilton v. Pacific Electric Ry. Co., supra.

[18-20] (2) Appellant contends that there is a fatal variance between the allegata and the probata in that plaintiff alleged that as he was standing upon the said platform or scaffold, the defendants, well knowing that ropes and wiring were hanging therefrom to the ground, negligently parked an automobile in the space below the scaffold and carelessly moved the same with rope or wiring from the scaffold caught around a fender, causing the scaffold to be swung out, throwing plaintiff to the ground and injuring him. But, contends appellant, the proof was that before plaintiff mounted the scaffold the cars directly beneath it had been moved and that that car No. 6, which brought plaintiff to his sorrow, was parked 3 feet west of the scaffold and that the light cord at the time plaintiff mounted to begin his work was not attached to the automobile or near it. But the narrow construction given the contract by appellant is not in keeping with the circumstances surrounding the incident or with the understanding of both parties as to the nature of the obligation imposed upon defendant. Steam and acids sprayed upon a brick or concrete wall do not converge in a narrow channel by which they find their way to earth. They are easy victims of the winds and air currents that from an altitude of 40 feet are conveyed to neighboring spaces, too often farther than 3 feet horizontally from the point at which they have been applied to the surface. If the agreement contemplated the safety of the cleaners, that safety could have been imperiled only by the ropes and cords suspended from the scaffold to the space below or in immediate proximity thereto. Not only were the issues created by the allegation of the complaint, the substance of which is given above, but the issue was broadened by the allegations of the answer to the effect that defendant had contracted to remove the automobiles from the wall underneath the scaffold and would keep the cars from being parked in that space while the cleaners were at their work to the end that they might work in safety. With the issues thus broadened, it was competent for plaintiff to prove that the safety of the workmen on the scaffold was to be secured by the careful removal of the cars parked against the wall. To grant the contention of appellant would operate to defeat justice by adhering to an over-wrought technicality in the construction of the language of the agreement and the duties of defendant to his invitees. The defendant having thus enlarged the issues, they embraced the negligence of defendant to an invitee upon his premises. Wantz v. Union Bank, etc., Co., 137 Cal.App. 98, 29 P.2d 882, 31 P.2d 826; Woods Central Irrigating Ditch Co. v. Porter, etc., Co., 173 Cal. 149, 159 P. 427. Furthermore since the purpose of an allegation is to apprise the defendant of the claims of the plaintiff and of the facts he intends to prove, the failure of a complaint to indicate all of the facts to be relied on is

cured where one trial has already occurred and the facts adduced at the second trial are identical with those presented at the first. Bridge v. New Amsterdam Casualty Co., 129 Cal.App. 355, 19 P.2d 76. Therefore, defendant cannot plead prejudice or surprise by plaintiff's proof that the removal of car No. 6 caused his injuries; under these circumstances to reverse the judgment because of a variance would do violence to section 4½ of article VI of the Constitution, which forbids a reversal except for prejudicial error. The theory of the pleading is not the controlling doctrine under such circumstances. California Western States Life Ins. Co. v. Tucker, Cal.Sup., 98 P.2d 511. If a cause of action has been stated and proved, appellate courts are concerned with the facts established provided the adversary party has had full opportunity to present his evidence and his argument to the trial court. 19 Cal.Jur., 692, sec. 115. The authorities cited by appellant in support of his claim of a variance (Brown v. Northern California P. Co., 14 Cal.App. 651, 114 P. 54, 74; McKeon v. Lissner, 193 Cal. 297, 223 P. 965; Marin Municipal Water Dist. v. Peninsula Co., 34 Cal.App.2d 647, 94 P.2d 404) do not apply. In neither the Brown case nor the Marin case was any negligence proved. In the McKeon case the allegation of negligence consisted in defendant's failure to keep the elevator and its operating apparatus in repair. But at the trial the only proof of negligence was that the hallway leading to the elevator was dark and confusing which condition was the proximate cause of plaintiff's injuries.

[21, 22] (3) Plaintiff requested the court to instruct the jury as follows: "You are instructed that the defendant was required to use such care as an ordinarily prudent person would have used for the safety of workmen who might be engaged in work where the movement of any automobile on said parking lot would endanger the safety of said workman. If you find that the defendant failed to exercise such care for the safety of Paul Beck as an ordinarily prudent person would have used, under the same or similar circumstances, you will find that the defendant was negligent in that regard." This instruction was not error. It would have been in better form had the word "any" been omitted therefrom, but no issue arose with respect to any car outside of the area immediately below the scaffold except car No. 6. There was no dispute as to the duty of defendant to move with reasonable care the car from the space seven. Indeed, appellant's brief stated: "Welch testified that prior to moving the car in lane 7 *he walked between the rear of the cars and the building wall to see if there were any ropes but did not do so when he returned a moment later to move the car in lane 6.*" These were the only two cars specifically discussed in the course of the trial. Defendant's agent thus demonstrated his own caution as well as defendant's view of his obligation under the circumstances in ascertaining whether there was any rope affixed to the car in lane 6. Appellant proceeds upon the theory that, because some of the evidence was that car No. 6 was some 3 feet west of the west end of the scaffold, it was not immediately beneath the scaffold and therefore he was not obliged to remove it in order to give safety to the cleaners or to the cars that were parked near the wall. The law disregards trifles. Civ. Code, sec. 3533. But in view of the fact that the plaintiff was cleaning the wall with steam and acids which, on being blown against the building would have been detrimental to any car sprayed with it, we cannot conclude otherwise than that a fair interpretation of the contract between Bates and Sirota required Sirota to remove the cars which were in such close proximity to the operations of the workmen as to imperil the safety of any automobile. Likewise, in view of the fact that there was no car by the wall and yet outside of the space directly beneath the scaffold except car No. 6, the instruction with reference to "any car" could have directed the attention of the jury to no car other than car 6. The attempt of appellant to apply the rule laid down in Marovitch v. Central, etc., Co., 191 Cal. 295, 216 P. 595, is unavailing. In that case, and in others there cited, specific allegations of negligence are made which the court held should have guided the trial court in giving instructions with reference to the negligence charged. But in view of the construction given by the parties themselves and of the fact that a reasonable interpretation of the contract would require the defendant to move cars that were sufficiently near the scaffold to suffer harm from the cleaning operations, it cannot be said that the phrase in plaintiff's pleadings in describing "the space immediately below said scaffold" could mean only the cars perpendicularly beneath the scaffold.

[23] Appellant further complains that in view of plaintiff's instruction No. 27 the court should have read defendant's re-

quested instruction XXXIV. That instruction reads as follows: "Plaintiff specifically alleges that at the time of the accident the defendant, knowing that ropes and wiring were hanging from the scaffold to the ground, negligently parked, or permitted to be parked, an automobile in the space immediately below said scaffold, and negligently moved the same with a rope or wire from said scaffold caught around a fender or bumper of said automobile thereby causing said scaffold to be swung out from the wall of the building throwing plaintiff to the ground. Unless plaintiff proves these allegations of the complaint by a preponderance of the evidence he cannot recover herein." But instruction III embraced substantially everything contained in his instruction XXXIV. Furthermore, if anything suggested in instruction XXXIV is not included in defendant's instruction III, it is found in plaintiff's instruction No. 27, both of which were read to the jury.

(4) Plaintiff's instruction No. 21 given by the court reads as follows: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. Where there is other evidence that conflicts with such presumption, it is the jury's duty to weigh that evidence against the presumption to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof." Appellant assigns this instruction as error and urges that, inasmuch as plaintiff and his witnesses gave their testimony with reference to the manner in which the injuries of plaintiff were received, an instruction to the effect "that every person is presumed to take ordinary care of his own concerns and that he obeys the law" should not have been given. In support of this proposition, appellant cites three cases, Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65; Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709, and Speck v. Sarver, Cal.App., 106 P.2d 49. In the Mundy case, the court having heard the uncontradicted testimony of eye-witnesses, instructed the jury to return a verdict for the defense. Thus, from plaintiff's own witnesses it was made clear that "there [was] no room for the operation of the presumption that he [decedent] was exercising due care". [8 Cal.2d 294, 65 P.2d 66.] It had been declared in the case of Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269, 273, that the "presumption cannot be deemed to give rise to a conflict * * * unless the presumption on the one hand is irreconcilable with the evidence on the other". In the Paulsen case, it was established that the defendant was negligent and that under the law plaintiff had not assumed the risks of his employment. Under the United States statutes, he was entitled to all the rights and remedies granted to the railway employees under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. In commenting upon the doubtful propriety of including among the instructions the presumption that plaintiff acted with ordinary care and obeyed the law, Mr. Justice Curtis observed that the presumption is evidence and *"it is difficult to see how there was any place for a presumption as to the plaintiff's conduct"*. [4 Cal.2d 111, 47 P.2d 714.] The judgment for plaintiff was affirmed in spite of the criticised instruction. The Speck case is not pertinent for the reason that the instruction there complained of stated "that plaintiff is not guilty of contributory negligence". [106 P.2d 51.] This goes further than the presumption contained in the instruction complained of.

The giving of such instruction has been the subject of much discussion. The consensus of opinion is that it is not prejudicial error. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 85 P.2d 152; Whicker v. Crescent Auto Co., 20 Cal.App. 2d 240, 66 P.2d 749; Westberg v. Willde, 14 Cal.2d 360, 367, 94 P.2d 590, 594. In the Westberg case, all possible facts with respect to the negligence of the plaintiff were before the court. The court there remarked that it was difficult to perceive how any presumption as to defendant's conduct could add to or detract from the evidence presented and held that "the giving of such an instruction under the circumstances just related was not prejudicial". In Tuttle v. Crawford, supra, the giving of the instruction worked no material prejudice to the defendant. "The presumption is a natural one, and the bare Code section, as given by the court, told the jury nothing that the philosophy of life and human experience do not impart to the average person," said the court. "No instruction was given defining the force or effect of presumptions." [8 Cal.

2d 126, 63 P.2d 1131.] In Parker v. Manchester Hotel Co., supra, 29 Cal.App.2d at page 459, 85 P.2d 152, where the plaintiff had testified with respect to her own injuries, the court held that giving the presumption, even if erroneous, was not sufficiently prejudicial to justify a reversal. See Whicker v. Crescent Auto Co., supra; Varner v. Skov, 20 Cal.App.2d 232, 67 P. 2d 123. In the case of Varner v. Skov, supra, the judgment was not reversed on account of the giving of the instruction, although it was assigned as error. In Whicker v. Crescent Auto, supra, an elderly woman was injured by an automobile as she stepped from the safety zone. She apparently suffered some confusion accompanying the casualty and her recollection was "Far from clear". Neither did the testimony of the driver of the automobile destroy the probative weight of the fact presumed. It was held that where facts are admitted or established by proofs which are irreconcilable with the presumption it loses its evidentiary weight; also that there is no sound reason why the familiar doctrine that a party may contradict though not impeach his own witnesses, should not, if the circumstances are consistent with honesty and good faith, be applied when he is himself the witness.

[24] In the instant case the trial court must have been impressed that plaintiff suffered confusion resulting from his fall from the scaffold and that he was thereby prevented from giving a clear and uncontradictory narrative of the events concerning the accident. If he was confused, he was entitled to the benefit of the presumption; if he was not confused the instruction was not prejudicial error.

[25] (5) Appellant has assigned as error the court's refusal to give eight of his instructions, viz., XX, XXIX, XXXV, XXXVII, XXXVIII, XXXIX, XL, XLI, on the ground that they were necessary to the proper presentation of his theory of the case. We have scrutinized each of them and find that they are argumentative; that they comment upon the effect of the evidence, or that they repeat the contents of instructions given. No useful purpose can be served by setting them out herein in view of the fact that the court's instructions fully and correctly advised the jury with reference to all of the issues.

Judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

42 Cal.App.2d 515

HECHLER et al. v. McDONNELL.

Civ. 12743.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1941.

Hearing Denied March 20, 1941.

1. Negligence ⇐135

In action for injuries sustained when restaurant patron slipped and fell while arising from stool on terrazzo platform, evidence warranted finding that patron, who knew that platform had been mopped while she ate, but who did not know and had not been warned that platform was still wet when she began to arise, was not negligent.

2. Negligence ⇐66(2)

To forget a known danger is not "negligence" unless such forgetfulness shows want of ordinary care.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

3. Negligence ⇐68

A restaurant patron who knew that terrazzo platform had been mopped while she sat on stool and ate her lunch, would be justified in assuming when she began to arise from stool, that platform had been mopped properly and in a manner that would not endanger her safety, and that restaurateur would not expose patron to a danger that would come to patron only through violation of restaurateur's duty to patron.

4. Negligence ⇐44

A terrazzo floor is not inherently dangerous in and of itself, but such a floor becomes potentially dangerous when it is wet.

5. Negligence ⇐32(1), 68

A restaurateur's duty to exercise ordinary care for safety of invitees requires restaurateur installing terrazzo floor to take precaution not to allow floor to become or remain wet while invitees are present, and to see that mopping is done in such a manner as effectually to dry the surface mopped before an invitee is permitted to walk on such surface, and invitee is not required to look for wet floors.

6. Negligence ⇐32(1)

The keeper of a public place of business is bound to keep his premises in a safe condition and must use ordinary care to avoid

accidents or injury to those properly entering upon premises on business.

7. Negligence ⇐134(3)

In action for injuries sustained when restaurant patron slipped and fell while arising from stool on terrazzo platform which had been mopped while patron ate, evidence warranted finding that restaurateur was negligent in allowing platform to be so wet as to lubricate it when patron arose.

8. Appeal and error ⇐1001(1)

The findings of jury will not be disturbed on appeal when supported by substantial evidence.

9. Trial ⇐296(9)

In action for injuries sustained when restaurant patron slipped and fell while arising from stool on terrazzo platform, instruction that "it is established that the employee who was mopping the floor in the restaurant at the time involved in the accident in question was acting as agent" for restaurateur, was not prejudicial error as assuming existence of disputed fact as to whether floor was mopped or swept, where jury were instructed that it was their exclusive province to determine the facts in the case and that trial judge did not intend to suggest inferences for jury to draw.

10. Negligence ⇐68

One to whom a duty of care is owing by another may assume that the latter will perform it, and, in the absence of reasonable grounds to think otherwise, is not negligent in assuming that he will not be exposed to a danger, which can arise only by violation of such duty.

11. Negligence ⇐68

An invitee can assume that keeper of public house will perform duty of care owing to invitee, and in absence of reasonable ground to think otherwise, invitee is not negligent in assuming that invitee will not be exposed by keeper to a danger which can arise only by violation of such duty.

12. Appeal and error ⇐1170(9)

In personal injury action, inclusion in damage instruction of element of compensation for damage to property was improper but was harmless, where no claim was made for damage to property and there was no evidence received of damage to property. Const. art. 6, § 4½.

13. Appeal and error ⇐932(1)

Where no claim or proof of damage to property was made, District Court of Appeal would not assume that jury intended to include such damage in the award, notwithstanding inclusion in damage instruction of element of compensation for damage to property.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Minnie Mae Hechler and another against M. A. McDonnell, for injuries sustained when the named plaintiff fell in defendant's restaurant. From a judgment for the plaintiffs, the defendant appeals.

Affirmed.

P. T. Howe and D. E. Ruppe, both of Los Angeles, for appellant.

Harold David Geffen, of Los Angeles, for respondents.

MOORE, Presiding Justice.

This is an appeal by defendant from a judgment, after verdict, in favor of plaintiffs in the amount of $3,500.

About 2:30 p. m. on July 18, 1938, plaintiffs, husband and wife, entered the restaurant of defendant, walked across a light-colored terrazzo floor to stools located upon a black-colored terrazzo platform which was 8 to 10 inches above the floor level. Plaintiff Minnie Mae mounted the platform, occupied a stool next to her husband, ordered and ate her lunch. While thus engaged in consuming her viands she observed a man enter from the kitchen and sweep the floor and platform. He retraced his steps to the kitchen, returned with bucket and mop and proceeded to mop the floor and platform where plaintiffs were seated. Mrs. Hechler finished her meal, turned her stool to the right and, with both feet on the platform, attempted to rise. Before she could gain her equilibrium both feet slipped from beneath her and she fell, fracturing her right hip.

Appellant contends that (1) plaintiff was negligent as a matter of law in having full knowledge of the wet platform; (2) that it was not established that appellant failed to exercise that degree of care required of a public house for the

protection of invitees; and (3) that the giving of certain erroneous instructions to the jury constituted prejudicial error.

[1-3] The jury was warranted by the evidence in finding that Mrs. Hechler was not negligent. She never testified that she knew the floor was wet at the time she fell. She knew the janitor had mopped the floor while she ate, but there is no positive proof that she knew it was wet as she began to arise. From the fact that it was wet and that of its wetness she was unconscious, and that defendant was negligent in not warning her, and that such negligence was the sole proximate cause of her injuries were inferences that might fairly have been drawn from the evidence. Hamilton v. Pacific Electric R. Co., 12 Cal.2d 598, 86 P.2d 829; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; Beck v. Sirota, Cal.App., 109 P.2d 419, this day decided. The manner of her attempted departure from the stool was natural and proper. To forget a known danger is not negligence unless it shows want of ordinary care, and this again was a question for the jury. Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078; Jacobson v. Oakland Meat, etc., Co., 161 Cal. 425, 119 P. 653, Ann.Cas. 1913B, 1194. Even if plaintiff had given any thought to the platform before rising from the stool, she would have been justified in assuming that it had been mopped properly and in a manner that would not endanger her safety, and that appellant would not expose her to a danger that would come to her only through a violation of his duty to her. 20 R.C.L. 66; De Verdi v. Weiss, 16 Cal.App.2d 439, 60 P.2d 879; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128.

Appellant cites numerous authorities (Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76; Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Weddle v. Heath, 211 Cal. 445, 295 P. 832; Funari v. Gravem-Inglis Baking Co., Cal.App., 104 P.2d 44; and Kauffman v. Machin Shirt Co., 167 Cal. 506, 140 P. 15) in support of his contention that because of plaintiff's conduct she was guilty of contributory negligence. But those and many other similar cases are authority for rejecting the demands of one who, being familiar with a building and its patent defects, was negligent as a result of which he received his injuries.

[4-8] (2) While a floor of terrazzo is not inherently dangerous in and of itself, yet when it is wet it becomes potentially dangerous, a fact concerning which defendant had superior knowledge. When defendant installed such a floor in his restaurant he knew that under his duty to exercise ordinary care for the safety of his patrons he was required to take precaution not to allow the floor and platform to become or remain wet while invitees were present. The mopping should have been done in such a manner as effectually to dry the surface mopped before an invitee was permitted to walk upon it. While this precaution was not taken by defendant, plaintiff was not obligated to look for wet floors. "The keeper of a public place of business is bound to keep his premises * * in a safe condition, and must use ordinary care to avoid accidents or injury to those properly entering upon his premises [on business]." Tuttle v. Crawford, supra [8 Cal.2d 126, 63 P.2d 1130]; De Verdi v. Weiss, supra. The jury having determined that defendant was negligent in allowing the platform to be so wet as to lubricate it, and that plaintiff was not negligent, its findings will not be disturbed when supported by substantial evidence. Hamilton v. Pacific Electric Ry. Co., supra.

[9] (3) Appellant assigns as prejudicial error the following instruction, claiming that it assumes the existence of a fact on which there is a conflict, i. e., whether defendant's employee did actually mop the floor. It follows: "It is established that the employee who was mopping the floor in the restaurant at the time involved in the accident in question was acting as agent for the defendant, and within the scope of his authority, at the time of the events out of which the accident occurred. Therefore the acts and omissions of that agent were in contemplation of law the acts and omissions, respectively, of his principal, the defendant, McDonnell." This is an instruction upon the liability of the employer for the acts of his agent or employee. If the point made by appellant is that the instruction declared it was established that the janitor was mopping the floor, whereas appellant contends that it was a question of fact as to whether he mopped or swept the floor, still there is no prejudice in the instruction. The jury was admonished by the judge that he did not intend to suggest inferences for them

to draw and that it was "their exclusive province to determine the facts in the case and to consider the evidence for that purpose". Respondents maintain that the phrase "who was mopping the floor", etc., was for the purpose of identifying the employee discussed, that it did not instruct the jury to find he was mopping the floor, and that even were it a "mere recital" it was not an instruction that said employee did mop the floor. Johnson v. Fletcher, 97 Cal.App. 153, 274 P. 1001. Further to establish that the contention made by appellant on this point is without merit we have only to recall that his statement of facts contains the following: "that the man then went back to the kitchen and came out with a bucket and large mop and mopped over the same place", etc.

[10, 11] Appellant assigns as prejudicial error the following instruction: "You are hereby instructed that the general rule is that one to whom a duty of care is owing by another has the right to assume that the person who owes such duty will perform it; and in the absence of reasonable grounds to think otherwise, it is not negligence on the part of the one to whom the duty is owing to assume that he will not be exposed to a danger which can come to him only through a violation of that duty by the person owing it." This identical instruction was approved in the cases of Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396, and Hanson v. Cordoza, 106 Cal. App. 500, 505, 290 P. 62. Appellant's contentions (1) that the instruction implies that if appellant were negligent in any degree respondents would under all circumstances be entitled to recover, (2) that it did not leave for the jury's determination whether appellant exercised ordinary care, and (3) that it made appellant insurer of respondent Minnie Hechler's safety, have no basis. The instruction correctly defines the rights of an invitee as against the keeper of a public house. Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 49 P.2d 405; Brown v. Holzwasser, Inc., 108 Cal.App. 483, 484, 291 P. 661; Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L.R.A. 580; McClurken v. Ralph's Grocery Co., 130 Cal.App. 529, 28 P.2d 66.

[12, 13] Appellant also attacks as prejudicial error that part of the court's instruction relative to fixing damages, wherein the court included as one of the elements of damage "such sum as will reasonably compensate said plaintiff for damage to her property". It is true that this "element" should not have been included, but it was utterly harmless in view of the fact that no claim was made for damage to her property and there was no evidence received of damage to her property. The instruction upon the subject of damage given by the court was in printed form, and the several elements or items which might constitute damage are on several sheets of paper. In this instance it was evidently an accident that the language criticised was included among the sheets which contained the elements constituting damage in cases of personal injury. However, there having been no claim or proof of damage to property, we cannot assume that the jury intended to include such in its award. Under the circumstances no miscarriage of justice could have resulted from including as one of the factors in computing plaintiffs' damages the element expressed in the clause complained of. Tuttle v. Crawford, supra; art. VI, sec. 4½ of the Constitution.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



ALLEN et al. v. McKINLEY et al.*

Civ. 11058.

District Court of Appeal, First District, Division 1, California.

Jan. 22, 1941.

Hearing Granted March 20, 1941.

1. Municipal corporations ⇐217(5)

The provision of present charter of San Francisco that when civil service commission deems it practicable it shall provide for promotional examinations, and provision of former charter that "wherever practicable" such examinations must be given, mean substantially the same thing, and under both provisions the question of whether a promotional examination is practicable is confided to the limited jurisdiction of the commission.

2. Municipal corporations ⇐217(5)

It is only when it appears that the limited discretion of the civil service commission

* Subsequent opinion 117 P.2d 342.

of San Francisco in determining whether a promotional examination is practicable has been abused that courts are warranted in interfering.

3. Municipal corporations ⇐978(1)

Under charter of San Francisco requiring civil service commission to hold promotional examinations "when practicable", where there were at least 18 persons ready and willing to take a promotional examination for the position of adjuster in the office of tax collector, to which they were eligible under the qualifications prescribed by commission, commission's action in ordering an open examination instead of a promotional examination, on theory that promotional examination was not "practicable", constituted an abuse of discretion.

See Words and Phrases, Permanent Edition, for all other definitions of "Practicable".

4. Municipal corporations ⇐217(5)
Officers ⇐11

Under San Francisco charter provision requiring civil service commission, whenever it deems practicable, to provide for promotion on basis of such examinations and tests as commission may deem appropriate and to give consideration to ascertained merit and record of city and county service applicants, the commission has wide discretion in determining what groups shall be included within the class permitted to take a promotional examination and the qualifications of those desiring to take it.

5. Mandamus ⇐168(2)

Where petitioners in mandamus proceeding against city civil service commission established a prima facie case of abuse of discretion by commission in giving notice of an open examination to establish an eligible list for a certain position in classified service instead of holding a promotional examination, burden was on commission of bringing forth any explanation it might have by way of defense.

6. Municipal corporations ⇐216(1)

A city civil service commission has wide discretionary powers in many of its fields of operation, but such commissions have only such powers as are conferred on them, and when they exceed or abuse their powers it is not only within the power, but it is the duty, of the judicial branch of government to prevent such excess or abuse on petition of those adversely affected.

7. Officers ⇐69

The purpose of civil service is to abolish the so-called spoils system, and to increase the efficiency of the service by assuring employees of continuance in office regardless of what party may be in power.

8. Municipal corporations ⇐217(5)

City charter provisions requiring promotional examinations to be held by civil service commission when practicable are intended to promote efficiency among public employees.

9. Municipal corporations ⇐217(5)

San Francisco charter provisions requiring civil service commission, whenever it deems it to be "practicable", to provide for promotion in service on basis of such examinations and tests as commission may deem appropriate, are mandatory.

10. Municipal corporations ⇐217(5)

The provision of the San Francisco charter requiring civil service commission, whenever it deems it to be practicable, to provide for promotion in civil service on the basis of such examinations and tests as commission may deem appropriate, constitutes a limitation on commission's discretion, and where it is practicable to hold a promotional examination such examination must be given.

11. Municipal corporations ⇐217(5)

Under San Francisco charter provision requiring civil service commission to give a promotional examination where it deems practicable, commission in determining whether it is "practicable" to give such examination has not an uncontrolled discretion, but if such an examination is not to be given a valid reason for not doing so must exist.

12. Mandamus ⇐75

Under city charter provision requiring civil service commission where practicable to provide for promotion on basis of examinations and tests, mandamus lies to compel commissioners to hold a promotional instead of an open examination where the decision of commissioners to hold an open examination is shown to constitute an abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Mandamus proceeding by P. G. Allen and others against Howard M. McKinley

and others, as Civil Service Commission of the City of San Francisco, its secretary and personnel director, to require respondents to hold a promotional examination instead of an open one for the purpose of creating an eligible list for positions in the Civil Service of San Francisco in the Tax Collector's office, designated as adjuster, Class G153. From a judgment directing the issuance of a writ of mandamus commanding respondents to hold a promotional examination, the respondents appeal.

Affirmed.

John J. O'Toole, City Atty., and Thomas P. Slevin and Norman Sanford Wolff, Deputy City Attys., all of San Francisco (L. R. Bunney, of San Francisco, of counsel), for appellants.

Grover O'Connor, of San Francisco, for respondents.

Loren A. Butts, of Los Angeles, for City Employees Ass'n of City of Los Angeles, and Arthur W. Lasher, of Los Angeles, for Civil Service Ass'n of America, amici curiae for respondents.

PETERS, Presiding Justice.

This is an appeal by the Civil Service Commission of San Francisco, its secretary, and its personnel director, from a judgment directing the issuance of a writ of mandamus commanding the appellants to hold a promotional examination, instead of an open one, for the purpose of creating an eligible list for positions in the civil service of San Francisco in the Tax Collector's office designated as Adjuster, Class G153. The proceeding was instituted in the trial court by respondents, who are eighteen employees in the office of the Tax Collector in San Francisco, after the Civil Service Commission had given notice of an open and original examination to establish an eligible list for the positions in question. It is the theory of these respondents, upheld by the trial court, that, under the appropriate charter provisions, they, as employees lower in rank to that of Adjuster, G153, as well as others in the civil service, are legally entitled to take a promotional examination to fill that position, and that the action of the Commission in ordering an open examination, under the circumstances here involved constituted an abuse of discretion.

The case was decided upon the petition of respondents and the answer and certain amendments to the answer. Based upon these pleadings, the trial court granted the motion of petitioners for judgment on the pleadings.

In support of the judgment the respondents first urge that the record shows that many of them entered the employ of the City and County of San Francisco under civil service prior to January 8, 1932, the effective date of the present charter, and that, under the old charter, the right to a promotional examination was secured to them by section 8, art. XIII, of that charter, and that section 142 of the new charter preserves this right. Section 142 of the new charter provides, in part, that: "The civil service rights, acquired by persons under the provisions of the charter superseded by this charter, shall continue under this charter."

The old charter (section 8, art. XIII) in reference to promotions provided: "The Commissioners shall provide for promotion in the classified service on the basis of ascertained merit and standing upon examination; and shall provide, wherever practicable, that vacancies shall be filled by promotion. All examinations for promotions shall be competitive among such members of the next lower rank, as established by the Commissioners, as desire to submit themselves, to such examinations."

The comparable provision of the new charter is section 146, which provides as follows: "Whenever it deems it to be practicable, the Commission shall provide for promotion in the service on the basis of such examinations and tests as the Commission may deem appropriate, and shall, in addition, give consideration to ascertained merit and records of city and county service of applicants. The Commission shall announce in the examination scope circular the next lower rank or ranks from which the promotion may be made. All promotions in the police and fire departments, respectively, shall be made from the next lower rank on the basis of examinations and tests, seniority of service and meritorious public service being considered."

[1, 2] Appellants urge that, if the old charter conferred greater rights than the new, section 142 of the new charter, supra, does not operate to preserve such an inchoate right as the right to a promotional examination, but only preserves vested or already acquired rights. We do not find it necessary to pass upon this point for

the reason that we are of the opinion that, whether the old or new charter measures the rights of respondents under both provisions it is the duty of the Commission to hold promotional examinations when "practicable". While the language employed in the two sections is not identical, and, while the new charter expressly provides that, when the *Commission* deems it practicable, it shall provide for promotional examinations, whereas the old charter provided that "wherever practicable" such examination must be given, it seems quite clear that the two sections should be construed to mean substantially the same thing—that is, that under the old section, as under the new, the question as to whether a promotional examination is practicable, is confided to the limited discretion of the Commission. Sound principles of administrative law, as well as the provisions of the statute, compel the conclusion that it is only when it appears that such limited discretion has been abused that the courts are warranted in interfering.

[3] There can be but little doubt that, under the facts alleged in the petition and admitted by appellants, an abuse of discretion appears.

In 1932 the Commission established, in the Tax Collector's office, a class of employment designated as License Adjuster, Class G152. On March 23, 1932, the Commission, pursuant to an examination theretofore held, created an eligible list for that position. The names of seven of the eighteen respondents were on that list. On April 8, 1932, M. J. Lawley (who was first on that list with a grade of 100 per cent) and I. A. Richardson (who was second on that list with a grade of 98 per cent) were appointed from that list as License Adjusters. On October 3, 1934, two other appointments were made from the eligible list to that position—Charles A. Burgess and Eugene Sheehy—who had grades of 87½ per cent. These last two men were ranked as numbers 10 and 10½ on the eligible list, ranking below five of the petitioners on the eligible list. Why the appointments were made of people so low on the eligible list does not appear. At that time, Sheehy, as well as several of the respondents, were employed in the Tax Collector's office as General Clerk, Class B222.

On March 23, 1936, the eligible list for License Adjuster, Class G152, expired automatically. At that time all but five of the respondents were General Clerks, Class B222, in the Tax Collector's office. Many of them had been so employed for many years. Of the five who were not so employed on that date, one of them, P. G. Allen, first entered the employ of the city for the Tax Collector's office in 1915 as Deputy Tax Collector. Subsequently, his position was classified as that of General Clerk, while still later he was appointed as Teller. The four other respondents were appointed General Clerks, B222, subsequent to March 23, 1936. Several of the respondents, from time to time, had been assigned to the bureaus in the Tax Collector's office known as the Bureau of Delinquent Revenue and the Bureau of Licenses.

After the expiration of the eligible list for License Adjuster, G152, in March of 1936, nothing was done to create a new eligible list for that position. Prior to June 1, 1938, there existed a vacancy in the Tax Collector's office in the classified position of General Clerk, Class B222. This general clerkship carried a monthly salary of $200. Other general clerkships in the same class carried lower salaries, and many of these lower salaried clerkships were held by the respondents. Instead of transferring one of the petitioners who was already in Class B222 to the vacant higher paid clerkship of the same class, the Commission proceeded in a different manner. By resolution of June 1, 1938, it abolished the class of License Adjuster, G152, and created a new class—Adjuster, G153. It further provided that persons theretofore holding the positions in Class G152 should be entitled, without examination, to hold positions in the new class, G153. The only persons thus entitled to be appointed to the new class of Adjuster, G153, were Lawley, Burgess and Sheehy, heretofore mentioned. What had happened to Richardson, who had been appointed with Lawley in 1932 to the position of License Adjuster, G152, does not appear. Apparently, he was no longer employed in that position. Accordingly, Lawley, Burgess and Sheehy were automatically given positions in the new class, G153.

By the same resolution of June 1, 1938, the Commission created a new class—Senior Inspector of Licenses, Class G154, with the further provision that this class should be deemed promotional from the newly-created class, G153. The resolution also provided that the vacant position of General Clerk, B222, should be al-

located to the newly-created class of Adjuster, G153. Thereafter, Lawley was given an emergency appointment to the newly-created position of Senior Inspector of Licenses, and one Connolly was given an emergency appointment to the newly-created position of Adjuster, G153 (which had formerly been classified as General Clerk, B222). Respondents allege on information and belief that Connolly had not theretofore taken any examination for any position falling within the classified civil service. This allegation is admitted in the answer.

On July 27, 1938, the Commission gave notice of an examination for the position of Senior Inspector of Licenses, Class G154, restricting the examination to the persons who had theretofore been appointed to the abolished position of License Adjuster, G152. By this limitation, the Commission restricted the field of those eligible to take that promotional examination to Lawley, Burgess and Sheehy. Stated another way, the Commission provided for a promotional examination to fill the position in Class G154, restricting the field of those eligible to take the promotional examination to three men.

Thereafter, on August 3, 1938, the Commission gave notice of an *open, nonpromotional examination* to create an eligible list for the other new class, Adjuster G153. It was further provided that the examination might be taken by persons possessing either of the following qualifications:

1. One year of first-class experience, within the past eight years, in the investigation and adjustment of accounts and the investigation of claims, assets and attachable property in connection with such accounts, or in general office procedure; or

2. Permanent employees of the Tax Collector's office falling within classes of General Clerk, General Clerk-Stenographer, or in the old class of Deputy.

The notice for this examination also provided that those falling within Class 2, supra, might receive a rating of not to exceed one hundred out of a total of one thousand points for ascertained merit in City and County service.

It was the action of the Commission in thus providing for an open nonpromotional examination for License Adjuster, G153, that led respondents to file an application for a writ of mandate to compel the Commission to make the examination promotional in character. It should be noted that respondents do not seek to invalidate the action of the Commission in declaring the examination for Class G154 promotional, nor its action in reclassifying the various positions. They do not charge that the Commission was without right to appoint Burgess and Sheehy to positions in Class G152 in 1934, although five of the respondents were higher on the eligible list than were the two men appointed. Their attack is upon the action of the Commission in making the examination for the new class, G153, open rather than promotional. The other matters enumerated above are set forth for whatever bearing they may have on the question as to whether the Commission abused its discretion in noticing an open examination for Class G153.

There seems to be no escape from the conclusion that the facts alleged in the petition and admitted in the answer demonstrate that the Commission abused the discretion conferred upon it by section 146 of the charter, supra, in noticing an open examination for the position in question. Although the Commission provided in the notice for the examination that persons who have had one year of first-class experience in general office procedure are qualified to take the examination, the Commission likewise determined that it was impracticable to provide a promotional examination when there are eighteen employees of the Tax Collector's office who have had experience in office work in that office for from "several years" to over twenty-three years. Several of these employees have had several years' experience in the Bureau of Delinquent Revenue and the Bureau of Licenses. Furthermore, seven of the eighteen were on the eligible list for the old position, G152, five of them with ratings higher than Burgess and Sheehy, who have been appointed to G153. That the duties of Class G153, here involved, are generally similar to that of old Class G152 is indicated by the fact that, in abolishing Class G152, the Commission provided that the three persons then occupying positions in Class G152 should automatically, without examination, hold positions in Class G153.

[4] The respondents also point out that the judgment here appealed from does not determine that the promotional examination must be limited to the eighteen General Clerks in the Tax Collector's office. The Commission, under the charter pro-

vision here involved, has wide discretionary powers in determining what groups shall be included within the class permitted to take a promotional examination, and what the qualifications of those desiring to take the examination shall be. If one year of first-class experience in general office procedure is a qualification for eligibility to the position of Adjuster, G153, there is a large number of persons in the civil service outside the Tax Collector's office earning less than the salary provided for Class G153 who are eligible for this examination. Even if it were impracticable to hold a promotional examination limited to the eighteen qualified employees of the Tax Collector's office, it is obviously not impracticable to hold such an examination among the large group of civil service employees with the requisite qualifications.

Another factor which tends to show an abuse of discretion is that the Commission has provided a promotional examination for Class G153 to Class G154, although, as described by the Commission, the distinction between the duties of those two classes is greater than between old Class G152 and new Class G153, and although there are but three persons eligible to take the promotional examination for Class G154.

[5-9] Upon the showing made by respondents in their petition, and the admissions made by appellants in their answer and amended answer, the trial court correctly held that respondents established a prima facie case of abuse of discretion. This placed on the Commission the burden and duty of bringing forth any explanation it might have by way of defense. The Commission has offered no reasonable explanation or justification for its actions in either its pleadings in the trial court or in its briefs filed in this court. It takes refuge in the proposition that local administrative boards should be permitted to operate with as little interference as possible from the judicial branch of the government. They cite cases for the rule that administrative action of local boards is beyond judicial control unless abuse of discretion is clearly shown. Maxwell v. Civil Service Commission, 169 Cal. 336, 146 P. 869; Pratt v. Rosenthal, 181 Cal. 158, 183 P. 542; Mann v. Tracy, 185 Cal. 272, 196 P. 484; Mitchell v. McKevitt, 128 Cal. App. 458, 17 P.2d 789. We may agree with these principles but still come to the conclusion that the Commission has abused its discretion in the instant case. The Commission has wide discretionary powers in many of its fields of operation. However, such Commissions have only such powers as are conferred upon them. When they exceed or abuse their powers it is not only within the power, but it is the duty of the judicial branch of the government to prevent such excess or abuse upon the petition of those adversely affected. Here the people of the City and County of San Francisco have seen fit to insert in section 146 of the charter, supra, a provision requiring the Commission "Whenever it deems it to be practicable" to give promotional and not open examinations. This provision embodies one of the fundamental concepts of a sound civil service system. All authorities agree that promotions are an essential of a sound civil service system. The purpose of civil service is twofold—to abolish the so-called spoils system, and to increase the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service. Provisions such as section 146 of the charter, that promotional examinations shall be held when practicable, are intended to promote efficiency among public employees. People v. Errant, 229 Ill. 56, 82 N.E. 271; Ptacek v. People, 194 Ill. 125, 62 N.E. 530. Its provisions are mandatory, and must be complied with.

[10, 11] Section 146 of the charter, supra, constitutes a limitation on the discretion of the Commission. Where it is practicable to hold a promotional examination, such examination must be given. In determining whether it is practicable to give such an examination the Commission has not an uncontrolled discretion. If such an examination is not to be given, a valid reason why not, must exist. When the Commission's action is challenged, and the petitioner produces a prima facie case that a promotional examination is practicable, the burden is on the Commission to justify its action.

There appears to be but little case law on the exact problem here presented. The diligence of counsel, and independent research by this court, have unearthed but two cases where the problem has been passed upon directly by the appellate courts

in this country. Both of these cases are in accord with the views herein expressed—in fact, in some respects, they go beyond the holding in this opinion.

In People v. Errant, supra, the Supreme Court of Illinois was presented with the following facts: The Chicago Civil Service Commission proposed to hold an open competitive examination instead of a promotional one for the position of Assistant Superintendent of Streets. Those next lower in rank contended that, under the civil service act and rules adopted pursuant thereto, a promotional examination should be given. The civil service act there involved Laws Ill.1895, p. 87, § 9, provided that the Commission "shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion". This is substantially the same language used in the old charter of San Francisco (sec. 8 of art. XIII, supra), and in section 146, supra, of the present charter. In interpreting the Illinois section the court stated (82 N.E. page 274): "The phrase in section 9 above quoted, 'in all cases where it is practicable,' adds but little to the meaning of the section, and takes little or nothing from it. If this phrase was eliminated entirely from the statute, it would mean substantially the same as it does with it in. The meaning in both cases is that the vacancies are to be filled by promotion. If this is not possible, the office is not to remain vacant and the wheels of government stop; but the place is to be filled in another way and the functions of the government go on. In the case before us the determination of appellees that it was not practicable to fill the place by promotion should not precede, but come after, a promotional examination, where it is their duty to hold such examination. There are, it is admitted, at least 15 ward superintendents who are ready and willing to take the promotional examination for the position to be filled. If the examination is held, and two or more ward superintendents qualify, then it will be practicable to appoint the one making the highest grade. Until such examination is held, and these persons given a chance to pass, the appellees cannot know whether it is practicable to fill the place from the ward superintendents. The only prayer of the petition is that appellees be required to hold such promotional examination. This, we think, it is their clear legal duty to do."

A similar conclusion was reached by the same court in Ptacek v. People, supra. That was a proceeding in quo warranto brought to test the legal right of Ptacek to hold the position of Assistant Superintendent of Police, an office to which he had been appointed after having participated in an open examination held by the Commission. It was contended that the examination had been improperly and unlawfully held in that it should have been a promotional and not an open examination. The civil service act in question contained the same clause as is quoted in the Errant case, supra. The court held that a promotional examination was required, although there were but five men eligible to take a promotional examination. In so holding, the court stated (194 Ill. page 132, 62 N.E. page 533): "We do not understand how the civil service commission could, under its rules, hold an original examination for the position of assistant superintendent of police unless it is shown in some way that the vacancy in that office could not be filled by promotion, and this, we think, the pleas wholly failed to do."

In the briefs of the parties to this appeal a decision of Honorable Emmet H. Wilson, judge of the Superior Court of Los Angeles County, in the case of Crowe v. Board of Civil Service Commissioners, L.A.No.427,601, is quoted in full. That case involved the question as to whether an examination for City Treasurer should be open or promotional, under charter provisions similar to those involved in the two Illinois cases, supra. The Commission pleaded that it had conducted an investigation as to the qualifications of all the employees of the City Treasurer's office, and all other classifications in the civil service, after such investigation had found that it was not practicable to fill the office by promotion. Nevertheless, the court granted the petitioners a judgment on the pleadings. It held that the provisions of the charter in reference to promotional examinations were mandatory, and that, if there were qualified persons in the service eligible to take the examination, the Commission could only ascertain that it was impracticable to give a promotional examination after those eligible had been given such an examination.

[12] The reasoning of these three cases is conclusive here. Under the provisions of section 146 of the charter, supra, pro-

motional examinations, except for those in the lowest ranks, are required to be held unless they are not "practicable". In determining that fact the Commission does not possess unlimited discretion. There are doubtless many situations where it would be impracticable to give a promotional examination, and where the Commission could determine that an open examination was proper. But the facts of the instant case demonstrate that this case does not fall within that category. Here the Commission has determined, by fixing the qualifications as a condition precedent for the taking of the examination, that the eighteen petitioners, as well as many others, are fully qualified to take the examination, and, if they pass, fully qualified to fill the position. If there are large numbers of persons in the service fully qualified to take the examination for the eligible list for the position in question, how can the Commission determine before it gives a promotional examination to those persons, that it is not "practicable" to give such an examination? Obviously, under such circumstances, to so determine is an abuse of the discretion vested in the Commission.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.



RHODEHAMEL v. CIVIL SERVICE BOARD OF CITY OF OAKLAND et al.*

Civ. 11221.

District Court of Appeal, First District, Division 1, California.

Jan. 22, 1941.

Rehearing Denied Feb. 21, 1941.

Hearing Granted March 20, 1941.

1. Municipal corporations ⇐217(5)

A city charter provision requiring civil service board to provide for promotion in the classified service on basis of ascertained merit, seniority in service, and standing on competitive examination, and where practicable, that vacancies shall be filled by promotion from among such members of the next lower rank established by the board as submit themselves for promotional examinations is mandatory.

2. Municipal corporations ⇐217(5)

Under city charter provision requiring civil service board to provide in all cases where "practicable" that vacancy shall be filled by promotion from among such members of next lower rank established by board as submit themselves for examination, board in passing on question whether a promotional or an open examination shall be given does not possess an uncontrolled discretion, but, if it is "practicable" to give a promotional examination, board must give such examination regardless of its opinion as to relative merits of the two types of examinations.

See Words and Phrases, Permanent Edition, for all other definitions of "Practicable".

3. Municipal corporations ⇐217(5)

If there are persons in the classified service who by reason of their position in the service possess the qualifications fixed by city civil service board as a prerequisite to take examination, board may properly ascertain that it is "impracticable" to give a promotional examination only after the persons eligible have been given a promotional examination.

See Words and Phrases, Permanent Edition, for all other definitions of "Impracticable".

4. Municipal corporations ⇐216(1)

Local boards, such as city civil service boards have only such powers as the people see fit to confer on them, and, if such a board exceeds or abuses its powers, the courts are empowered to prevent such excess or abuse on petition of one adversely affected.

5. Mandamus ⇐168(4)

In mandamus proceeding to compel civil service board to hold a promotional examination to obtain an eligible list for position of senior account clerk and to terminate proceedings for an open examination, evidence of existence of classified positions known as "intermediate account clerk" and "senior account clerk," and as to respective duties of the positions, established a prima facie case that board abused its discretion in determining that a promotional examination was not practicable under city charter provision requiring such examinations to fill vacancies where practicable.

* Subsequent opinion 117 P.2d 349.

6. Municipal corporations ⇐217(5)

The question whether better employees will be secured by an open or a promotional examination is one of "legislative policy" and not of "administrative" or "judicial" policy, which was settled by city charter provision requiring civil service board to provide in all cases, where practicable, that vacancies be filled by promotion from among such members of next lower rank established by board as submit themselves for promotional examination, and neither the board nor District Court of Appeal, whatever its opinion as to merits of that policy, can substitute its opinion for that of the people as set forth in the charter.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Policy", "Judicial Policy", and "Legislative Policy".

7. Municipal corporations ⇐217(5)

Under city charter provision requiring civil service board to provide, where "practicable", that vacancies should be filled by promotional examinations from next lower rank established by board, it was no proper ground for holding an open instead of a promotional examination for position of senior account clerk on theory that the intermediate account clerks, who would be eligible to take such examination, would not be eligible to fill positions above that of senior account clerk.

See Words and Phrases, Permanent Edition, for all other definitions of "Practicable".

8. Municipal corporations ⇐217(5)

A civil service board may not deny an employee the right to advance one rank by means of a promotional examination because he will not be able to be promoted to a still higher rank.

9. Mandamus ⇐168(4)

Evidence *held* to establish that duties of senior account clerk, as related to the lower position of intermediate account clerk, were such that the superior position was promotional from the inferior one under city charter provision requiring civil service board to provide, where "practicable", that vacancy shall be filled by promotional examination from members of next lower rank established by board.

10. Municipal corporations ⇐217(5)

City civil service board cannot substitute its present opinion on issue whether one position is promotional from another position in the classified service in place of the board's prior official description of the duties of the two positions, without any prior action in changing the description of those duties, under city charter provision requiring board, where practicable, to fill all vacancies by promotional examinations.

11. Municipal corporations ⇐217(5)

In order that one position should be "promotional" from another within city charter provision requiring that, where practicable, vacancy shall be filled by a promotional examination, it is not required that the duties of the two positions be identical, but real question is whether duties of the inferior position are such that they reasonably prepare employee for the superior position.

See Words and Phrases, Permanent Edition, for all other definitions of "Promotional Position".

12. Municipal corporations ⇐217(5)

The fact that there were only eight intermediate account clerks and eight senior account clerks in classified service furnished no ground for holding an open examination to obtain an eligible list for position of senior account clerk instead of holding a promotional examination, which would have been limited to the intermediate account clerks under charter provision requiring civil service board to provide in all cases where "practicable" for filling of vacancies by promotional examinations from next lower rank established by the board, where, when board determined to give open examination, there was but one vacancy in the position of senior account clerk.

13. Municipal corporations ⇐217(5)

The fact that, when a promotional examination is held, none of those in the immediate rank below taking the examination will pass it, conclusively demonstrates that a promotional examination is not "practicable" within city charter provision requiring civil service board to provide, in all cases where "practicable", that vacancy shall be filled by a promotional examination from among members of next lower rank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Mandamus proceeding by Harry Rhodehamel against the Civil Service Board of the City of Oakland and others, to compel the board to hold a promotional examination to obtain an eligible list for

the position of senior account clerk and to terminate the proceedings for an open examination. From a judgment denying his application for a writ of mandate, the petitioner appeals.

Reversed.

J. Paul St. Sure, of Oakland, for appellant.

F. B. Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondents.

PETERS, Presiding Justice.

Petitioner appeals from a judgment denying his application for a writ of mandate to compel the civil service board of the City of Oakland to hold a promotional examination to obtain an eligible list for the position of senior account clerk, and to terminate proceedings for an open examination, as announced by the board. Petitioner is an employee in the classified civil service of the city, holding the position of intermediate account clerk. He filed the petition as such employee, and as a resident, taxpayer and elector of the city, and also as a member and on behalf of all members of the Oakland Municipal Civil Service Association.

The Oakland Charter, section 77, provides as follows: "The board shall provide for promotion in the classified service on the basis of ascertained merit, seniority in service, and standing upon competitive examination, *and shall provide, in all cases where practicable, that vacancies shall be filled by promotion from among such members of the next lower rank established by the board* as submit themselves for such examination for promotion. The board shall certify to the appointing power the names of not more than three applicants having the highest rating for each promotion." (Italics ours.)

It is urged by appellant that, under this charter provision, if it is practicable to give a promotional examination the board has no discretion, but must give such promotional examination; that under the facts of this case it amounted to an abuse of whatever discretion is vested in the board to order an open examination.

[1-3] The problem involved in this case is similar to that presented in Allen v. McKinley, Cal.App., 109 P.2d 429. The charter provisions involved in the two cases are substantially similar. What was said in that case concerning the proper interpretation of such a charter provision need not be repeated in this opinion. Upon the authority of, and for the reasons stated in, Allen v. McKinley, supra, we hold:

1. That such charter provisions are mandatory;

2. That in passing on the question as to whether a promotional or an open examination shall be given the board does not possess an uncontrolled discretion—that if it is practicable to give a promotional examination the board must give such examination regardless of what its opinion may be as to the relative merits of an open or promotional examination;

3. That if there are persons in the service who, by reason of their position in the service, possess the qualifications fixed by the board as a prerequisite to take the examination, the board may properly ascertain that it is impracticable to give a promotional examination only after those eligible have been given a promotional examination.

[4] As in Allen v. McKinley, supra, the board argues that whether it is "practicable" to fill a vacancy by promotion is confided to the discretion of the board, and that such discretion is not subject to judicial control. They cite the same cases that were cited by the San Francisco Civil Service Commission in Allen v. McKinley, supra, to the effect that local administrative boards should be permitted to operate with as little interference as possible from the judicial branch of the government. However, as was pointed out in the Allen v. McKinley opinion, supra, local boards such as the one here involved have only such powers as the people see fit to confer upon them. If such local boards exceed or abuse their powers the courts are empowered to prevent such excess or abuse upon the petition of one adversely affected.

Applying these principles to the facts here involved, and keeping in mind the fact that the trial court in the instant case has decided all controverted questions of fact in favor of the board, we have no hesitancy in stating that the record herein demonstrates, as a matter of law, that the board, in a legal sense, abused the limited discretion confided to

it by section 77 of the Oakland Charter, supra.

[5] The evidence shows that pursuant to the powers conferred upon the board it has classified all positions subject to civil service. Among the classified positions is one known as intermediate account clerk, and another as senior account clerk. On June 2, 1938, one vacancy occurred in the position of senior account clerk. There was no existing eligible list from which that position could be filled. The board, after several meetings, at which the question as to whether the examination should be open or promotional was discussed, decided to hold an open examination on the theory that there was no rank, for promotional purposes, next lower to the position of senior account clerk. Admittedly, all those holding the position of intermediate account clerk, as well as many others in the civil service, would be eligible to take the examination for senior account clerk.

There are various factors which demonstrate that the board abused the limited discretion vested in it. In the first place, the title "intermediate account clerk" tends to indicate that such position is of the same type, but lower in rank, to that of "senior account clerk". In the second place, evidence shows that each position has three salaries attached to it. For the position of intermediate account clerk these salaries are $140, $150 and $160 a month, depending upon merit and length of service. For the position of senior account clerk the three salaries are $160, $170 and $185 per month. This again tends to show that one position is the next advanced position from the other.

In the third place, the evidence shows that, in addition to classifying the positions, the board has officially described the two positions. Thus, the two positions have been described officially by the board as follows:

"Intermediate Account Clerk:

"Under direction, to do clerical work of average difficulty involved in the keeping and certifying of financial and other office records, and the handling of office routine; to interview callers; and to do other work as required.

"Senior Account Clerk:

"Under direction, to do difficult clerical work involved in auditing, keeping, and certifying financial records; and to do other work as required."

The "typical duties" officially described by the board are quite lengthy, and no useful purpose would be served by setting them forth in this opinion. Suffice it to say that an examination of such duties shows that they are quite similar, the differences being such as would be anticipated by reason of the higher salary of the superior position. This same conclusion follows from a consideration of the minimum qualifications officially fixed by the board for each position. They are as follows:

"Intermediate Account Clerk:

"Either (1) education equivalent to that represented by completion of the twelfth grade, and two years of clerical or other office experience, or (2) some other combination of education and clerical experience of equal or greater value; good knowledge of modern office methods and ability to operate modern office appliances; ability to understand and carry out oral and written directions; arithmetical aptitude; accuracy in computing and posting figures; resourcefulness; accuracy; good penmanship; orderliness; integrity; good address; and good judgment.

"Senior Account Clerk:

"Either (1) education equivalent to that represented by completion of the twelfth grade, including a standard course in bookkeeping and three years' experience as a bookkeeper, or (2) some other combination of education and experience of equal or greater value; knowledge of double and single entry bookkeeping and the keeping of financial accounts and records; intimate knowledge of accepted accounting principles and methods; skill in the operation of computing machines and other office appliances; accuracy in computing and posting figures; good penmanship; integrity; orderliness; and good business judgment."

In the fourth place, the evidence shows that previously the board had given a promotional examination for the position of assistant supervising officer, a position more advanced and carrying a higher salary than senior account clerk, and that intermediate account clerks were permitted to take that promotional examination.

From this evidence there can be no doubt that appellant presented to the trial court a prima facie case of abuse of discretion. From this evidence but one conclusion can be reached, namely, that the positions of intermediate account clerk and senior account clerk present a plain instance of positions in a regular line of promotional progression, and that before an open examination may be given to create an eligible list for the superior position, under section 77 of the charter, supra, those in the next lower rank are first entitled to take a promotional examination.

[6] In support of its determination that a promotional examination was not "practicable", and in an attempt to meet the prima facie case of appellant, the board offered the testimony of T. G. Stahlberg, secretary and chief examiner of the board, and of Harold C. Holmes, Jr., president of the board. They both frankly admitted that two of the factors that motivated the board in its determination, were that, in the opinion of the board, a better man would be secured by an open examination than would be secured by a promotional examination because a larger group would take the examination; and that, if the position of intermediate account clerk were established as the position next lower in rank to that of senior account clerk, there were still higher positions above senior account clerk for which such intermediate clerks would not be eligible. In the opinion of the board, therefore, intermediate account clerks should not be permitted to take a promotional examination for senior account clerk because that would be as high as they could go. This second factor was frequently referred to by both witnesses and obviously was one of the major factors that led the board to determine to give an open examination. At the time of the oral argument counsel for respondents conceded that neither, or both, of these factors "standing alone" constitute a lawful justification for the action of the board.

This concession is in accordance with the law. The question as to whether better employees will be secured by open or promotional examinations is one of policy. The people of the City of Oakland have settled that question of policy and have taken its determination from the board by section 77 of the charter, supra. They have determined, as a matter of policy, that, in the long run, better employees will be secured, and higher efficiency promoted, by a system of promotional examinations. That is a question of legislative and not administrative or judicial policy. Neither the board nor this court, whatever its opinion as to the merits of that policy may be, is empowered to substitute its opinion for that of the people as set forth in the charter.

[7, 8] The second reason—that intermediate account clerks could not take promotional examinations for positions higher than that of senior account clerk—obviously, should not have been considered by the board. If a civil service board may deny an employee the right to advance one rank by means of a promotional examination because he will not be able to be promoted to a still higher rank, it can deny the right to all promotional examinations. Obviously, only a very few are qualified for the highest positions, but that is no reason for denying the employee the opportunity to rise as far as his ability and training will permit him. It is obvious that these two factors, therefore, cannot be relied upon as a lawful justification for the action of the board.

[9-11] Stahlberg and Holmes also testified that in their opinion the duties of the two positions were such that one was not promotional from the other. In fact, in their answer in the trial court the respondents pleaded that there is no position in the classified service which affords sufficient training to make the position of senior account clerk promotional from a lower rank. This contention, if sustained, would mean that the names given to the positions of intermediate and senior account clerks were misnomers. It would also mean that the board would be justified in substituting its present opinion in place of the description of the duties of the two positions as officially set forth by the board itself without any action by the board in changing the description of those duties. We think the evidence demonstrates that the duties are such that the superior position is promotional from the inferior one, and that the "opinion" of the secretary and president finds no support in the record. It must be remembered that for one position to be promotional from the other it is not required that the duties of the two be identical.

The real question is whether the duties of the inferior position are such that they reasonably prepare the employee for the superior position. On that question the evidence is clear and uncontradicted. The duties of intermediate account clerk are so related to those of senior account clerk, as those duties are officially described by the board, that the former is clearly preparatory for the latter.

[12, 13] The only other reason given by respondents to support the judgment, is that the board considered the fact that, if the examination were limited to intermediate account clerks, there was a possibility of not obtaining an eligible list large enough to fill all possible vacancies which might occur in the position of senior account clerk during the two years that such eligible list would remain in effect. There were eight intermediate account clerks, and eight senior account clerks in the service during the times here involved. At the time the board determined to give an open examination there was one vacancy in the position of senior account clerk. The exact number of vacancies that would occur could not be fixed by the witnesses, but one of them stated that perhaps there would be three or four during the two-year period. It is conceivable, of course, that if all eight intermediate account clerks took a promotional examination, all eight would pass. If so, for all practicable purposes, the number on the list would be far in excess of the anticipated number of vacancies. It may be that if a promotional examination is held, none of the intermediate account clerks will pass it. If so, that would conclusively demonstrate that a promotional examination is not "practicable", and that an open one is required. But, until the promotional examination is given, it rests in mere guess or conjecture as to the number that will pass it.

The appellant having presented a prima facie case that a promotional examination is practicable, and the board having failed to offer a lawful reason why such an examination should not be held, it must be held that, as a matter of law, an abuse of discretion has been shown.

The judgment appealed from is reversed.

We concur: KNIGHT, J.; WARD, J.

42 Cal.App.2d 536

SCHWEITZER v. BANK OF AMERICA N. T. & S. A.

Civ. 12783.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1941.

1. Banks and banking ⇐148(2)

Where a check is delivered to an impostor as payee, and drawer believes that impostor is the person on whose indorsement it will be paid, the indorsement by impostor in the name which he is using to impersonate another is not a "forgery."

See Words and Phrases, Permanent Edition, for all other definitions of "Forgery".

2. Banks and banking ⇐148(2)

Where a check is delivered to an impostor as payee and drawer believes that impostor is person on whose indorsement it will be paid, drawee bank which pays check on indorsement of impostor is not liable.

3. Banks and banking ⇐148(2)

Where a check is delivered to an impostor as payee, and drawer believes that impostor is the person on whose indorsement it will be paid, the fact that another person might bear the same name as that assumed by impostor and might have some contractual relationships with impostor does not subject to a loss the drawee bank when it has paid the check to impostor.

4. Banks and banking ⇐148(2)

The general rule is that the true owner and payee of a check has an action against drawee bank for conversion of a check paid on a forged or unauthorized indorsement.

5. Principal and agent ⇐163(1)

A "ratification" can occur only by approving the act of the agent after the agent performs openly on behalf of his principal and not for himself. Civ.Code, § 2312.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

6. Principal and agent ⇐163(1)

"Ratification" is the subsequent adoption by one claiming the benefits of an act which, without authority, another has voluntarily done while ostensibly acting as agent of him who affirms the act and who had the power to confer authority. Civ.Code, § 2312.

7. Banks and banking ⇐148(2)

The "payee" of a check is the individual who is intended by the drawer to be the recipient of the money.

See Words and Phrases, Permanent Edition, for all other definitions of "Payee".

8. Banks and banking ⇐148(2)

A person though bearing name of payee of check, if not the person intended by drawer as payee, has no title to the check and cannot indorse it or transfer title thereto.

9. Bills and notes ⇐6, 32

Any negotiable instrument not payable to bearer must be payable to a determinate person or persons.

10. Banks and banking ⇐148(2)

When maker intends a particular person to be the payee of negotiable instrument, such person, though designated by a fictitious name and even though maker was induced by deceit of such person to designate him as payee is, nevertheless, the actual "payee" and has authority to indorse the instrument.

11. Banks and banking ⇐148(2)

Where E owned scrap iron stored in yard of plaintiff who had general authority from E to sell the iron, and plaintiff directed G to sell the iron and collect proceeds, and thereafter G presented himself with loads of scrap iron at foundry to which he made sales, representing himself to be E and owner of iron, relying on which representations foundry drew several checks on defendant bank payable to E and delivered them to G, who indorsed them in the name of E without her knowledge, E was neither "payee" nor "owner" of the checks and never had title which could be assigned to plaintiff, and G's indorsement was not a "forgery", since he was payee intended by drawer.

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

12. Principal and agent ⇐164(1)

Where buyer of scrap iron was induced by seller's fraud to draw checks to name of actual owner, whose name and identity were fraudulently assumed by seller whom buyer believed to be the owner and who was payee intended by buyer, the real owner or her assignee by filing of assignee's suit against drawee bank for conversion of the checks, did not "ratify" the delivery of checks to the seller, since seller did not pretend to act on behalf of real owner or of any other person, but solely on his own behalf. Civ.Code, § 2312.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratify".

13. Banks and banking ⇐148(2)

The rule that where a check is delivered to an impostor as payee, and drawer believes that impostor is person on whose indorsement check will be paid, impostor's indorsement in the name which he is using to impersonate another is not a forgery does not apply only as between drawer and drawee, but applies as to persons impersonated as well.

14. Banks and banking ⇐148(2)

Where check is delivered to impostor as payee, and drawer believes that impostor is person on whose indorsement it will be paid, drawer is bound by transaction between drawee bank and payee, because when bank cashes check for impostor it is merely carrying out drawer's intention that proceeds be received by impostor.

15. Trover and conversion ⇐16

In action of conversion, the gist of right of recovery is derived from ownership with right of possession, or from actual possession at time of alleged conversion.

16. Banks and banking ⇐148(2)

Where E owned scrap iron stored in yard of plaintiff who had general authority to sell the iron and receive proceeds, pursuant to which plaintiff directed G to sell the iron and collect proceeds, and thereafter G, fraudulently assuming to be E and owner of the iron, sold it to foundry and received checks payable to E which he indorsed without knowledge of E, E's ownership of the iron did not authorize plaintiff, as E's assignee, to recover in action against drawee bank as for conversion of the checks, since plaintiff could not prove ownership or right of possession of checks as against bank.

17. Judgment ⇐249

Where an action in assumpsit would not lie, judgment for plaintiff could not be supported by count for moneys had and received.

18. Banks and banking ⇐148(2)

Where agent, having general authority from owner to sell scrap iron, directed G to sell iron and collect proceeds, and G thereafter sold iron to foundry, fraudulently representing himself to be the owner, and received checks drawn in name of owner which

he indorsed and thereby obtained proceeds without owner's knowledge after drawee bank had telephoned foundry and was assured, from description given by bank, that payee named in check was identical person intended, fact that over a month previously owner's agent had informed bank's manager that owner of iron was a woman for whom he was acting as agent did not "estop" bank from pleading defense of impersonation against action for conversion of checks brought by agent as assignee.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

19. Banks and banking ⇐154(5)

In action by assignee of owner of scrap iron against drawee bank for conversion of checks given by buyer of iron to seller who fraudulently represented himself to be owner, in which complaint alleged plaintiff's ownership and right to possession of checks, but answer denied such allegations, issue of fact was created, and it was not necessary that answer allege affirmatively the defense of impersonation.

20. Banks and banking ⇐154(5)

In action by assignee of owner of scrap iron against drawee bank for conversion of checks received by impostor who fraudulently sold iron and received checks from buyer payable to true owner, in which all facts comprising basis of alleged estoppel were received in evidence in support of plaintiff's claim of ownership of checks and on contention that impostor had no authority to indorse checks, defendant was not required by its pleadings to anticipate such other contentions, not disclosed by complaint, as plaintiff might seek to rely on.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Ray Schweitzer against the Bank of America N. T. & S. A. and another to recover damages for alleged conversion of checks. Judgment for plaintiff, and named defendant appeals.

Reversed, with directions to enter judgment for named defendant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

J. H. Sims and M. H. Wallbert, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff as assignee of one E. Anderson sued to recover damages from appellant bank for the alleged conversion of sixteen checks. The complaint contains thirty-three counts, sixteen of which allege conversion as a result of unauthorized endorsements, count 17 is for money had and received, while the remaining sixteen counts allege conversion by means of forgeries of one Myer Glazer, a codefendant. Defendant bank has appealed from a judgment entered in favor of the plaintiff for the face value of all of the checks.

It appears that a woman whose name is E. Anderson was the owner of a supply of scrap iron stored in the yard of plaintiff, who was a scrap iron dealer. Plaintiff had general authority from Mrs. Anderson to sell the iron and to receive the proceeds. Pursuant to such instructions plaintiff directed Glazer to remove the iron, sell it and to collect the proceeds of such sales. Glazer thereafter presented himself on a series of occasions with loads of scrap iron at the offices of the Ace Foundry Company, to which he made sales. At no time did he disclose that he was acting as the agent of Mrs. Anderson, but assumed the role of owner in making each sale and at all times represented himself as "E. Anderson". Relying upon Glazer's representations that he was the owner of the iron, the foundry company drew its several checks upon appellant payable to "E. Anderson" and delivered them to Glazer. At the time of no one of the sixteen purchases made by the foundry company from Glazer did the company gain any knowledge that Glazer was sailing under false colors in calling himself "Anderson". All of the checks were endorsed "E. Anderson" by the hand of Glazer without any knowledge of Mrs. Anderson, whose claim is represented by the plaintiff.

When Glazer presented the first check to the bank to be cashed, for information as to his identity the bank telephoned the office of the foundry company and was then assured from the description reported by the bank that the payee named in the check was the identical person at that time in the office of the bank demanding payment, and that the check had been regularly issued by the foundry company. Subsequently the remainder of the checks were cashed by the bank's paying the money directly to Glazer or by payment through the clearing house to the bank at which he had made deposits. Having ascertained that her scrap iron had

been sold and that Glazer had secured the money by the methods above described, E. Anderson assigned her claim against the bank to plaintiff.

The primary contention made by appellant is that Glazer was an impostor using the name of "E. Anderson" to effectuate his transactions; that he was actually the payee intended by the foundry company in each of the checks issued in that name and that therefore Mrs. Anderson was never intended to be the payee and consequently had no interest in the checks as against the bank or as against the foundry.

[1-3] The impostor rule as applied to negotiable instruments is understood throughout the states of the Union. The weight of decision in the United States and the doctrine which is followed in California is that where a check is delivered to an impostor as payee and the drawer believes that the impostor is the person upon whose endorsement it will be paid, the endorsement by such impostor in the name which he is using to impersonate another is not a forgery. The reason for the rule is that the drawer intended the check to be endorsed by the identical person to whom it was delivered. Under such circumstances the drawee bank is to be protected when it has paid the check upon such endorsement. Ryan v. Bank of Italy, 106 Cal.App. 690, 289 P. 863; Security-First National Bank v. United States, 9 Cir., 103 F.2d 188; United States v. National Exchange Bank, C.C., 45 F. 163; Sherman v. Corn Exchange Bank, 91 App.Div. 84, 86 N.Y.S. 341; Cohen v. Lincoln Savings Bank of Brooklyn, 275 N.Y. 399, 10 N.E.2d 457, 112 A.L.R. 1424. Also, see, 22 A.L.R. 1228; 52 A.L.R. 1326 and 112 A.L.R. 1435. The soundness of the rule obtains in the fact that the money has actually been paid to the person for whom it was really intended. Because another person might bear the very name assumed by the impostor and might have some contractual relationships with the impostor does not subject to a loss the drawee bank when it has paid the check to the person intended as the payee. Merely because a person may be designated by his name for ordinary practical purposes, his name does not become a more certain or accurate means of identification than his own visible presence with its distinct features. If a buyer is deceived as to the true name of the individual with whom he deals, but at the same time he intends to purchase from the man who commits the deception, he there identifies the seller by sight and hearing. If he thinks the seller's name is X and draws a check in his favor intending to designate him as the person to whom he desires to pay his money, and delivers the check to X, the drawee bank, in paying the proceeds of the check to X carries out the purpose of the drawer. Cohen v. Lincoln Savings Bank of Brooklyn, supra. This is exactly what occurred when the foundry company delivered its check to Glazer believing him to be E. Anderson. Moreover, there is no evidence that the foundry company had any knowledge that "E. Anderson" was the name of a woman who owned iron which had been taken from plaintiff's yard to be sold. Glazer might have assumed the name of Marco Polo with the same results to the bank.

While conceding the virtue of the impostor rule, plaintiff insists that its application should be limited solely to controversies between the drawer and the drawee of a check. Ubowich v. Northern Trust Co., 281 Ill.App. 109. But in that case plaintiff sued both the collecting and drawee banks for the conversion of a check payable to plaintiff. That check had been drawn by the county clerk to the order of plaintiff in payment of his distributive share of an estate. In some mysterious manner the check found its way into the hands of a stranger to the estate, was deposited with the collecting bank and was paid by the drawee bank upon a forged endorsement. Judgment was entered against the collecting bank only. The comments of the court in that case with respect to the impostor doctrine, which are here relied upon by plaintiff, are clearly dictum, for at page 119 of the decision, 281 Ill.App., the court states that "there is absolutely no evidence that the county treasurer delivered the check to an impostor with the intention that the impostor should receive the proceeds of the check, or even that the person who received it indorsed it or banked it".

[4] The general rule is that the true owner and payee of a check has an action against the drawee bank for the conversion of a check which was paid upon a forged or unauthorized endorsement. But this rule is to be limited by the very authorities which support it. Spaulding v. First Nat'l Bank, 210 App.Div. 216, 205 N.Y.S. 492; Graves v. American Exchange Bank, 17 N.Y. 205; Szwento v. Manhattan Sav. Institution, 178 App.Div. 57, 164 N.Y.S. 498; Byrne v. Dennis, 303 Pa. 72, 154 A.

123; Kentucky, etc., Bank v. Dunavan, 205 Ky. 801, 266 S.W. 667; Bentley, etc., Co. v. La Salle Street Bank, 197 Ill.App. 322; State v. First Nat'l Bank, 38 N.M. 225, 30 P.2d 728, and others. In none of the cited cases did the drawer of the check deliver it to an impostor representing himself to be the true payee with the intention that the impostor receive the proceeds of the check, as was the case when the foundry delivered the check to Glazer. In each of those cases the situation involved a check payable to plaintiff, who was either known to or identified by the drawer, with the intention that the payee named in the check should receive its proceeds. In each instance the drawee bank paid the check upon the forged endorsement of a stranger or upon the unauthorized endorsement of an agent of the payee. In some cases the wrongdoer who cashed the check was the payee's agent but without authority to cash the check; in other cases the wrongdoer represented himself as the agent of the payee although wholly unauthorized so to do. Moreover the facts which constitute the bases of the last-mentioned authorities are distinguished from the facts in the case at bar in that in each of those cases the drawer had plaintiff and not some other person in mind when the check was drawn. In other words it was intended by the drawer that the plaintiff should receive the proceeds of the check.

[5, 6] In those cases where the agent or pretending agent obtained the check before it was actually delivered to the plaintiff, delivery to the plaintiff was established on the theory that, in filing suit, plaintiff ratified delivery to such agent as having been done on behalf of plaintiff. But a ratification can occur only by approving the act of the agent after the agent performs openly on behalf of his principal and not for himself. It is the subsequent adoption by one claiming benefits of an act which, without authority, another has voluntarily done while ostensibly acting as agent of him who affirms the act and who had the power to confer authority. Civ.Code, sec. 2312; Watkins v. Clemmer, 129 Cal.App. 567, 19 P.2d 303; Restatement of the Law of Agency, secs. 82, 83, 84 and 85. The record definitely establishes that it was not the intention of the foundry company, in issuing any check, that Mrs. Anderson should receive its proceeds.

[7-10] The payee of a check is the individual who is intended by the drawer to be the recipient of the money. Even though another person bear the same name, if he be not the one intended by the drawer to receive the money, he has no right or title to the check and he cannot endorse it or transfer the title of it. Cohen v. Lincoln Sav. Bank of Brooklyn, supra; Hartford Accident, etc., Co. v. Middletown Nat. Bank, 126 Conn. 179, 10 A.2d 604. Any negotiable instrument not payable to bearer must be payable to a determinate person or persons. When the maker intends a particular person to be the payee, then such person, although designated by a fictitious name, and even though the maker was induced by the deceit of such person to designate him as payee, still such deceiver is the actual payee and has the authority to endorse the instrument. Halsey v. Bank of New York & Trust Co., 270 N.Y. 134, 200 N.E. 671.

[11] It follows that Mrs. E. Anderson was neither the payee nor the owner of the check, and never had a title which could be transferred to plaintiff. Glazer's endorsement was not a forgery, for he was the payee intended by the drawer. Ryan v. Bank of Italy, supra; Cohen v. Lincoln Savings Bank of Brooklyn, supra.

[12] It cannot be said that by filing suit either plaintiff or his assignor ratified the delivery of the checks to Glazer. That gentleman did not pretend to act on behalf of Mrs. Anderson or of any other person, but in each instance he dealt with the foundry company solely on his own behalf. There was, therefore, nothing for Mrs. Anderson or the plaintiff to ratify, and under such circumstances there can be no ratification. Watkins v. Clemmer, supra. While it is true that the court made a finding that Glazer was the agent of Anderson, yet in no sense does this improve her status with respect to the bank. No finding was made that Glazer received the checks as the agent of Anderson and if there had been such a finding it would be without support in the evidence.

[13, 14] Contrary to plaintiff's contention it cannot be said that the impersonation doctrine applies only as between the drawer and drawee. Whatever rights Mrs. Anderson might have acquired in the checks must necessarily have been derived from the drawer's intention to pay the money to her. Consequently, if the foundry was bound by its delivery of the checks to Glazer, the impostor who cashed them, there is no logical basis upon which Mrs. Anderson, a total stranger to both the

foundry and the bank, can recover against the latter. The foundry company is bound by the transaction between the bank and Glazer, because when the bank cashed the check for the impostor it was merely carrying out the intention of the foundry that the proceeds were to be received by Glazer. Because Mrs. Anderson has the same name as that used by Glazer in effecting his sales and collections does not improve her situation as against the bank. The check was intended for the party who called at the foundry and made his sale. While a name may serve to identify an individual, yet if the check was received by the identical person to whom the drawer intended to deliver it, and was by that person endorsed with the name to which it was made payable, the bank owed no further obligation with reference to it. Hartford Accident & Indemnity Co. v. Middletown Nat. Bank, supra, 10 A.2d at page 608.

[15-17] From the foregoing it is clear that plaintiff is in no position to recover in an action for conversion. In such actions the gist of the right of recovery is derived from ownership with the right of possession, or from actual possession at the time of the alleged conversion. McCoy v. Northwestern C. & S. Co., 3 Cal.App.2d 534, 39 P.2d 864; General Motors A. Corp. v. Dallas, 198 Cal. 365, 245 P. 184. While plaintiff proved ownership of the scrap iron in Mrs. Anderson, yet he failed to prove ownership or possession or the right of possession of the checks as against the bank. Merely because Glazer appropriated the iron and delivered it to an unsuspecting person representing himself to be its owner, and assuming a fictitious name withal, does not give rise to a cause of action in favor of Mrs. Anderson against the bank which paid the money, as directed by its depositor, to an impostor. Since under the circumstances an action in assumpsit will not lie (First Nat. Bank v. Whitman, 94 U.S. 343, 24 L.Ed. 229) the judgment rendered cannot be supported by the count for moneys had and received.

[18] Plaintiff contends further that defendant is estopped to plead the defense of impersonation. This contention is based upon the fact that more than a month prior to the first call of Glazer plaintiff visited the bank and undertook to cash a check drawn by the Ace Foundry Company in favor of E. Anderson. On that occasion the teller declined to cash the check and referred plaintiff to the manager. At that time plaintiff informed the manager that "E. Anderson" was a woman for whom plaintiff was agent. But there is no evidence that the branch manager's attention was directed to the fact that the Ace Foundry Company was the drawer of the check. The conversation related solely to the identity of the payee of that particular check. There is nothing in the name "Anderson" or in the letter "E" to make them severally or jointly a warning against impostors. Both are quite commonly found on books of account and in directories. There was therefore nothing in the conversation between plaintiff and the bank manager to put appellant upon notice that subsequent checks drawn against the account of the Ace Foundry Company payable to E. Anderson would be payable only to a woman. Moreover, the bank was actually informed by the foundry company, at the time of Mr. Glazer's first call, that "E. Anderson" was a man of Glazer's description. In view of the knowledge imparted to the bank when Glazer presented his first check, and while he was in the bank's office, it must be held that any prior information imparted to the bank that a woman by the name of E. Anderson dwelled among mortals would not create an estoppel.

[19, 20] Plaintiff's contention that the answer was so defective that it failed to raise any issue, in that it failed to allege impersonation affirmatively, is untenable. The complaint alleged plaintiff's ownership of, and the right of possession to, the checks. The answer denied these allegations. This created an issue of fact, and it was not necessary to allege affirmatively the defense of impersonation. Also since all the facts comprising the basis of the estoppel were received in evidence, in support of plaintiff's claim of ownership, and upon his contention that Glazer had no authority to endorse the checks, defendant was not required in its pleadings to "anticipate such other contentions as the plaintiff may seek to rely upon" when plaintiff's main reliance has failed her. This is especially true where such other contentions do not appear upon the face of the complaint. Kenny v. Christianson, 200 Cal. 419, 424, 253 P. 715, 717, 50 A.L.R. 1297.

The judgment is reversed, with directions to the trial court to enter judgment in favor of appellant.

I concur: McCOMB, J.

I concur in the judgment of reversal: WOOD, J.

42 Cal.App.2d 528

CAMDEN FIRE INS. ASS'N v. JOHNSON, State Treasurer.

Civ. 6452.

District Court of Appeal, Third District, California.

Jan. 22, 1941.

1. Constitutional law ⇐70(1)

Where the object and intent of statute is plain, courts cannot by interpretation add to or detract therefrom.

2. Taxation ⇐840, 844

Under statutory and constitutional provisions for 15 per cent. penalty tax on an insurance company which fails to pay gross premium tax within time and manner specified, where insurance company six days before date on which penalty for delinquency was to be assessed, mailed check for the amount of tax to State Treasurer, who did not receive the check until after date on which tax became delinquent, penalty became part of tax and court could not relieve insurance company from penalty imposed for delay in payment of tax. Pol.Code, § 3668b; Const. art. 13, § 14.

3. Taxation ⇐844

In absence of statutory authorization, courts have no power to relieve delinquent taxpayers from penalties incurred by violations of statutes providing for penalties.

4. Statutes ⇐245

Tax laws are to be construed most strictly against the government and most favorably to the taxpayer.

5. Taxation ⇐844

A person claiming relief from tax penalties clearly imposed by law must point to clear warrant of law to support his claim and he is entitled to no special privilege over other taxpayers which is not definitely established by law.

6. Taxation ⇐840, 844

The penalty assessed for the delinquency in the payment of a gross premium tax imposed upon an insurance company becomes a part of the tax and commands all the support given to a tax regularly levied for the support of the government and cannot be forgiven for mistake whether excusable or not. Pol.Code, § 3668b.

7. Taxation ⇐140, 387

The gross premium tax imposed upon insurance companies is an "indirect tax" levied as ordinary property taxes are levied with a view to determine the value of the thing taxed and to make it pay its proportion of taxes for the support of the government and the method of assessment was not provided to differentiate the tax from other forms of taxation utilized, but was adopted because of the different nature of the thing assessed and of the difficulty of arriving at a correct estimate of its value by any other means. Pol.Code, § 3668b; Const. art. 13, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Indirect Tax".

8. Taxation ⇐140

The gross premium tax imposed upon insurance companies is not a "property tax" but an "excise tax" levied upon the privilege of doing business in the state for purpose of raising revenue and penalties for nonpayment become part of the tax. Pol.Code § 3668b; Const. art. 13, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Excise Tax" and "Property Tax".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Camden Fire Insurance Association against Charles G. Johnson, State Treasurer, to recover a penalty imposed for tax delinquency and paid under protest. A demurrer to the complaint was sustained without leave to amend and from a judgment for the defendant, plaintiff appeals.

Affirmed.

Fontaine Johnson and Lloyd G. Buchler, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Neil Cunningham, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is an appeal from a judgment entered in favor of the State Treasurer, after a demurrer to the complaint had been sustained without leave to amend. From the complaint it appears that plaintiff was a corporation engaged in the insurance business in this state. On August 16, 1937, certain taxes became delinquent as provided by section 3668b of the Political Code, which section also provided that unless such taxes were paid prior to that

day fifteen per cent would be added to the amount due as a penalty.

It is also alleged that on August 10, 1937, plaintiff placed its check for the amount of the tax in the mail but the letter was inadvertently misdirected and the check did not reach the office of the State Treasurer until after the 16th day of August. For this delay the penalty was imposed. The tax with the penalty was thereupon paid under protest, and this action brought for recovery of the penalty. After judgment in favor of defendant, this appeal is presented to us.

[1] It is the contention of appellant that the issue here is one of statutory construction. However, if the object and intent of the law is plain, courts cannot, by interpretation, add to or detract therefrom.

[2, 3] Section 3668b of the Political Code clearly imposes a fifteen per cent penalty on a taxpayer who fails to pay the tax at the time and in the manner specified. Taxes upon insurance companies assessed and levied as provided in section 14 of article XIII of the Constitution of this state "* * * shall be due and payable on the first Monday in July * * * and one-half thereof shall be delinquent on the sixth Monday * * *, and unless paid prior thereto, fifteen per cent shall be added to the amount thereof * * *". This section reveals no language that would justify a court in relieving a taxpayer from a situation as here exists. The general rule as given in 61 Corpus Juris at page 1494, which is supported by a number of cases there cited, states: "In the absence of statutory authorization, the courts have no power to relieve delinquent taxpayers from penalties incurred by violations of the statutes providing therefor. * * *"

[4, 5] As pointed out in In re Premises, etc., 117 Pa.Super. 132, 177 A. 700, 702, that while tax laws are to be construed most strictly against the government and most favorable to the taxpayer, "* * * it is equally well settled that where taxes, including interest and penalties, are clearly imposed by law, he who would claim an exemption or relief from them, when so legally imposed, must point to clear and unmistakable warrant of law to support his claim; he is entitled to no special privilege over other taxpayers which is not clearly and definitely established by law."

Judge Shields, who originally passed upon the issues here presented, well expressed the solution of the problem in an opinion by him when he sustained the demurrer. He there said in part:

[6] "This is an action to recover a sum assessed for delinquency in the payment of a tax imposed upon an insurance company under the provisions of section 3668b, Political Code. It is admitted that the tax was not paid upon the date required by law, but the pleadings show that the short delay in its payment was the result of a mistake innocently made and which in purely personal relations an honest man would be prompt to relieve against and forgive. But the statute fixes the date of payment and states the exact amount and nature of the penalty and I am convinced that in such a case the law is the measure of the rights of all the parties involved, the state and the taxpayer. I am satisfied that in the circumstances of this case the penalty provided by the statute, upon its becoming operative, became a part of the tax and thereupon commanded all of the support given to a tax regularly levied for the support of government. Carpenter v. Peoples, etc., 10 Cal.2d 299, 74 P.2d 508; State of California v. Hisey [9 Cir.], 84 F.2d 802 [805], where it is said sententiously: 'The penalty is a part of the tax.' If we accept this view the law governing this case is well stated in State v. Chicago, etc. [128 Wis. 449], 108 N.W. [594], at page 607. 'If the legislative idea was a penalty for failure to pay a tax strictly so-called * * * it could no more be forgiven for mistake, whether excusable or not, than that to which it is incidental.

"'As soon as the default occurred the penalty would be regarded in legal effect as part of the tax * * *. We venture to say that in all tax laws where it is provided that upon default in payment being made a certain amount in addition to the tax shall be forfeited, upon the forfeiture occurring, the penal sum is regarded to be as fixed and certain in its obligatory feature as the tax itself. It is said, in effect, in Cooley on Taxation, 900, that a penalty for neglect to pay a tax constitutes an addition to the tax. Judicial authorities so hold.' Continuing, on page 607 [of 108 N.W.] the court say: 'We venture the assertion that no authority can be found nor principle referred to sustaining the proposition that a statutory penalty for failure to pay an ordinary tax can be avoid-

ed on the ground of mistake or discharged otherwise than by full payment.'

[7] "Interesting illustrations could be given of cases which do not come within this rule. Some of them are cited by plaintiff in his brief herein. They are not exceptions to the rule stated, of which there are none, but rather represent cases where the penalty was not one imposed upon the nonpayment of a tax, strictly so called, but where, as in the case of the authority last above cited, the tax possessed some contractual characteristics, or where, as discussed in 1 Cooley on Taxation, section 35, the penalty possessed some regulatory or other quality which distinguished it from a normal tax for purely revenue purposes. But the tax involved here upon which the penalty was imposed was levied solely for the support of the State in its governmental capacity. It was an indirect tax but was levied as ordinary property taxes are levied with a view to determine the value of the thing taxed and to make it pay its proper proportion of taxes for the support of the government. The indirect method of assessment was not provided to differentiate the tax from other forms of taxation utilized in the State, but was adopted because of the different nature of the thing assessed and of the difficulty of arriving at a correct estimate of its value by any other means. See Pullman Co. v. Richardson, 185 Cal. 484, 197 P. 346.

[8] "True, the tax upon insurance companies levied under the provisions of section 14, subd.(b), of article XIII of the Constitution is not a property tax, but an excise tax levied upon the privilege of doing business in the State. Carpenter v. Peoples Mutual Life Ins. Co., 10 Cal.2d 299, 74 P.2d 508. But it is a revenue tax rather than a regulatory tax and is levied for the purpose of raising funds for the support of the State. As has been said penalties imposed for the nonpayment of such taxes become part of the tax to which it is appurtenant. It might be that such penalty or excess might be forgiven or otherwise disposed of by the legislature (Tukey v. Douglas County [133 Neb. 732], 277 N.W. 57), but in the absence of such disposition, and in the face of the direct provisions of section 3668b of the Political Code, the courts are wholly without power to relieve against such a penalty as is herein pleaded."

The judgment is affirmed.

In re CHAMBERLAIN'S ESTATE.*

CHAMBERLAIN et al. v. PERRY.

Civ. 6546.

District Court of Appeal, Third District, California.

Jan. 22, 1941.

Rehearing Granted March 11, 1941.

1. Contracts ⇐99(1)

A relationship of trust and confidence existed between son and aged, infirm mother who had suffered a paralytic stroke and was living with son, who managed her affairs, as respects burden of proof in relation to liability of son to account for property received from mother.

2. Contracts ⇐99(1)

Where a fiduciary relation or a relation of trust and confidence exists between a parent and child, a presumption of undue influence arises, and the burden of proving that transaction was the result of free volition and was not superinduced by fraud or undue influence rests upon the child obtaining property from parent.

3. Appeal and error ⇐1010(1)

If there is any substantial evidence which will justify finding that the acts of mother in turning over property to son were free from undue influence, order based on finding that no undue influence existed must be sustained upon appeal, notwithstanding presumption of undue influence.

4. Contracts ⇐99(3)

Son's evidence that $1,500 paid to him by aged, infirm mother living with son was for care and support and that the crops were turned over to son under the same circumstances was evidence which would serve to rebut the presumption of undue influence.

5. Appeal and error ⇐931(1)

On appeal from order finding that no undue influence existed on part of son to whom mother had transferred money and property, appellate court was bound to assume that mother's mental condition was normal, in absence of proof to the contrary, notwithstanding mother's advanced age and illness.

6. Contracts ⇐99(3)

Where presumption of undue influence existed, as regards liability of son to account for money and property transferred to him by aged, infirm mother living with son,

*For subsequent opinion see 112 P.2d 53.

fact that mother was in full possession of her mental faculties and capable of understanding the consequences of the transaction was to be considered as tending to rebut the presumption of undue influence.

7. Contracts ⇐99(3)

Evidence that money and property had been turned over by aged, infirm mother to son as compensation for her care and support, and that mother was in full possession of her mental faculties and capable of understanding the consequences of the transaction, *held* sufficient to overcome the presumption of undue influence.

8. Appeal and error ⇐1010(1)

Where evidence was sufficient to overcome the presumption of undue influence on part of son to whom aged and infirm mother had transferred money and property, finding of trial court that no undue influence existed was binding on appellate court.

9. Bills and notes ⇐120
Executors and administrators ⇐202(1)

Where mother and son executed new note in lieu of note signed by son and deceased father, mother and son were severally liable upon the note, and, where mother died, the obligation could be enforced against her estate.

10. Bills and notes ⇐119
Principal and surety ⇐45

If a note is signed by two or more makers, it will be presumed that they are comakers and liable as such and not as principal and surety.

11. Principal and surety ⇐9

Where one signs a note as principal, he will be held as principal, notwithstanding the creditor knew that, as between the one thus signing and the principal debtor, former was in fact only a surety.

12. Executors and administrators ⇐221(1)

Where mother and son executed new note in lieu of note signed by son and deceased father, and mother subsequently died, burden of proving that deceased mother signed the note as an accommodation maker rested upon mother's executor.

13. Bills and notes ⇐96

One who has received value for signing a note cannot set up the defense of "accommodation maker". Civ.Code, § 3110.

See Words and Phrases, Permanent Edition, for all other definitions of "Accommodation Maker".

14. Bills and notes ⇐96

Where mother executed new note with son in lieu of note signed by her deceased husband and son, and son agreed to and did pay funeral and other expenses for which husband's estate was liable and waived his right in separate property of deceased husband, mother was not an "accommodation maker" but was primarily liable on note with son, notwithstanding that months later all the real property of husband's estate was awarded to mother as a homestead. Civ. Code, § 3110.

15. Executors and administrators ⇐294

Where deceased mother was primarily liable with son on note executed by them and note was paid out of proceeds of mother's estate, son's distributive share of the estate could not be charged with amount paid on note.

Appeals from Superior Court, Yolo County; J. S. Bruton, Judge.

Proceedings in the matter of the estate of Annie E. Chamberlain, deceased, by C. L. Perry, executor, for the settlement of his accounts, wherein Elmer V. Chamberlain and Margaret M. Chapman filed objections. From an order settling the accounts, the objectants separately appeal.

Order affirmed in part and reversed in part.

C. C. McDonald, R. H. Schwab, Jr., and O'Donnell & Bagby, all of Woodland, for appellants.

A. G. Bailey, of Woodland, for respondent.

TUTTLE, Justice.

There are two separate appeals here involved, based upon the same record. Each appellant appeals from an order settling accounts in the Estate of Annie E. Chamberlain, deceased. Objections were filed by appellants to said accounts, and after a trial of the issues thus raised, the court overruled said objections.

Annie E. Chamberlain died on October 8, 1931, at the age of 87 years. She was twice married. Both of her former husbands were deceased when the incidents which are the subject of this action arose. By her first husband she had two children: Margaret M. Chapman, one of the appellants, and C. L. Perry, respondent. Appellant Chamberlain is the child of the second

marriage. She inherited the ranch, upon which she lived, from her second husband, and continued to live thereon with her son, Elmer Chamberlain, for some seventeen years. On the 17th day of May, 1930, she suffered a stroke of paralysis, and upon the same day was removed to the home of respondent, where she resided until her death. Her illness left her in a very weak and helpless condition. She could not get out of bed without assistance, and required the attention of the family of respondent both day and night. She required assistance in dressing and in eating. At this time she had some $3,700 on deposit in a local bank, and was the owner of a small ranch which she inherited from her second husband. During the time she was at respondent's home, he handled all her business affairs. He took her to his own attorney for the purpose of having her will drawn; looked after her almond orchard, harvesting and selling the crops; prepared some of her checks for signature, and attended to all her banking for her. On or about July 14, 1931—some three months before she died—Mrs. Chamberlain signed and delivered a check for $1,500 in favor of respondent, and it was cashed by him, and the money applied to his own use. Just how this occurred is detailed by him, in answer to questions propounded by his counsel. We quote from the record:

"Q. Mr. Perry, that $1500.00—was there any discussion between you and your mother when she gave you that check as to what it was given for? A. Well, she told me; she said that she wanted to stay there and I wanted my sister to take her to Sacramento because it would be handy to doctors and she knew how to take care of her better than I and my wife did. My wife was not hardly able to take care of her, but she did not want to go over there, and my brother he couldn't take her; his wife was away part of the time, and they did not have no use for her, and nobody would take her, and she wanted to stay with me. She told me to take the crop, what was left there, for them two years. There wasn't hardly any, not so much, but she said I had earned it, and then Elmer got this money from the Bank of Esparto.

"Q. Bank of Yolo? A. Or, the Bank of Yolo, and they were all getting a dig at it, and I thought, well, there is no one taking care of her but me and my wife, and I had to get up from five to nine times at night to take her back and forth to the bathroom, and it took both of us most of the time, so I thought—I just mentioned it to her, and I thought she ought to give me something for taking care of her, and she said she would and I told her we would take care of her and, if she gave us $1500.00, we would take care of her the rest of her lifetime and she was very glad to do it and, if she wanted to go back to the ranch she could, but she said she would never go back to the ranch, and she wouldn't go over to my sister's, and she didn't want her to have anything."

We turn now to another incident which occurred during the time mentioned above. Perry had been, for several years, managing the almond orchard belonging to his mother. During the two years before her death, he appropriated to his own use, the gross proceeds from the sale of almonds. The amount thus received was $1,453.18. Perry gave the following explanation of the matter:

"Q. Was there anything said by her, in your presence, in regard to the almond crop for 1930 and 1931? A. No, only one day I made the remark—we had prunes on our place at that time and I said, 'The prunes are not going to amount to anything', and I said, 'There are no almonds to amount to a great deal and we won't make much', and she said, 'Well, what there is, you will make that'."

Perry testified that prior to the above conversation with his mother they had agreed upon the terms of a written contract covering this matter, under which she agreed to let him have the proceeds from the almond orchard, with the understanding that he was to care and provide for her the remainder of her life. This contract was never executed.

Upon the death of Mrs. Chamberlain, respondent Perry and appellant Chamberlain were appointed executors of her estate. During the course of probate, one of the latter's bondsmen died. Upon his failure to give another bond, Chamberlain was discharged by the court as executor, and ordered to file an account. This he did on July 7, 1938. Prior to that date executor Perry filed his second account, wherein he failed to account for the said sum of $1,500 paid to him by the decedent, and also for the proceeds received by him from the sale of said almond crop. Both appellants filed objections to said account. They set up that the transfer of $1,500 was void, as being procured through undue influence ex-

erted over the deceased by Perry. They also made the same contention with reference to the proceeds from the sale of the almond crop. They prayed that Perry be ordered by the court to account for and charge himself with said sums. After a hearing which lasted several days, the trial court found in favor of Perry and against appellants on the issues thus raised. Appellants now separately appeal from the order made in accordance with such finding.

[1, 2] It must be admitted that the facts clearly show a relationship of trust and confidence existed between respondent and his mother. The latter was of the age of 86 years, and suffering not only from the infirmities of old age, but also from the result of a paralytic stroke. Her physical condition is described above. She was living in the home of respondent, under his direction and care. He managed her affairs, as detailed above. Where a fiduciary relation or a relation of trust and confidence exists between a parent and child, a presumption of undue influence arises, and the burden of proving that the transaction was the result of free volition, and was not superinduced by fraud or undue influence will rest upon respondent. 24 Am.Jur. p. 791, sec. 116; Nobles v. Hutton, 7 Cal.App. 14, 93 P. 289; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336. Respondent contends that the evidence upon the issue of undue influence was conflicting; and that we are therefore bound, under the familiar rule on appeal, to accept the finding of the trial court.

[3, 4] While it must be conceded that there is a rather strong showing made by appellants, still, in the final analysis and in spite of the presumption, if there is any substantial evidence which will justify a finding that the acts of the mother were free from undue influence, the order must be sustained upon appeal. "A mere doubt as to whether a finding is justified by the evidence will not authorize the appellate court to set aside the findings. * * * When the evidence is conflicting, the court will presume that the evidence in support of the verdict or findings is true, and construe it and resolve every substantial conflict as favorable as possible in support thereof." 2 Cal.Jur. pp. 880-881, sec. 515. If the trial court believed the testimony of respondent (as it must have), that the $1,500 was paid to respondent as compensation for her care and support, and that the crops were turned over to respondent by her under the same circumstances, such evidence would serve to aid in rebutting the presumption of undue influence. In 13 C.J., page 405, section 329, 17 C.J.S., Contracts, § 180, it is said: "Solicitation, importunity, argument, and persuasion are not undue influence, and a contract is not to be set aside merely because the one party has used these means to obtain the consent of the other. Influence obtained by persuasion and argument or by appeals to the affections is not prohibited either in law or morals, is not obnoxious even in courts of equity, and may be termed 'due influence'. Nor is the case changed because the parties stand in confidential relations to each other."

In 20 Cal.Jur., page 448, section 44, it is stated: "In disproof of any inference of imposition or undue influence, it is especially significant that the parent owed to the beneficiary a debt of gratitude for filial devotion and service, and care during the parent's declining years."

[5-8] In addition, there is the fact that there is not a word of evidence in the record that the mental condition of the mother was anything but normal. We must therefore assume that her mind was sound, and that she knew precisely what she was doing at all times. "* * * it is to be considered, as tending to rebut the presumption of undue influence, that the donor or grantor was in full possession of his mental faculties, and capable of understanding the consequences of the transaction." 20 Cal. Jur., p. 447, sec. 43. In view of the foregoing, we are of the opinion that there is sufficient evidence to rebut the presumption of undue influence, and the court having found against the presumption, its order settling the account of respondent in respect to both transactions must be affirmed.

In the account of Elmer Chamberlain, as executor, a question arose in respect to what is known as the "Schwab" note. It appears that in 1911, Elmer borrowed $900 from Sam Schwab, and a promissory note was executed by him and his father in that amount. The father died intestate on January 15, 1932. The note had not been paid. Elmer and his mother were administrators of his estate, and they employed attorney Anderson to represent them. Shortly after their appointment as administrators a meeting was held in the office of their attorney, where the affairs of the estate were talked over between attorney Anderson, Elmer and his mother. It was

there agreed that there was not sufficient money in the estate to pay either the costs of administration, expenses of last sickness, funeral expenses, or the Schwab note, without the sale of some portion of the real property. So, Mr. Anderson talked to Mr. Schwab about it, and Schwab agreed to take a new note signed by Elmer and his mother, Annie E. Chamberlain, in lieu of his claim against the estate of V. J. Chamberlain. It was also agreed at this meeting that if Annie E. Chamberlain would go on the Schwab note so as to keep it from being filed as a claim against V. J. Chamberlain's estate, Elmer would pay out of his own funds the attorney's fees, expenses of last sickness, funeral expenses, etc., which the estate could not pay. In addition to the payment of these items, Elmer was asked to waive his half interest in the separate property of his father so that his mother might have a probate homestead upon all of the real property. In the fulfilling and carrying out of this agreement, Elmer paid for the cemetery lot, funeral expenses, the doctor's bill, the attorney's fees amounting to some $486. He also complied with attorney Anderson's request and waived his rights in his father's separate property. The mother, on the other hand, joined with Elmer in the making of a new note to Schwab.

[9-12] When Mrs. Chamberlain died, the note was still unpaid. The sum of $5,040.50 was due thereon. Elmer, as executor, filed a petition for an order permitting the estate of his mother to borrow sufficient money to pay said note. The court granted the petition, and the note was paid in full from the funds of the estate so borrowed. The court, however, further ordered that the distributive share of Elmer Chamberlain be charged with the amount which the estate paid to discharge said note. It is from the last mentioned portion of said order that Elmer Chamberlain prosecutes this appeal. He contends that his mother was primarily liable upon the note, and that her estate must pay it. Respondent contends that there was no consideration for said note so far as Mrs. Chamberlain was concerned, and that her estate was not obliged to pay it, because she was merely an "accommodation party", and not a maker. The parties were severally liable upon the note, and under such conditions "each is bound to performance * * * and if one dies, the obligation may be enforced against his estate". 8 C.J., p. 66, sec. 96, 10 C.J.S., Bills and Notes, § 37. "If a note is signed by two or more makers, it will be presumed that they are comakers, and liable as such, and not as principal and surety." 8 C.J., p. 1002, sec. 1308, 11 C.J.S., Bills and Notes, § 658. "* * * we understand the rule to be that where one signs as principal he will be held as such, notwithstanding the creditor knew that, as between the one thus signing and the principal debtor, the former was in fact only a surety." California National Bank v. Ginty, 108 Cal. 148-150, 41 P. 38, 39. It therefore appears, in determining the capacity in which Mrs. Chamberlain signed the note, the burden rested upon respondent of proving that she was not what the instrument showed on its face—a joint and several maker—but an accommodation maker.

The undisputed evidence to which we have referred above, shows that Mrs. Chamberlain did derive some benefit when she signed the note. She was entitled to succeed to a portion of the estate of her husband. When her son Elmer paid the expenses for which the estate would otherwise be liable and forced to meet, her distributive share was correspondingly increased. Thus, she received value for signing the note. Section 3110, Civil Code, reads as follows: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

[13] Under said section, one who has received value cannot set up the defense of accommodation maker. In 8 C.J., page 255, section 403, it is stated: "No consideration moving to the accommodating party is necessary to uphold accommodation paper. As already defined, accommodation paper is paper to which the accommodation party has put his name without consideration. It follows that the paper is not accommodation paper if there is a consideration accruing to the accommodating party for the signing."

In 11 C.J.S., Bills and Notes, page 297, § 742, it is said: "On the other hand, the consideration may in reality be for value, although the purpose was to accommodate another party, and where a person lending

his credit seeks to accomplish thereby legitimate objects of his own and not simply to aid the maker, the act is not for accommodation."

To the same effect: Gardiner v. Holcomb, 82 Cal.App. 342, 255 P. 523; Seth et al. v. Lew Hing et al., 125 Cal.App. 729, 14 P.2d 537, 15 P.2d 190. The case of Warren Nat. Bank v. Suerken, 45 Cal.App. 736, 188 P. 613, is directly in point. There the court stated that the notes imported consideration, and that the burden was upon the defendant to establish the fact of want of consideration. Disposing of the contention and holding that the defendant was an accommodation maker, the court said, at page 740 of 45 Cal.App., at page 614 of 188 P.: "An accommodation maker is defined in Parsons on Notes & Bills, § 131, as 'one who puts his name there without any consideration, with the intention of lending his credit to the accommodated party.' As stated in Randolph on Commercial Paper (2d Ed.) § 472, the term 'without consideration' must be considered as meaning simply 'without consideration to the accommodating party directly.' Accepting this definition, can it be doubted that when the defendant here became a party to these notes it was for the direct advantage to be gained by herself and her coheirs and associates in protecting their interest in decedent's estate from the immediate enforcement of this liability against it? It was not a liability enforceable against the defendant, but it was enforceable against the property to which she was about to succeed. Any suspension or forbearance of a legal right constitutes a sufficient consideration for a note or bill. Civ.Code, § 1605; Naglee v. Lyman, 14 Cal. 450. And where heirs or assignees of an estate of a deceased person, in order to protect that estate from claims against the decedent which are enforceable against the property of the estate, obtain a renewal or extension of time on the original claim by agreeing to pay it, such renewal or extension is sufficient consideration for their promise. Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054; Whelan v. Swain, 132 Cal. 389, 64 P. 560; Humboldt Sav., etc., Soc. v. Dowd, 137 Cal. 408, 70 P. 274."

[14, 15] The undisputed evidence shows that the mother signed not simply to aid her son, but also to benefit herself. We therefore conclude that there was no evidence upon which to base a finding to the effect that the mother was an accommodation maker, and that the undisputed evidence shows that she was a maker, and therefore, primarily liable with her son upon the instrument. The court therefore erred in deducting from the distributive share of Elmer Chamberlain the amount paid by the estate upon said note. The contention made by respondent that if the consideration did not come from the payee, but from the accommodation party, (Elmer), the accommodation status of Mrs. Chamberlain was not affected. The cases cited by him—Gardiner v. Holcomb, supra, and Harris v. Holland, 107 Cal.App. 646, 290 P. 903—do not support his contention. Neither does 11 C.J.S., Bills and Notes, § 742, 296, nor 8 C.J. 253, paragraph 398, lay down such a rule. *Some months* after the note was executed, the court, on application of Mrs. Chamberlain, set aside all the real property of her husband's estate as a homestead. This left practically nothing in the estate. Respondent contends that as the widow had the right to her homestead, irrespective of the claims against the estate, it was no benefit to her to have the claims paid by her son. We do not see how the fact that she might, in the future, take such action, would affect the benefit which would accrue to her in the *ordinary course* of administration, and which was in contemplation of the parties when they executed the note.

That portion of the order appealed from which relates to the payment of the sum of $1,500, and the further payment of the proceeds from the almond orchard, is affirmed, while the portion which deducts from the distributive share of appellant, Elmer V. Chamberlain, the amount paid by the estate on the promissory note, is reversed, with directions to the trial court to enter an order in conformity with this opinion.

Appellant Elmer V. Chamberlain will recover his costs on appeal. Appellant Chapman and respondent will each pay his own costs.

We concur: PULLEN, P. J.; THOMPSON, J.

17 Cal.2d 104

WILLIAMS v. WELLS FARGO BANK & UNION TRUST CO.

Sac. 5404.

Supreme Court of California.

Jan. 27, 1941.

1. Appeal and error ⇐80(1)

In partition suit, decree determining parties' ownership of realty involved and directing sale thereof and division of proceeds because partition could not be made in kind without great prejudice to owners was "interlocutory judgment" within statute authorizing appeals from such judgments in actions for partition, though it reserved allowance of attorney's fees and costs and other details until final decree. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Interlocutory Judgment".

2. Partition ⇐77(3)

Where land owned by cotenants cannot be divided without prejudice to them and one of them is entitled to partition thereof, court may order sale of land and division of proceeds in lieu of partition in kind.

3. Appeal and error ⇐460(2)

The perfection of appeal from interlocutory decree, ordering partition of land by sale thereof and division of proceeds, stays proceedings thereon in lower court, without writ of supersedeas, in absence of specific provision concerning interlocutory judgment of partition under statute allowing court to require undertaking for performance of judgment appealed from. Code Civ.Proc. §§ 949, 963.

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Action by Flora J. Williams against the Wells Fargo Bank & Union Trust Company for partition of land. From a decree ordering sale of land and division of proceeds between the parties, plaintiff appeals. On appellant's petition for a writ of supersedeas to stay proceedings until decision on appeal.

Petition denied.

Edwin H. Williams, of San Francisco, for appellant.

George H. Johnston, of San Francisco, for respondent.

EDMONDS, Justice.

In a partition action brought by Flora J. Williams, the court rendered a decree ordering the property sold and the proceeds divided in proportion to the interest of each party. She then appealed from that decree upon the ground that the property should be partitioned in kind, and now seeks a writ of supersedeas to stay all proceedings authorized by it until the decision upon her appeal.

The controversy concerns 310 acres of land, one quarter of which, the superior court decided, is owned by the petitioner. The remaining three-fourths was decreed to be owned by the respondent Wells Fargo Bank & Union Trust Company, as trustee. The court further determined that the petitioner is entitled to partition, but that as it cannot be made in kind without great prejudice to the owners, a sale of the property is necessary. By other provisions of the decree the court appointed referees and directed them to sell the land, subject to confirmation, reserving the right to allow and apportion attorneys' fees, the expenses of sale, and costs in a final decree.

[1, 2] The petitioner contends that an appeal may be taken from an interlocutory decree which determines the rights of the parties and directs that a partition be made, and that the perfecting of the appeal stays all proceedings upon the decree appealed from. The respondent's position is that no appeal lies from a decree which orders a partition of property by sale and not in kind. It is insisting upon a sale notwithstanding the pendency of the appeal, and the referees are proceeding to act under the provisions of the decree.

The decree appealed from is within the express terms of section 963 of the Code of Civil Procedure, which provides that "An appeal may be taken * * * from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made * * *." It determines the ownership of the real property involved and describes it as that "herein ordered and adjudged to be partitioned and for the purpose of such partitionment * * * ordered and directed to be sold".

Such a decree, this court has held, is one from which an appeal may be taken

because the provisions concerning sale and confirmation merely state the action required to be taken in execution of its terms, and the order of confirmation to be later made will be one following final judgment. Hammond v. Cailleaud, 111 Cal. 206, 43 P. 607, 52 Am.St.Rep. 167. This is the logical and reasonable conclusion to be drawn from the applicable Code provisions. Where property owned by cotenants cannot be divided without prejudice to the owners and one of them is entitled to a partition, the court may order it to be sold and then divide the proceeds in lieu of a partition in kind. But a sale of the property and division of the proceeds is a partition, and it would be a curious result to hold that a party may appeal from an interlocutory decree ordering a partition in kind but not from one ordering a sale.

The present case aptly illustrates the injustice which would result from the construction of the statute urged by the respondent. The petitioner's principal objection to the interlocutory decree relates to the method used by the court in dividing the property. She is insisting upon a partition in kind, asserting that the only present use of the land is for dry farming; for this reason she says, it is now of very little value, but if the ditch of a proposed irrigation project is located on the land its value will be materially increased, whereas a sale now would necessarily result in a low and inadequate price. Under such circumstances, the right to an appeal before the sale and confirmation are had is particularly appropriate. And although the decree appealed from reserved the allowance of attorney's fees and costs of suit and other details until the final decree, it is clearly an interlocutory one within the meaning of section 963 of the Code of Civil Procedure.

[3] In the absence of specific provision concerning an interlocutory judgment of partition under section 949 of the Code of Civil Procedure, the perfecting of an appeal stays proceedings in the lower court upon such a decree. And although that section allows the court in its discretion to require an undertaking in an amount to be fixed by it "conditioned for performance of the judgment or order appealed from", this language has been expressly interpreted to mean "that a bond may be ordered in such of those cases where the appellant was adjudged to have money or other property in his possession belonging to the respondent, or was required to perform some act for the benefit of the respondent or in pursuance of the directions of the judgment or order appealed from, and that in all other cases the provisions of the section should operate as a stay of proceedings without bond." Jensen v. Hugh Evans & Co., 13 Cal.2d 401, 406, 90 P.2d 72, 74. For these reasons the appeal has stayed all proceedings upon the interlocutory decree and the petitioner does not require the writ of this court to that effect.

The petition is therefore denied.

We concur: GIBSON, C. J.; TRAYNOR, J.; CARTER, J.; SHENK, J.; PETERS, Justice pro tem.; WARD, Justice pro tem.



17 Cal.2d 85

FEWEL & DAWES, Inc., v. PRATT.

L. A. 16070.

Supreme Court of California.

Jan. 27, 1941.

1. Appeal and error ⇐1011(1)

A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment.

2. Appeal and error ⇐1011(1)

Where the evidence in support of a finding of trial court's finding is so slight that it does not create a real and substantial conflict, finding may be set aside on appeal.

3. Appeal and error ⇐1010(1)

Where written contract provided for division of insurance commissions solely between two named persons, and party asserting that corporation was party to agreement testified that other party refused to do business with the corporation, and there was no unequivocal statement by him that other party agreed to contract with corporation or with such party on behalf of corporation, testimony of such party that other party had said that he did not want to do business with the corporation but would do

business "through your corporation with you" did not constitute "substantial evidence" sufficient to support finding of trial court so as to preclude setting aside of such finding on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Evidence".

4. Contracts ⇐103

A contract which requires the performance of unlawful acts is unenforceable. Civ. Code, §§ 1608, 1667.

5. Insurance ⇐12

Where party to an agreement for the division of insurance commissions was not licensed as an insurance broker or agent either at such time or thereafter, he could not legally solicit insurance or receive commissions therefor and neither he nor his assignees could enforce such contract. St.1935, p. 584, § 1714; Civ.Code, §§ 1608, 1667.

6. Insurance ⇐12

An unlicensed person is not precluded from recovering an insurance commission if he secures such license by the time the contract is performed although it was executed prior to the time he was licensed. St.1935, p. 584, § 1714.

7. Novation ⇐1

Where assignment of contract for division of insurance commissions with an unlicensed person was merely of assignor's interest in commissions and there was no assumption of obligations by the assignee, there was no "novation" and obligations of the agreement remained with such unlicensed person and precluded assignee from suing thereon. St.1935, p. 584, § 1714; Civ. Code, §§ 1608, 1667.

See Words and Phrases, Permanent Edition, for all other definitions of "Novation".

8. Insurance ⇐12

Where contract for division of insurance commissions with unlicensed broker was illegal, party promising to divide commissions was not "estopped" from denying validity of contract because he accepted receipts in payment of part of commissions from unlicensed broker in name of corporation to conceal illegality of the transaction. St.1935, p. 584, § 1714; Civ.Code, §§ 1608, 1667.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

9. Contracts ⇐136

An illegal contract cannot be ratified and no person can be estopped from denying its validity. Civ.Code, §§ 1608, 1667.

10. Appeal and error ⇐179(1)

Where party to contract for division of insurance commissions with an unlicensed agent denied liability under the contract and introduced evidence showing that plaintiff was at no time a licensed agent or broker and moved in trial court to vacate judgment for plaintiff and to have judgment entered in his favor on ground that contract was illegal and made same contention on appeal, there was no basis for precluding him from raising question of illegality on appeal. St.1935, p. 584, § 1714; Civ.Code, §§ 1608, 1667.

11. Appeal and error ⇐173(6)

If a contract is illegal as a matter of law, Supreme Court may refuse to enforce it regardless of the pleadings of the parties. Civ.Code, §§ 1608, 1667.

CARTER, CURTIS, and SHENK, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; J. A. Smith and Ruben S. Schmidt, Judges.

Action by Fewel & Dawes, Incorporated, against Franklin L. Pratt, to recover insurance commissions. From a judgment for plaintiff, the defendant appeals.

Judgment reversed.

For prior opinions, see 101 P.2d 94, and 103 P.2d 209.

Hugh Ward Lutz, of Los Angeles, for appellant.

Hulen C. Callaway and Joe Crail, Jr., both of Los Angeles, for respondent.

TRAYNOR, Justice.

The appellant, Franklin L. Pratt, a licensed life insurance broker, had written several policies of life insurance for John G. Bullock of Los Angeles. In 1928, Bullock decided to take out additional life insurance amounting to $150,000 under an arrangement that would enable his son-in-law, Richard W. Fewel, to receive half of the commissions. Fewel was in debt to Bullock, and the latter wanted him to earn a share of the commissions so that he could meet his obligations. On July 10, 1928, Pratt and Fewel met in Bullock's office to make arrangements for working together.

Pratt refused to work with Fewel's associates and insisted that the agreement be with Fewel alone. Fewel maintained that he could not work without his associates. When they finally agreed to work together and to divide the commissions so earned, they went to the office of Pratt, who executed the following writing:

"July 10, 1928

"Mr. Richard W. Fewel,
"716 South Spring St.,
"Los Angeles.

"Dear Mr. Fewel:

"This is to confirm our verbal understanding of this date that we will work together in the purchase of insurance for Mr. John G. Bullock, on the basis of an equal division of the commissions.

"Very truly yours,

"F.L.P."

Fewel accepted this writing as embodying the terms of the agreement, and there is no question as to its authenticity.

Neither at that time nor since has Fewel been licensed as an insurance broker or agent. At the time of the agreement, however, he was planning to organize a corporation to carry on an insurance business. His plans materialized with the incorporation of Moore, Fewel & Company on July 30, 1928, which was duly licensed as an insurance broker on August 10, 1928. On September 1, 1928, Fewel, an officer and director of this company, assigned to it his interest in the agreement with Pratt. The company subsequently assigned its rights under the contract to its successor, Moore, Fewel & Devlin, Inc., which in turn assigned them to Moore, Fewel & Dawes. The latter subsequently changed its name to Fewel & Dawes, respondents herein. Richard W. Fewel has been at all times an officer of these corporations.

None of the life insurance policies contemplated by this agreement was secured until 1930. In 1930, 1931 and 1932, Pratt wrote various life insurance policies for Bullock with the cooperation of Fewel. On July 31, 1930, Pratt and Fewel made their first division of commissions. Pratt objected that the payment of commissions to Fewel would be illegal because the latter had no license. It was therefore agreed that Fewel should issue a receipt signed "Moore, Fewel & Devlin by Richard W. Fewel" to enable Pratt to show a legal transaction on his books. Pratt made out his check for the commissions to Fewel personally. Fewel deposited the check in his private account, which he alone used. Other commissions were subsequently divided in the same manner, the last division being made on February 19, 1931. On September 15, 1933, John G. Bullock died. On December 15, 1935, Fewel & Dawes, the last assignee of Fewel's right to commissions under the agreement with Pratt, brought suit against Pratt for unpaid commissions. The trial court gave judgment for plaintiff, and defendant Pratt has appealed.

The trial court found that Fewel was acting on behalf of the corporation Moore, Fewel & Company in making the agreement with Pratt. There is no substantial evidence that Pratt agreed to contract with an actual or contemplated corporation rather than with Fewel. Plaintiff has failed to sustain the burden of proving that Pratt gave the assent necessary to the completion of such a contract. On the contrary, it is undisputed that Pratt repeatedly insisted he would not work with Fewel's associates and would enter into a contract only with Fewel individually. Fewel's statement that he could not work without his associates in no way establishes that Pratt contracted with Fewel and his associates as a corporation. The question is not how Fewel intended to carry on his business, but who were the parties to the contract. Fewel's statement could not make the corporation a party to the contract without Pratt's agreement. The terms of the contract set forth in the memorandum written by Pratt, and accepted by Fewel, make no mention of a corporation as party to the contract. They clearly indicate the contract to be between Pratt and Fewel as individuals.

[1, 2] A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment. Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220; Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933; Tobias v. Adams, 201 Cal. 689, 258 P. 588; Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947; Thoreau v. Industrial Accident Commission, 120 Cal. App. 67, 7 P.2d 767; Gamberg v. Industrial Accident Commission, 138 Cal.App. 424, 32 P.2d 413; Gardiner v. Holcomb, 82 Cal. App. 342, 255 P. 523; Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377; Field v. Shorb, 99 Cal. 661, 34 P. 504; Felsenthal v. Warring, 40 Cal.App. 119, 180

P. 67; White v. Greenwood, 52 Cal.App. 737, 199 P. 1095; Elliott v. Market Street R. Co., 4 Cal.App.2d 292, 40 P.2d 547. If, however, the evidence is so slight and tenuous that it does not create a real and substantial conflict the finding may be set aside. Ibid. "There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character, such as reasonably supports the judgment * *." Herbert v. Lankershim, supra [9 Cal.2d 409, 71 P.2d 251].

[3] In the present case the only evidence in the entire record which tends to indicate that Pratt agreed to contract with Fewel on behalf of the corporation is the following statement by Fewel: "He said 'I don't want to do business with the corporation, but I will do business through your corporation with you.'" This statement, in itself contradictory and ambiguous, appears in the course of testimony by Fewel that Pratt insisted he would not do business with the corporation but only with Fewel personally. Nowhere in Fewel's testimony is there an unequivocal statement that Pratt agreed to contract with the corporation or with Fewel on behalf of the corporation. Against his ambiguous statement there stands not merely his other statements that Pratt would not do business with the corporation, and Pratt's testimony that he contracted with Fewel personally and not with the corporation; there stands also the written memorandum embodying the terms of the agreement, which makes no reference to the corporation but clearly states the contract to be between Pratt and Fewel as individuals, as well as the written assignment to the corporation in which Fewel openly refers to the contract as being between Pratt and himself. In this context Fewel's statement does not constitute evidence substantial enough to support the finding of the trial court.

[4-6] It is well established in California that a contract which requires the performance of unlawful acts is unenforceable. Civ.Code, §§ 1608, 1667; Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L.R.A., N.S., 575, 11 Ann.Cas. 661; La Rosa v. Glaze, 18 Cal.App.2d 354, 63 P.2d 1181. Former section 633aa of the California Political Code (now Insurance Code sec. 1714, St.1935, p. 584) provided: "Any person who shall act or offer to act or assume to act as a life insurance broker or agent, unless licensed by the insurance commissioner as provided in this section * * * shall be guilty of a misdemeanor." On the facts presented, the contract under consideration was between Pratt and Fewel as an individual. Since Fewel was at no time licensed as an insurance broker or agent, he could not legally solicit insurance or receive commissions; therefore, neither he nor his assignees can enforce the contract. It is true that an unlicensed person is not precluded from recovering a commission if he secures such license by the time the contract is performed, although it was executed prior to the time he was licensed. Houston v. Williams, 53 Cal.App. 267, 200 P. 55; Radich v. Cernokus, 65 Cal.App. 452, 224 P. 124; Brenneman v. Lane, 87 Cal. App. 414, 262 P. 400. In the present situation, however, Fewel not only had no license at the time he entered into the contract, but never acquired one thereafter. All the acts which he performed under the contract were illegal and can therefore give rise to no enforceable obligation.

The subsequent assignment by Fewel to the corporation of his right to receive payments under the contract in no way purported to substitute the corporation in Fewel's stead as a party to the original agreement, nor did the assignee-corporation undertake to perform any of the duties under the agreement. The assignment read: "Know all men by these presents: That I, Richard W. Fewel, of Los Angeles, California, for a valuable consideration, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and set over unto Moore, Fewel & Company its successors and assigns, all my right, title and interest in and to any and all commissions and renewal commissions for life insurance policies written on the life of John G. Bullock and accruing to me under and by virtue of an agreement between Franklin L. Pratt and myself, providing for the payment of one-half of said commissions to me. September 1, 1928. (Signed) Richard W. Fewel."

[7] The wording of the assignment clearly indicates that Fewel was merely transferring to the corporation the right to receive payments of money in return for a valuable consideration. There is no assumption of obligations by the corporation. There is no novation effected whereby the corporation steps into Fewel's shoes as obligor under the contract. The ob-

ligations of the agreement remained with Fewel; he performed them, and it was his performance of them without a license which rendered the contract illegal.

The assignment clearly states that the contract was between Fewel as an individual and Pratt. No assignment of rights would have been necessary had Fewell made the contract on behalf of the corporation, for the latter could then simply have adopted the contract as its own. Ballantine, Private Corporations, § 47.

[8, 9] Pratt is not estopped from denying the validity of his contract with Fewel because he accepted receipts from Fewel in the name of the corporation to conceal the illegality of the transaction. An illegal contract cannot be ratified, and no person can be estopped from denying its validity. Colby v. Title Insurance Co., 160 Cal. 632, 117 P. 913, 35 L.R.A., N.S., 813, Ann.Cas.1913A, 515; Reno v. American Ice Machine Co., 72 Cal.App. 409, 237 P. 784; Wood v. Imperial Irr. Dist., 216 Cal. 748, 17 P.2d 128; Regan v. Albin, 219 Cal. 357, 26 P.2d 475; A. L. I. Restatement, Contracts, §§ 590, 598.

[10, 11] Defendant in his answer denied any liability under the contract. He introduced evidence at the trial showing that Fewel was at no time a licensed agent or broker. He moved in the trial court to vacate the judgment and to have judgment entered in his favor on the ground that the contract was illegal and hence unenforceable. In his brief on appeal he urged the illegality of the contract as grounds for reversal. There is therefore no basis for precluding him from raising the question of illegality on appeal. If the contract is illegal as a matter of law, this court may refuse to enforce it regardless of the pleadings of the parties. Morey v. Paladini, 187 Cal. 727, 740, 203 P. 760; Pacific Wharf, etc., Co. v. Standard American Dredging Co., 184 Cal. 21, 192 P. 847; Endicott v. Rosenthal, 216 Cal. 721, 16 P. 2d 673; Kreamer v. Earl, 91 Cal. 112, 27 P. 735; Dean v. McNerney, 91 Cal.App. 206, 266 P. 975; 6 Cal.Jur. 162; 4 Cal.Jur. Supp. 71-72.

The judgment of the trial court is reversed.

We concur: GIBSON, C. J.; EDMONDS, J.; HOUSER, J.

CARTER, Justice (dissenting).

I dissent.

I cannot agree with the conclusion reached in the opinion prepared by Mr. Justice Traynor for the reason that it is predicated upon an incorrect statement of the facts of this case as they appear in the record and as found by the trial court, and the rules of law relied upon in said opinion are not applicable to the factual situation as disclosed by the record and determined by the findings of the trial court.

In my opinion the judgment should be affirmed with the modifications hereinafter mentioned.

As a correct understanding of the facts is essential to the solution of every legal problem, I will state the facts of this case as they appear in the record and as found by the trial court. They are as follows:

During the early part of the year 1928, Richard W. Fewel was a partner in an insurance brokerage firm known as "Universal Underwriters". Fewel was married to John G. Bullock's daughter. Pratt approached Fewel around the 10th day of July, 1928, and suggested that between the two of them they could sell Bullock some additional life insurance. Whereupon, Pratt gave Fewel a letter of that date agreeing to an equal division of commissions on such insurance as was purchased by Bullock. Fewel at the time was planning the organization of a new corporation to take over his insurance business. The organization of the corporation was completed July 25, 1928, under the corporate name of Moore, Fewel & Company. On September 1, 1928, Richard W. Fewel assigned the contract with Pratt covering the Bullock life insurance commissions to Moore, Fewel & Company, of which he was then an officer and stockholder. Moore, Fewel & Company were duly licensed as insurance brokers on August 10, 1928. The first policy of life insurance written for John G. Bullock was several months after August 10, 1928. Thereafter, Moore, Fewel & Company assigned the Pratt agreement to Moore, Fewel & Devlin, Inc., Ltd. (when a new corporation was formed to take in another partner), and Moore, Fewel & Devlin in turn assigned it to Moore, Fewel & Dawes. Moore, Fewel & Dawes changed its corporate name to Fewel & Dawes, Inc., the respondent herein. At all times prior to their respective

assignments Richard W. Fewel was an officer of the aforesaid corporations.

Fewel informed Pratt at the time the contract was made of his intention to organize a new corporation to take over his insurance business and that the Bullock life insurance would be handled through the new company, although it would have his personal attention.

During the years 1930, 1931 and 1932 considerable insurance was written on the life of John G. Bullock, resulting in the collection by the defendant Pratt of commissions amounting to $23,074.29. It was part of the arrangement between the parties that Pratt would keep the records, collect the premiums, and account to the plaintiff and its assignors for the commissions.

John G. Bullock died September 15, 1933. Prior to his death Bullock was unable to pay all the premiums on a large amount of life insurance purchased through Pratt and the respondent's assignors after the agreement was entered into. An arrangement was made between Pratt and the respondent's assignors whereby certain portions of the commissions earned would be advanced to Bullock and used in keeping the insurance in force.

At the time of Bullock's death there was $4,150.83 due Pratt and the respondent on account of the advances so made, for which Pratt filed a claim against the Bullock estate. This claim was approved and ordered paid by the Probate Court on December 12, 1935, the same date this action was instituted.

Prior thereto Pratt made a division of commissions, and the sum of $2,687.75 was paid to respondent's assignors and receipted therefor by Moore, Fewel & Devlin, Inc., Ltd., to Pratt. No other amount was ever paid to the respondent, or its assignors. Pratt was not required to account for the commissions prior to Bullock's death for the reason that Fewel knew a large portion thereof was being advanced back to Bullock in order to enable him to pay premiums. After Bullock's death, and up to the time of institution of the action, Pratt refused to account, for the reason, among others, that all of the commissions had not been collected.

At the conclusion of the trial, the trial court found "that the contract was made by Richard W. Fewel as an officer and agent of Moore, Fewel & Company, and was subsequently performed by him as an officer and agent of the other corporations owning it under the respective assignments."

The trial court further found "that at all times during the performance of the contract the respondent and its corporate predecessors in title thereto were duly licensed insurance brokers and entitled to one-half of the commissions derived from insurance written on the life of John G. Bullock after the date of the contract; that an accounting was had in open court, wherein it was determined that the gross amount of commissions was $23,074.29; and that after crediting the amounts theretofore paid by Pratt to respondent's assignor, there was due the plaintiff herein from Pratt the sum of $8,849.39 as its share of said commissions." The court found against the appellant Pratt on all of his defenses.

The trial court further found "that the appellant Pratt ratified the assignment of the agreement by accepting receipts from a subsequent assignee, Moore, Fewel & Devlin, Inc., Ltd."

Judgment was entered in favor of plaintiff for the sum of $8,849.39, with interest in addition thereto amounting to $1,993.30.

The first attempt by the defendant to assert the illegality of the agreement of July 10, 1928, was on a motion to vacate the judgment and to have a judgment entered in his favor. In support of such motion, the defendant contended that the agreement of July 10, 1928, was contrary to express statute and void for the reason that Fewel was not at that time a duly licensed and authorized insurance broker. This motion was denied by the trial court, and defendant appealed.

It is not true, as stated in the majority opinion, that: "There is no substantial evidence that Pratt agreed to contract with an actual or contemplated corporation rather than with Fewel. Plaintiff has failed to sustain the burden of proving that Pratt gave the assent necessary to the completion of such a contract. On the contrary, it is undisputed that Pratt repeatedly insisted he would not work with Fewel's associates and would enter into a contract only with Fewel individually. Fewel's statement that he could not work without his associates in no way establishes that Pratt contracted with Fewel and his associates as a corporation."

In making the foregoing statement, the author of the majority opinion has disregarded the findings of the trial court which

found the facts directly in conflict with said statement. These findings are supported by substantial evidence in the form of testimony of witnesses and inferences which the trial court was justified in drawing from the testimony and conduct of the parties.

So that there will be no question as to the testimony upon which the foregoing statement is based, I will quote the testimony of the witnesses verbatim. Fewel testified as follows:

"A. I will say this—that I was authorized at all times to negotiate with Mr. Bullock and Mr. Pratt, from the very inception they knew I was handling it; that Mr. Pratt didn't want anything to do with Mr. Moore, and I told him so; he told me he did not care to do business with Mr. Moore, he wanted to do business with me; that I was Mr. Bullock's son-in-law; he said, *'I don't want to do business with the corporation, but I will do business through your corporation with you.'* I said, 'All right.'

"A. No, he said he didn't want to do business with Mr. Moore and my associates; *that he didn't care if the corporation or my company or my associates participated,* but he wanted the contract with me; that I was Mr. Bullock's son-in-law and he did not see any reason whatever for them to come into the picture. I explained to him on the first matter, as I told you before, *I told him that I was associated with these people, and whatever I did I did it with them.*"

Defendant Pratt testified:

"I told Mr. Bullock, in Mr. Fewel's presence, that I couldn't legally do what we had agreed to do, but that I didn't want to be the beneficiary of that inability to do a thing I had contracted to do in good faith and that I would give any broker or anyone qualified legally to receive the commissions the amount involved.

"Q. *So therefore you paid it to Moore, Fewel & Devlin? A. Mr. Fewel said that if I would give the commissions to Moore, Fewel & Devlin he would arrange to see that he got the credit over there.*

"Q. *Well, was that agreeable to you? A. Yes, so far as giving away commissions is agreeable.*"

As I read the foregoing testimony I am forced to the conclusion that the trial court was justified in concluding as it did conclude that Fewel advised Pratt that the agreement between them was to be performed by Fewel and his associates who were later organized into a corporation which immediately became licensed as an insurance broker; that Pratt dealt with said corporation by paying to it one-half of the premiums which he collected on insurance policies written for Bullock; that Pratt thereby ratified the assignment of said agreement from Fewel to the corporation and by Moore, Fewel & Company, a corporation, to its successors in interest. The majority opinion also states that "It was therefore agreed that Fewel should issue a receipt signed 'Moore, Fewel & Devlin by Richard W. Fewel' to enable Pratt to show a legal transaction on his books. Pratt made out his check for the commissions to Fewel personally. Fewel deposited the check in his private account which he alone used. Other commissions were subsequently divided in the same manner, the last division being made on February 19, 1931."

The foregoing statement is only half true as the record shows without contradiction that Fewel had an understanding with the Board of Directors of the corporations, of which he was a director and officer, that while the portion of the premiums on Bullock's life insurance policies to which these corporations were entitled were to be paid to him and by him to Bullock on an indebtedness which Fewel owed to Bullock, Fewel would be charged on the books of the corporation with such premiums, and his account with the corporation would be adjusted when the subsequent premiums were paid. In this regard Fewel testified:

"I was vice-president, I believe; and I spoke to them—under my obligation to Mr. Bullock that I owed him so much money, and that I had an understanding with him that I would take these profits, the first year's profits and give them to him against my indebtedness, but that I would give the renewals to them, and they could charge me back for whatever I withdrew against my account, which was the current account.

"Q. You mean by that whenever you gave any of these commissions to Mr. Bullock, that the brokerage firm charged you with that money? A. They agreed to such an arrangement and we would work it out sooner or later. I explained it was going to be a big amount of insurance and renewals; and I was the only one in the corporation that was not drawing a sizable

salary, and I thought I was entitled to something, and it had to be along this line to work it out.

"Q. Did they agree with that? A. They agreed with that—Mr. Bullock understood it thoroughly.

"A. I testified that I later had an agreement with Mr. Moore, who was attending to the life insurance end of our corporation—I informed him that I was heavily indebted to Mr. Bullock; that I was to take no compensation out of the company; that he and Mr. Devlin were drawing good salaries; that Mr. Bullock felt that I should get something out of it and pay him on account of what I owed him; and I thought we should have some kind of understanding with them whereby I could return those first year's premiums to Mr. Bullock, to credit my account; they would get the renewals, and eventually they could charge the amount I gave Mr. Bullock and eventually we would wipe it out on other commissions we wrote.

"Q. When did you have the understanding with Moore, Fewel & Company? A. The first time I talked it over, I think, was with Mr. Moore and Mr. Dawes; and they said they could not agree on it until we had a board of directors' meeting; and I talked to the boys in the board of directors' meeting one day and they agreed that that was fair enough."

The only conclusion which one can draw from the foregoing testimony is that whatever service Fewel rendered in connection with the performance of the agreement between himself and Pratt of July 10, 1928, was rendered and performed by him as an officer and director of the corporations to which said contract had been assigned. These corporations were licensed as insurance brokers at the time all of the insurance policies were issued to Bullock and at the time the premiums became due thereon with the exception of two of said policies hereinafter mentioned. In view of the findings of the trial court, which are amply supported by substantial evidence in the record, the facts of this case do not warrant the application of the rule enunciated in the cases of Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L.R.A.,N.S., 575, 11 Ann. Cas. 661; and La Rosa v. Glaze, 18 Cal. App.2d 354, 63 P.2d 1181, relied upon in the majority opinion.

The leading case of Levinson v. Boas, supra [150 Cal. 185, 88 P. 826, 12 L.R.A., N.S., 575, 11 Ann.Cas. 661], involved a pawnbroker who was operating a pawnshop in violation of the law. The court stated in its opinion: "The respondent, neither at the time of the making of the loans, or at any time, had a license to carry on or conduct the business of pawnbroker."

Likewise, in the case of La Rosa v. Glaze, supra. The plaintiff in that action never at any time had a license as agent, commission merchant, or dealer in farm products, as required by section 1263 of the Agricultural Code, St.1933, p. 276.

It has been uniformly held that an unlicensed person is not precluded from recovering a commission, if he had such license at the time the contract was performed and the cause of action arose, although the contract under which he seeks to recover commissions may have been executed prior to the time he was licensed. Houston v. Williams, 53 Cal.App. 267, 200 P. 55; Radich v. Cernokus, 65 Cal.App. 452, 224 P. 124; Brenneman v. Lane, 87 Cal.App. 414, 262 P. 400.

In each of the above-mentioned cases, a real estate broker's contract was involved. A contract authorizing a real estate agent to sell real property on a commission basis had been entered into before the agent had obtained a license pursuant to the law of this state, but a license had been obtained by him before the sale was consummated and his right to the commission had accrued. It is true that the court in the Houston case predicated its opinion upon the wording of section 20 of the act, St.1919, p. 1259, which provides that no person engaged in the business or acting in the capacity of a real estate broker shall bring or maintain any action in the courts of this state for collection of compensation for the performance of any of the acts mentioned in section 20 of the said act without alleging and proving that said person was a duly licensed real estate broker at the time the alleged cause of action arose.

In the case of Davis v. Chipman, 210 Cal. 609, at page 622, 293 P. 40, at page 46, this court, in referring to the case of Houston v. Williams, supra, said: "In Houston v. Williams, supra, it was held that a limitation upon this rule was made by section 20 of the act, and that the rule in all its rigor should not apply to a person holding a broker's license at the time he consummated a sale of real property, even though he had no such license at the time he entered into a contract with the owner to pay him a commission. The court there held that a reasonable construction of the act would permit such a

holding. While agreeing with the appellate court in this ruling, we are further of the opinion that it would be a most unreasonable construction of the statute to hold that it permitted an action to be maintained as in the present proceeding where the plaintiff had no license at the date the sale of the property was effected, or during any of the time during which he rendered the services for which he seeks to recover, and only secured such a license practically a year after the sale was effected. 'As plaintiff held no broker's license at the time the sale involved herein was consummated, he is not entitled to recover compensation for his services, all of which were rendered prior to his securing any license."

The inevitable conclusion at which one must arrive from a reading of the above-mentioned cases is that it was the intention of the legislature to denounce the performance of certain acts by a person whom the law required to procure a license before such acts can be performed. In the case of a real estate broker, it was the sale of real estate on a commission basis; in the case of an insurance broker, it was the solicitation or sale of insurance. In other words, it was the doing of something in connection with the conduct of the business of such agent or broker which constitutes a violation of the statute, instead of merely agreeing to perform such acts at some future date, when the person performing the same has complied with the requirements of the law with respect to obtaining the license.

The record conclusively shows that the respective assignee corporations to which the agreement was transferred were licensed insurance brokers throughout the entire time of performance under the agreement, except as hereinafter stated. Moore, Fewel & Company was licensed from August 10, 1928, to June 30, 1930; Moore, Fewel & Devlin, Inc., Ltd. from July 1, 1930, to June 30, 1932; Moore, Fewel & Dawes from July 1, 1932, to October 6, 1933. On October 11, 1933, Moore, Fewel & Dawes, Inc., Ltd. changed its corporate name to Fewel & Dawes, Inc. There was a lapse in its license from October 6, 1933, to November 10, 1933. Performance under the agreement having come to an end with the death of John G. Bullock, and respondent being a duly licensed life insurance broker at the time of performance and at the commencement of this action, it is not material that there was a lapse in the corporation's license from October 6, 1933, to November 10, 1933. Moore, Fewel & Dawes was, however, not licensed when two policies were issued February 17, 1932. Those premiums should be eliminated from the judgment.

The agreement of July 10, 1928, was a continuing agreement or contract and there is nothing to show that such contract was not to exist as long as Pratt procured insurance under said agreement. The evidence shows that Bullock contemplated taking out $150,000 additional insurance at the time the written agreement was executed. Pratt had no option to terminate the contract at will. There is no evidence that the contract was terminated on February 19, 1931, as contended by appellant. The contract could only be terminated by the mutual consent of all parties. Findings number 27 and number 28 to the effect that the contract was not terminated are supported by the evidence.

There is no merit in the contention that a proper accounting was not had between the parties. An accounting was held and the record fails to show any prejudice to appellant with the exception of the item of interest, which was allowed. Respondent introduced in evidence a record containing a list of the companies, the policies and premiums and the commissions which were earned. Appellant reserved the right to check the correctness of this record, and to offer evidence of any error which it might contain. The court found that appellant was paid $23,074.29, as commissions under the agreement, and that respondent's share of 50 per cent thereof amounted to $11,537.14. The court also found that respondent's assignors had been paid by appellant on account of its share of said commissions only the sum of $2,687.75, leaving a balance due to respondent under the agreement of $8,849.39. That finding is supported by the evidence, except as hereafter stated.

It is true that the corporate name of Moore, Fewel & Devlin was changed in 1932 to Moore, Fewel & Dawes. The contract involved in this case was assigned to the last-mentioned corporation January 12, 1932, which was not licensed as a broker until July 1, 1932. During the interval between the date of assignment of the contract to the last-mentioned corporation, and the issuance of its broker's license, Pratt procured two policies on the life of Bullock of $25,000 each and two renewals of premiums, on or about February 17, 1932, from which commissions aggregating the sum of $2,146.81 were received by Pratt.

While the assignor's license was in full force during that interval, I assume that since title to the contract was then in the name of Moore, Fewel & Dawes, which was not then licensed as a broker, it would not be entitled to share in such commissions. The judgment of $8,849.39 should therefore be modified by subtracting therefrom said sum of $2,146.81.

Findings numbers 24 and 25, with respect to the interest allowed, are not supported by the evidence. The record fails to disclose the dates of payments of commissions to appellant. At least it is impossible to determine which dates refer to the specific times when the commissions were received by the appellant. The record therefore fails to show that respondent is entitled to interest on unpaid commissions which were received by the appellant. The judgment should also be modified by disallowing the items of interest in the sum of $1,993.30.

There is no merit whatever in appellant's contention that the contract of July 10, 1928, was not assignable, or that he could not be compelled to recognize the assignee thereof, as the evidence is undisputed that appellant dealt with the corporate assignees of Fewel, and accepted receipts signed by said assignees for commissions paid Fewel, pursuant to said contract. The conclusion is therefore inescapable that even though appellant did not contemplate contracting with the corporate assignees of Fewel at the time he entered into said agreement, he is, nevertheless, estopped by his conduct from contending that the assignment of the agreement by Fewel terminated the contract and that the assignee acquired no rights thereunder by virtue of the various assignments thereof.

As I view this case, however, in view of the findings of the trial court, I am of the opinion that the contract of July 10, 1928, was made by Fewel on behalf of the corporation which he contemplated organizing, and the assignment thereof by Fewel to the corporation was a mere formality and was not essential to secure to said corporation the rights to which it was entitled under said contract.

The evidence is sufficient to support the findings of the trial court that said contract was made by Fewel as an officer and agent of Moore, Fewel & Company, and was subsequently performed by him as an officer and agent of the other corporations to which it was assigned.

Appellant has attempted to raise the proposition of res adjudicata against the judgment recovered by respondent in this case. This proposition is presented by way of a motion to take additional evidence in this court, pursuant to section 956a of the Code of Civil Procedure.

The judgment which appellant contends is res adjudicata of the judgment herein appealed from was entered September 8, 1937, approximately fifteen months after the entry of the judgment in the case at bar; said judgment of September 8, 1937, arose out of the following factual situation:

About December 12, 1933, respondent levied an attachment upon certain funds held by the executors of the estate of John G. Bullock. After entry of judgment on June 24, 1936, no stay having been obtained by appellant, execution was levied by the respondent against these same funds. The executors thereupon filed an action of interpleader, and paid the moneys into court, alleging that numerous claims had been made thereto by various creditors of said Franklin L. Pratt. Respondent filed an answer and cross-complaint in this action, setting forth its claim to the interpleaded fund. The cross-complaint sets forth and alleges a prior right to the interpleaded fund for the reasons that, (1) The rights of other claimants were based on certain assignments from Pratt which constituted fraudulent conveyances, and (2) The fund was impressed with a constructive trust and therefore no assignments could be validly made by Pratt.

The court in this interpleader action found that Fewel & Dawes, Inc., was entitled to recover said moneys subject to the right of two other claimants, who held valid assignments from Pratt. The court also found that the interest of Fewel & Dawes, Inc., existed, however, only by virtue of the levy of the writ of attachment and the subsequent levy of a writ of execution. As to the second cause of action, which was predicated on the theory of a constructive trust in the fund for the benefit of respondent corporation, the court found that no such trust existed. The findings of fact determined that the contract of July 10, 1928, was not made with or on behalf of Moore, Fewel & Company; that, on the contrary, the agreement was made with Richard W. Fewel and that it was void, as he was not a licensed life insur-

ance agent or broker at the time of said agreement, nor at any time thereafter; that the claim for the funds in question from the estate of John G. Bullock, deceased, was properly made in behalf of Franklin L. Pratt. The judgment in this interpleader action was entered on November 8, 1937, and became final after time for appeal had elapsed. Appellant sought to introduce that final judgment as evidence in this case to establish it as res adjudicata and to create an estoppel.

I am of the opinion it was not the court's province in the suit of interpleader to challenge the judgment upon which execution had issued. The sole issue which was presented to the court in that cause of action was neither involved in nor determinative of the issues in the present suit. The issue before the court in that action raised the question as to whether the appellant, Pratt, was a trustee of the interpleaded fund, and as such, whether he violated his duty as trustee by assigning that fund to various claimants. A finding that he was not a trustee of said fund for the benefit of the respondent herein did not determine the issues presented in this suit for an accounting. That final judgment, therefore, is not res adjudicata of the issues presented in this case.

An examination of the cases cited by appellant fails to disclose any precedent for the application of res adjudicata or estoppel under the circumstances of this case.

I am forced to the conclusion, after a very careful examination of the record and briefs in this case that every consideration of equity and justice is on the side of the plaintiff and respondent in this case, and that the defendant and appellant is attempting to evade an obligation which he contracted in good faith to perform and which he did perform until the death of Bullock, but when he saw no further opportunity to advance his own interests by continuing to secure the cooperation of Fewel and his corporation, he repudiated his obligation and is now attempting to resort to technical defenses to defeat a just obligation which he contracted in good faith, with full knowledge of all the facts and circumstances surrounding the arrangement which he himself made with Fewel and which the trial court found had been faithfully executed by Fewel and his successors in interest. To now permit the defendant to prevail under such circumstances, will, in my opinion, result in a miscarriage of justice which should not be countenanced by any court.

The judgment should be modified by striking therefrom the commissions on the policies and renewals of February 17, 1932, aggregating the sum of $2,146.81, and the items of interest allowed in the sum of $1,993.30, and as so modified, the judgment should be affirmed.

We concur; CURTIS, J.; SHENK, J.



DILLON v. BOARD OF PENSION COMMISSIONERS OF CITY OF LOS ANGELES et al.*

L. A. 17553.

Supreme Court of California.

Jan. 29, 1941.

Rehearing Granted Feb. 27, 1941.

1. Limitation of actions ⇐51(2)

A mandamus action commenced by deceased police officer's widow over three years after his death, to compel city board of pension commissioners to issue order for payment of pension to petitioner, was not barred by statute of limitations as to pension payments accruing within three years before bringing of action and in future, as right to pension payments is a continuing one, and right to each installment accrues when it becomes payable. Code Civ.Proc. §§ 312, 338, 1109.

2. Limitation of actions ⇐51(2)

A mandamus action by deceased police officer's widow to compel Los Angeles city board of pension commissioners to issue order for payment of pension to petitioner was not barred by statute of limitations as to pension payments accruing within three years before bringing of action and in future, though not brought within three years after board's denial of petitioner's claim for pension, as running of such statute is determined by time when right to each pension payment accrues and claimant need not present claim to board anew after three years from date of denial thereof. Code Civ.Proc. §§ 312, 338, 1109; Charter of City of Los Angeles, §§ 183, 376.

* Subsequent opinion 116 P.2d 37.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding by Virginia M. Dillon for a writ of mandamus to compel the Board of Pension Commissioners of the City of Los Angeles to issue an order for payment of a pension to petitioner as the widow of a deceased city police officer. From a judgment of dismissal, plaintiff appeals.

Reversed.

Prior opinion, 100 P.2d 803.

Pollock & Pollock, Edward I. Pollock, David Pollock, Theodore A. Horn, and Louis Miller, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiff's husband, a police officer for the city of Los Angeles, committed suicide in April, 1934. Within six months, plaintiff presented an application to the Board of Pension Commissioners of the city of Los Angeles for the allowance of a widow's pension under article 17, section 183 of the charter of the city of Los Angeles. The application was denied by the board in February, 1935. In December, 1938, she filed the present proceeding in mandamus to compel the board to issue an order for the payment to her of a pension in future and a cash sum equal to the amount of pension funds accrued in the three years preceding the date of the filing of the petition plus the amount of pension which will have accrued from that date to and including the date of such order with interest. The petition alleged that in the course of his duties as police officer plaintiff's husband suffered two accidents entailing severe injuries to his body and nervous system which gave rise to a condition of mental unbalance during which he took his life. Defendants demurred to the petition on the grounds that the petition did not state sufficient facts as to the nature and extent of the deceased's injuries and his mental condition before death and that any cause of action was barred by the statute of limitations. The trial court sustained the demurrer without leave to amend holding that the cause was barred by the statute of limitations. Upon being refused leave to file a second amended petition, plaintiff appealed from the judgment of dismissal.

[1] Sections 338 and 312 of the Code of Civil Procedure, which are applicable to actions in mandamus, Code Civ.Proc. sec. 1109, provide that an action upon a liability created by statute, other than a penalty or forfeiture, must be commenced within three years after the cause of action has accrued. Defendants contend that under these provisions the action is barred because it was commenced more than three years after the death of plaintiff's husband. In the language of this court, however, "The right to pension payments is a continuing right." Dryden v. Board of Pension Commissioners, 6 Cal.2d 575, 580, 59 P.2d 104, 107. The right to each installment accrues at the time it becomes payable, not at the time of the decedent's death. In the Dryden case the court was concerned with section 376 of the Charter of the City of Los Angeles which requires that any claim against the city other than for damages be presented within six months after the last item of the claim has accrued. A deceased police officer's widow had presented her claim more than six months after her husband's death. The court in upholding her claim declared: "Petitioner by her conduct may have barred herself from collecting payments which have accrued, but this does not mean that she is without means to enforce the right to present and future pension payments, as distinguished from past and accrued pension payments. * * * It is our opinion that the petitioner is entitled to all those periodic pension payments which fell due within a period of six months prior to her application to the Board of Pension Commissioners, and to all those periodic pension payments which have accrued since that date and which will continue to accrue in the future * * *." Dryden v. Board of Pension Commissioners, 6 Cal.2d 575, 580, 59 P.2d 104, 107. In Talbot v. City of Pasadena, 28 Cal.App. 2d 271, 82 P.2d 483, defendants claimed that a widow's action for a pension six years after the death of her husband was barred by section 338(1) of the Code of Civil Procedure. The court stated: "The period of limitation prescribed by subdivision 1 of section 338 of the Code of Civil Procedure will run against a claim for accrued pension payments. * * * From the allegations of the plaintiff's

complaint all claims for pension payments accrued before April 15, 1933, would be subject to the bar of the statute of limitations. The fact that some of the payments may be barred does not justify an order sustaining the demurrer without leave to amend." 28 Cal.App.2d at page 273, 82 P.2d at page 484. "The right, if any, to a pension is a continuing one." 28 Cal. App.2d at page 274, 82 P.2d at page 484.

These cases are controlling herein. Defendants rely upon Hermanson v. Board of Pension Commissioners, 219 Cal. 622, 28 P.2d 21, for the proposition that a pension claim is completely barred if action thereon is not brought within three years of the death of the decedent. The court there held, however, that the plaintiff was not entitled to a pension on the merits. It then added without discussion a statement not essential to the decision to the effect that the action was also barred by the statute of limitations. Whatever implications lay therein have been dispelled by this court's statement in the Dryden case, supra, that "Defendants contend that the conclusion reached above is inconsistent with our decision in Hermanson v. Board of Pension Commissioners, [supra]. In that case we held that on the merits the petitioner was not entitled to a pension, and added that the statute of limitations was a bar to his claim. The point raised in the instant case, that the right to a pension is a continuing one, was not made in the Hermanson Case, and, in view of the adverse determination against the applicant on the merits, would have been unavailing."

[2] Defendants' contention that in any event the action is barred because the plaintiff did not bring it within three years after the board's denial of her claim for a pension is also without merit. Sections 183 and 376 of the City Charter require that a pension claim must be presented first to the Board of Pension Commissioners, and denial of the claim by the board must precede any court action to enforce the claim. The running of the statute of limitations, however, is determined not by the time of the board's denial, but by the time when the right to each payment accrues. Talbot v. City of Pasadena, supra. Nor is it necessary for the plaintiff to present her claim to the board anew because more than three years have elapsed from the date of the last denial. One proper claim, even though denied by the board, serves to satisfy the requirements of the City Charter with regard to any claim for future payments. Talbot v. City of Pasadena, supra.

We therefore hold that the statute of limitations has not run upon any right which plaintiff may have to payments which have accrued within three years prior to the bringing of this action and to payments which may accrue in the future.

The judgment of the trial court is reversed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; HOUSER, J.; EDMONDS, J.; CARTER, J.



17 Cal.2d 189

ROMERO et al. v. DEPARTMENT OF PUBLIC WORKS, et al.

L. A. 16483.

Supreme Court of California.

Jan. 30, 1941.

Rehearing Denied Feb. 27, 1941.

1. Railroads ⇐82(3)

Where grantee, when applying to probate court for order directing execution of deed by administratrix in accordance with agreement between grantee and deceased, represented that grantee had performed its part of agreement which called for construction of railroad on land, it could be assumed that court, by its order, and administratrix, by execution and delivery of deed, intended to provide for a reversion in event of a cessation of use of land for railroad purposes by language in deed providing that, if grantee and its successors failed to use conveyed land for railroad purposes, land should revert to deceased's heirs.

2. Eminent domain ⇐152(1)

Generally, the owner of a possibility of reverter prior to a breach of the condition is not entitled to compensation when property is taken under law of eminent domain, but the owner of fee or reversionary interest should have a separate valuation of his interest where land taken has some special value to him, and otherwise the law will not take notice of separate value of fee and of

user where there is no substantial difference in their values, and, if, in such case, at time fixed for valuation the reversion has not occurred, the reversionary interest has no compensable value in a condemnation proceeding.

3. Eminent domain ⇐158

In action for declaration of plaintiffs' title to land which had been condemned by the state for highway purposes, and for a mandate directing defendants to proceed with condemnation proceedings to an adjudication of amount due plaintiffs as compensation for the taking of plaintiffs' alleged reversionary interest in land, question concerning value of reversionary interest was for trier of fact, after proof of such value had been introduced in evidence.

4. Eminent domain ⇐158

In action for declaration of plaintiffs' title to land which had been condemned by state for highway purposes and for other relief, a complaint, alleging that land was conveyed by administratrix for plaintiffs' predecessor under deed containing condition that, if grantee and its successors failed to use land for railroad purposes, it should revert to predecessor's heirs and that land was abandoned for railroad purposes after it was condemned for highway purposes in proceedings wherein no summons was served upon heirs who did not appear in such proceedings prior to entry of judgment, was sufficient to tender issue of damages to an interest in property taken for public use.

5. Eminent domain ⇐269

In action for declaration of plaintiffs' title to land which had been condemned by state for highway purposes, Supreme Court was unable to compel defendants to revive an old condemnation proceeding or institute new condemnation proceedings for purposes of an adjudication of amount due plaintiffs as compensation for the taking of land and plaintiffs' interest therein.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Hortensia M. Romero and others against the Department of Public Works of the State of California and others, wherein plaintiffs sought a declaration of their title to certain land and other relief. From a judgment of dismissal entered on an order sustaining defendants' demurrer to the complaint, plaintiffs appeal.

Reversed.

For prior opinion, see 97 P.2d 871.

Tanner, Odell & Taft and S. W. Odell, all of Los Angeles, for appellants.

C. C. Carleton, Chief Counsel, Department of Public Works, Frank B. Durkee, C. R. Montgomery and Robert E. Reed, Attys., Department of Public Works, all of Sacramento, for respondents.

SHENK, Justice.

The plaintiffs appealed from a judgment of dismissal entered on an order sustaining the defendants' demurrer to the complaint.

The complaint shows the following:

In July, 1891, Bonifacio Marquez was the owner of land bounded on the west by the Pacific Ocean and on the south by the city of Santa Monica. In that month he agreed to sell and convey to Pacific Improvement Company a strip of his land 200 feet in length and 100 feet wide, bordering on the ocean. The consideration for the grant was the sum of one dollar and the benefits to be derived by him from the construction and operation of a railroad between the city of Los Angeles and the Southern Pacific wharf at Santa Monica. The agreement provided: "In case said railroad shall not be located on said land, this agreement shall be null and void." The Pacific Improvement Company located and constructed the railroad in accordance with the agreement. On September 8, 1891, while the railroad was in the course of construction, Bonifacio Marquez died intestate and Maria Antonia Oliverez de Marquez was appointed administratrix of his estate. The Pacific Improvement Company filed a petition in the probate proceedings, alleging performance of the agreement and asking for a conveyance of the 100-foot strip. Pursuant to an order of court, a deed was executed and delivered by the administratrix on October 27, 1892, conveying a strip 100 feet wide a distance of approximately 200 feet, containing about 46/100 acres of land. The deed provided: "This deed is made upon the express condition that the land hereby conveyed shall be used by the party of the second part, its successors or assigns, for railroad purposes, and in the event that said party of the second part, its successors or assigns, shall fail so to use

said land for railroad purposes then and thereupon said land shall revert to and become vested in the heirs of Bonifacio Marquez, deceased."

The Pacific Improvement Company and its successors, Southern Pacific Company and Pacific Electric Railway Company, commenced and continued the operation of a railroad on said strip or a portion of it for about forty years.

On August 16, 1922, California Highway Commission, acting on behalf of the Department of Public Works of the state of California, adopted a resolution providing for the "acquisition of a right of way for highway purposes over and upon" the strip of land described in the above mentioned deed. The Department of Public Works filed an action "for the purpose of condemning a right-of-way for a highway across said lands". No summons was ever issued in said action or served upon the administratrix of the estate of Bonifacio Marquez named therein as a defendant, nor upon any of the heirs, some of whom are the plaintiffs herein. In that action, however, the corporate defendants voluntarily appeared, and a stipulated judgment was entered providing for a decree of condemnation of the property of those defendants, namely, Southern Pacific Company, Pacific Electric Company, and others. An interlocutory judgment of condemnation was entered in said action on August 28, 1922, and a final judgment in July, 1925. Pursuant to the stipulated judgment the westerly 60 feet of the 100-foot strip were condemned for highway purposes and the Southern Pacific Company and the other appearing defendants received as damages the cost of the re-location and re-construction of the right-of-way and railroad bed on the remaining 40 feet of the 100-foot strip, and continued the operation of the railroad on said 40-foot strip until on or about January 25, 1934, when the operation of the railroad on said land ceased, all materials were removed, and the strip was wholly abandoned for railroad purposes. It was alleged that after such abandonment the Department of Public Works entered upon the westerly ten feet of the remaining 40-foot strip and improved said ten-foot strip as part of the highway. Possession was so taken and improvement pursued without any adjudication in the pending condemnation action or in any other proceeding.

On April 24, 1934, the heirs of Bonifacio Marquez or their representatives filed an action in the superior court in Los Angeles county to quiet their title to the 100-foot strip of land. In August, 1934, the same parties appeared and filed an answer in the condemnation action in which judgment had been entered in July, 1925. The plaintiff in the condemnation action moved to dismiss the action as to said appearing defendants. The motion was denied and judgment for the defendants, heirs of Marquez, followed. A stipulation was thereupon entered into between the parties in both the condemnation action and the quiet title action, in which it was agreed that if the plaintiff in the condemnation action should prevail on its appeal to the District Court of Appeal from the judgment in favor of the defendants, heirs of Marquez, their claimed title to the ten-foot strip would be deemed to be adjudged thereby; that if the judgment should be affirmed, the several heirs would accept a designated proportion of the award for said ten-foot strip; but that if the judgment on appeal did not go to the merits the stipulation was to be ineffective. On the appeal (People ex rel. v. Southern Pacific R. Co., 17 Cal.App.2d 257, 61 P.2d 1184), the court held that the motion of the plaintiff to dismiss the action as to said defendants, heirs of Marquez, pursuant to section 581a, Code of Civil Procedure, should have been granted. That decision made ineffective the stipulation between the parties, and expressly relegated the defendants affected thereby to a prosecution of the pending action to quiet title for an adjudication of their title or their rights to compensation for the taking of said 60-foot strip. People v. Southern Pacific R. Co., supra, 17 Cal.App.2d at page 262, 61 P.2d 1184.

By the present action subsequently filed, the plaintiffs sought a declaration of their title to said 100-foot strip, and the mandate of the court directing the defendants to proceed with the prior condemnation proceeding, or in a new condemnation proceeding, or in the action herein, to an adjudication of the amount due to the plaintiffs as compensation for the taking of said 60-foot strip and said ten-foot strip or of any right, title or interest of the plaintiffs therein. It was also alleged that prior to the filing of the action herein the plaintiffs duly served a written claim and demand for

the payment to them of compensation, which was rejected.

The defendants filed a general demurrer to the complaint which was sustained and the judgment of dismissal followed.

On this appeal the plaintiffs contend that the condition contained in the administratrix's deed hereinabove quoted and the alleged abandonment of the strip of land for railroad purposes are determinative of their right to compensation for said 70-foot strip. They rely on Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047; Papst v. Hamilton, 133 Cal. 631, 66 P. 10; Parsons v. Smilie, 97 Cal. 647, 32 P. 702; Liebrand v. Otto, 56 Cal. 242; Moakley v. Blog, 90 Cal.App. 96, 265 P. 548, and similar cases.

The defendants contend that the condition should not be construed to effect a reversion or a right of re-entry, because such title or right is not predicated on a cessation of the use of said land for railroad purposes, but on a failure to put said land to such use; that the word "fail", as employed in said covenant, does not mean "cease"; therefore, a use for railroad purposes having been alleged, the judgment is conclusively supported by the cases of Hasman v. Elk Grove Union High School, 76 Cal.App. 629, 245 P. 464; Booth v. County of Los Angeles, 124 Cal.App. 259, 12 P.2d 72, and O. T. Johnson Corporation v. Pacific Elec. Ry. Co., 19 Cal.App.2d 306, 65 P.2d 368.

[1] There is merit in the contention of the plaintiffs that the word "fail" as used in said deed should be read with the meaning contended for by them. Webster's New International Dictionary, second edition, applies both meanings to the word "fail", namely, "to keep or cease from an appointed, proper, expected, or required action. * * *" When the Pacific Improvement Company applied to the court for an order directing the deed to be executed, it represented that it had fully performed the agreement on its part. Considered in the light of that fact it may be assumed that the court by its order and the administratrix by the execution and delivery of the deed intended the language to provide for a reversion in the event of a cessation of the use of said strip for railroad purposes.

[2] When the state in the condemnation proceeding acquired the title to the sixty-foot strip for highway purposes it thereby prevented its use for railroad purposes. As to so much of said property, the condition that it should be used for railroad purposes became impossible of further performance by operation of law. In other words, the public necessity for highway purposes as to that portion which was conclusively established in the condemnation proceeding, prevented further performance of the condition. The authorities generally are to the effect that the owner of the possibility of a reverter prior to a breach of the condition is not entitled to compensation when the property is taken under the law of eminent domain. Such cases hold that the possibility of voluntary abandonment by non-user is so remote and improbable that it has no substantial value to be estimated in a condemnation proceeding. They recognize, however, that the owner of the fee or the reversionary interest should have a separate valuation of his interest where the land taken has some special value to him, as where the underlying lands are shown to be mineral bearing or otherwise of value separately from the use of the surface of the land; but that otherwise the law will not take notice of the separate value of the fee and of the user where there is no substantial difference in their values, and if, in such case, at the time fixed for the valuation the reversion has not occurred, the reversionary interest is said not to have any compensable value in a condemnation proceeding. Southern Pac. R. Co. v. San Francisco Sav. Union, 146 Cal. 290, 79 P. 961, 70 L.R.A. 221, 106 Am.St.Rep. 36, 2 Ann.Cas. 962; City of San Gabriel v. Pacific El. Ry. Co., 129 Cal. App. 460, 18 P.2d 996; Lutes v. Louisville & Nashville Railroad Co., 158 Ky. 259, 164 S.W. 792; Nichols, Eminent Domain, 2d Ed., vol. 1, p. 243; see also Lyford v. City of Laconia, 75 N.H. 220, 72 A. 1085, 22 L. R.A.,N.S., 1062, 139 Am.St.Rep. 680.

No difficulty presents itself as to the alleged right of the plaintiffs in and to the easterly thirty feet of said 100-foot strip or to their alleged right to compensation for their interest in said ten-foot strip. It appears from the complaint that the reversionary interest in the easterly forty feet had vested the entire title or interest in the plaintiffs after the abandonment by the railroad company, and, as appears by the judgment in the condemnation action, by the state itself. The revesting of the plaintiffs' ownership in the easterly 40 feet must be deemed to be shown by the facts alleged in the complaint. If the facts so alleged be supported by proof and it be shown that

there had been an abandonment of said 40-foot strip by the railroad company, and subsequently a taking of 10 feet of said strip by the state, the plaintiffs, rather than the railroad, would be entitled to compensation for that portion of the land formerly deeded by the administratrix of the estate of their ancestor.

[3] The plaintiffs contend that the facts alleged respecting the sixty-foot strip show that they are also entitled to some compensation for the taking thereof. The contention is based on the argument that by the alleged agreement Bonifacio Marquez retained a particular interest in the hundred-foot strip, namely, the right to the benefits to be derived from the operation of the railroad to be constructed and which was constructed thereon; that that was, in fact, the only consideration received for the grant of the strip; that therefore when the state deprived the plaintiffs of their reversionary interest in said 60-foot strip, it took from them not merely a naked reversionary title, but what may be considered a substantial benefit retained by the grantor of said strip, which benefit was the consideration for the grant, and that such benefit had a substantial and ascertainable value for which the plaintiffs would be entitled to be compensated under the decision in Southern Pacific Railroad Co. v. San Francisco Savings Union, supra. In that case it was held that generally in a condemnation proceeding the value of the easement condemned is the value of the fee for the purpose of assessing the value of the right or interest taken under the power of eminent domain; but that where the fee has a definite substantial value to the owner, the easement taken must be valued separately. In that case the sub-surface of the land taken for surface easement purposes contained oil deposits. It was concluded that the fee retained by the owner was property with an ascertainable value which must be estimated separately. It is contended that the declaration in that case leads to the conclusion herein that the plaintiff's reversionary interest in said 60-foot strip has a separate value from the value of the easement condemned by the state, and that the plaintiffs have a right to have that value estimated. It is apparent that these considerations bear solely upon the question of the value of the reversionary right or interest which it has been concluded herein the plaintiffs have alleged in their complaint. The question is one of fact to be determined by the fact finding authority after proof of value has been introduced in evidence, and is therefore not a question which can be settled by a consideration of the issues raised by the demurrer. No satisfactory reason appears why the heirs or their representative joined as defendants in the condemnation proceeding were not served in that proceeding and the value of their reversionary interest determined as alleged therein. Unless the defendants now have some valid defense to the recovery of damages for the taking of the alleged condemned reversionary interest, the plaintiffs would be entitled to the payment of any value which it may be found to have.

[4, 5] The foregoing observations dispose of all the contentions urged in respect to the issues raised by the demurrer. We conclude that the complaint states a cause of action and that the defendants should be put to such defenses as may be available to them. The plaintiffs have been precluded from seeking any relief in the condemnation proceeding because of the application of the provisions of section 581a of the Code of Civil Procedure by the District Court of Appeal in People v. Southern Pacific R. Co., supra. However, we know of no way by which this court may now compel the defendants to revive the old or institute a new condemnation proceeding. The present complaint is undoubtedly sufficient in form to tender the issue of damages to an interest in property taken for a public use. See Tyler v. Tehama County, 109 Cal. 618, 625, 42 P. 240.

The judgment is reversed.

We concur: GIBSON, C. J.; CARTER, J.; CURTIS, J.; TRAYNOR, J.; PETERS, Justice pro tem.; KNIGHT, Justice pro tem.

STALEY v. STATE BAR OF CALIFORNIA et al.

L. A. 17588.

Supreme Court of California.

Jan. 29, 1941.

Rehearing Denied Feb. 27, 1941.

1. Attorney and client ⇐6

Where any dissatisfied applicant can show that he was denied passage of state bar examinations through fraud, imposition, or coercion, or that he was prevented from fair opportunity to take examinations, the Supreme Court will listen to his complaints, but inability to pass examinations which are successfully passed by other applicants will not be inquired into.

2. Attorney and client ⇐4

General qualifications of an applicant should not be substituted for requisite knowledge of law which one must possess in order to be admitted into the legal profession.

3. Mandamus ⇐168(2)

An applicant for a writ of mandate charging that though he passed the state bar examination held in 1939 with a higher grade than 70 per cent., the Committee of Bar Examiners arbitrarily and capriciously reduced the grade to below a passing mark, and refused to certify his name for admission to the bar, had the burden of showing wherein the determination of the committee was incorrect or unfair.

4. Mandamus ⇐168(2)

Where petitioner for a writ of mandate charged that though he passed the state bar examination in 1939 with a higher grade than 70 per cent., the Committee of Bar Examiners arbitrarily and capriciously reduced his grade to below a passing mark, and refused to certify his name for admission to the bar, the Supreme Court would not assume from his statement of general qualifications concerning education and ability that it was impossible for petitioner to receive the grade given by the Committee.

HOUSER and CARTER, JJ., dissenting.

Petition by John E. Staley against the State Bar of California and others for a writ of mandate, wherein an alternative writ was issued requiring the Committee of Bar Examiners of the State Bar to show cause why petitioner should not be admitted to practice law in the state.

Alternative writ discharged, and peremptory writ denied.

Rehearing denied; HOUSER and CARTER, JJ., dissenting.

John W. Preston and John E. Staley, in pro. per., both of Los Angeles, for petitioner.

Claude Minard, of San Francisco, for State Bar of California.

EDMONDS, Justice.

Upon the application of the petitioner, who failed to pass the bar examination held in 1939, this court issued an alternative writ of mandate requiring the Committee of Bar Examiners and The State Bar to show cause why he should not be admitted to practice law in this state. He charges that although he passed the examination with a higher grade than 70 per cent, the board "arbitrarily and capriciously" reduced this to below a passing mark and refused to certify his name for admission to the bar.

In support of his charge against the committee, the petitioner alleges that he "successfully completed the law course" of the University of Michigan in 1914, and also "successfully completed" a post graduate course in legal instruction at Southwestern University, Los Angeles. He also states, generally, that he has the legal learning and ability of the average candidate who successfully passes the bar examination of the State of California. More specifically, he alleges that he has been a commissioned officer in the armed forces of the United States and studied and passed the subject of military law, and that he has practiced before the Industrial Accident Commission with great success.

In a supplemental petition, the petitioner has set out in full the questions asked of him, the answers given, and the grade assigned to each. These grades amount, in the aggregate, to 940 points as against the 1,820 required to pass. In criticism of such marking, he presents a certificate of Charles E. McGinniss that he has read the petitioner's papers and has assigned to his answers a total of 2,121 grade points, which is above the passing grade. Mr. McGinniss states that he is a member of the California bar, that he has been a law editor and professor of law, and that in his opinion the petitioner "is educationally qualified to practice law in the State of California and elsewhere."

By their return, the respondents deny that the petitioner's answers were arbitrari-

ly or capriciously graded. It specifically alleges that his answers to the questions asked of him were carefully, fully and completely read and graded by highly skilled readers who were chosen for their ability to do this work, and it sets forth in detail the methods under which the examination taken by the petitioner was carried on. It also alleges that the records of the committee show that the petitioner has taken eight examinations since the year 1926, and has passed none of them although each examination was determined on its own merits. It also denies that the petitioner successfully completed the regular academic course of law at the University of Michigan, asserting that although the petitioner was at one time a student there, he did not pass a sufficient number of subjects to entitle him to a degree.

The allegations of the petitioner amount to nothing more than a general statement that his answers entitle him to a passing grade notwithstanding the grade given his papers by the Committee of Bar Examiners. He makes no charge of fraud, imposition or coercion, and does not assert that he was denied a fair opportunity to take the examination.

[1, 2] Such a petition falls far short of the requirements laid down by this court in a proceeding to review the examinations given by the committee in 1933. At that time it restated the rule which had been adopted in a previous consideration of the question as follows: "The attitude of this court is that if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition, or coercion, or that in any other manner he was prevented from a fair opportunity to take the examinations, this court will be willing to listen to his complaint. Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the court. Also, as you have no doubt found out, one's general qualifications are not to be substituted for the requisite knowledge of law which one must possess in order to be admitted into the legal profession." In re Admission to Practice Law, 1 Cal.2d 61, 64, 33 P.2d 829, 830. See, also, Salot v. State Bar, 3 Cal.2d 615, 45 P.2d 203; Spears v. State Bar, 211 Cal. 183, 191, 294 P. 697, 72 A.L.R. 923.

[3, 4] The burden is on the petitioner to show wherein the determination of the board was incorrect or unfair, and this court will not assume from the statement concerning his general qualifications that it was impossible for him to receive the grades given by the Committee of Bar Examiners.

The alternative writ of mandate is discharged and a peremptory writ denied.

We concur: GIBSON, C. J.; TRAYNOR, J.; SPENCE, Justice pro tem.

HOUSER, Justice.

I dissent.

Section 6060 of the Business and Professions Code, St.1939, p. 353, contains various provisions which relate to the qualifications necessary to be possessed by applicants for admission to practice law in this state, which provisions, among others, include the following requirements: that such applicants shall "Before beginning the study of law, have completed at least two years of college work or have reached the age of twenty-five years"; shall have either "Graduated from a law school accredited by the examining committee requiring substantially the full time of its students for three years. * * * Graduated from a law school accredited by the examining committee requiring a part only of its students' time for four years. * * * Studied law diligently and in good faith for at least four years * * * [and] Have passed a final bar examination given by the examining committee".

The sub-title to section 6066 of the same Code is "Appeal to Supreme Court". The language of that section is as follows: "Any person refused certification to the Supreme Court for admission to practice may have the action of the board, or of any committee authorized by the board to make a determination on its behalf, pursuant to the provisions of this chapter, *reviewed by the Supreme Court,* in accordance with the *procedure* prescribed by the court." (Emphasis added.)

From the title of section 6066 and the language employed in said section, it is clearly apparent that in enacting such provision it was the intention of the legislature to give to a rejected applicant for admission the right to "*Appeal* to [the] Supreme Court" from a "determination" or "action of the board, or of any committee authorized by the board to make a determination on its behalf",—and there-

upon to have such "determination" or "action * * * *reviewed* by the Supreme Court". And, in that connection, it would seem extremely unlikely that by such enactment the legislature ever contemplated anything other than that on the taking of such an appeal the Supreme Court, by and through the members thereof, would actually personally *review* the "determination" or "action" by the board of governors, or its examining committee, by a genuine and painstaking re-examination of the several questions which theretofore had been propounded to the applicant, as well as the respective answers which had been made by the applicant to such questions,—and thereupon, as an independent action by the court, reach a conclusion on the question whether in truth and in fact the applicant was *entitled* to be admitted to practice law in this state. In my opinion, the fact that by the terms of the statute the Supreme Court is authorized to prescribe the *"procedure"* to be followed in such a matter cannot affect the *substantive* right that is conferred upon the applicant to have his examination papers *"reviewed"* by this court. In other words, other than by prescribing *"procedure"* this court has no authority to legislate and thereby attach conditions under which the right of the applicant may be affected. Nor can the fact that literally hundreds of rejected applicants simultaneously may seek relief from a situation identical in all respects with that here presented alter or in any wise affect the substantive right accorded to each of such individual applicants. The time of the Supreme Court may be, and without doubt is, fully occupied with the ordinary business of the court; but that fact should not of itself present a good or a sufficient reason for it either to neglect or to refuse to perform the additional and burdensome duty thrust upon it by reason of such legislative enactment. Clearly, any *"procedure"* which this court may adopt in the premises must relate not to any diminution of the primary right of a petitioner, but, rather,—as is indicated within the terms of the act,—must be concerned solely with the manner in which he must act or proceed in bringing to the official attention of the court the essential fact that he is or has been an "unsuccessful applicant for admission to practice, after he has taken any examination" (section 6065, Bus. and Prof. Code), and that the board of bar governors has "refused certification to the Supreme Court for [applicant's] admission to practice" (section 6066, Bus. and Prof. Code).

In his petition for "review", neither by express language contained in the statute, nor by any meaning to be implied therefrom, is the rejected applicant required to ascribe any reason, whether real or fanciful, why the board refused to certify the fact that he be entitled to be admitted to the practice of law in this state. However, as is stated in the prevailing opinion herein, the instant proceeding is a hearing by this court which has occurred by reason of the fact that heretofore, at the instance of petitioner, an alternative writ of mandate was issued by which *"the Committee of Bar Examiners and The State Bar"* were required "to show cause why he [petitioner] should not be admitted to practice law in this state". By its judgment, as is expressed in its majority opinion herein, this court has decided that "The *burden* is on the *petitioner* to show wherein the determination of the board was incorrect or unfair, * * *." (Emphasis added.) It here may be noted that the bar of this state formerly—although possibly erroneously—has entertained that which now may be termed a ridiculous notion, to wit: that when, as a consequence of the issuance of an alternative writ of mandate, the *respondent* therein has been specially directed or ordered to *show* cause why the said respondent had not pursued a designated course, as expressly indicated in such order,—in response thereto,—the final duty was cast upon such respondent (and not upon the petitioner for the writ) to actually *show cause as directed.* Section 71, "Mandamus", 16 Cal.Jur. p. 875.

Within the prevailing opinion herein the rule is quoted that, in a proceeding of this kind, unless the *petitioner* therein make a showing of "fraud, imposition or coercion", or that he had been denied "a fair opportunity to *take* the examinations", this court would not "be willing to listen to his complaint". Citing In re Admission to Practice Law, 1 Cal.2d 61, 64, 33 P.2d 829; Salot v. State Bar, 3 Cal.2d 615, 45 P.2d 203; Spears v. State Bar, 211 Cal. 183, 191, 294 P. 697, 72 A.L.R. 923. However, on examination of the cited authorities, particularly with respect to the facts of those respective cases, it becomes apparent that none of them is clearly applicable to the factual situation here involved. Moreover, the rule set forth in the prevailing opinion, as was announced in Re Admission to Prac-

tice Law, 1 Cal.2d 61, 64, 33 P.2d 829, was amplified in the later case of Salot v. State Bar, 3 Cal.2d 615, 617, 45 P.2d 203. In that case, following the statement that the remedy (if any) of a rejected applicant for admission to practice law in this state in effect must be based upon "fraud, imposition or coercion", the important, if not controlling, and necessarily essential and conclusive language of the court is: *"or that he has been treated unfairly or unjustly"*. (Emphasis added.) It therefore would seem to follow that even though a petitioner be unable, or should fail, to *show* either "fraud, imposition or coercion", nevertheless (assuming that the burden is upon him), if he can show that he has been treated either "unfairly or unjustly", he still may be entitled to the relief which he seeks.

Considering the complete language of the announced rule (Salot v. State Bar, 3 Cal.2d 615, 617, 45 P.2d 203) and both the circumstances prior to and ordinarily following the process of examining applicants for admission to practice law in this state, it is difficult, if indeed possible, to comprehend the reason (if any) for the use in the announced rule of the words "fraud" and "coercion". Manifestly, the facts relating to any alleged fraud (except with respect to constructive or implied fraud) which was or might have been practiced upon an applicant would not be available to him; and how or in what manner any applicant could or might be "coerced" with reference to his examination must be and forever remain a dark and deep secret! But as to the significance of the word "imposition", it is clear that the existence of circumstances might have been surmised which would or did justify its use. As presently employed, it probably imports something akin to the words "unfairly or unjustly", which so closely follow the former word. But, again considering the nature of the proceeding at bar, it is beyond ordinary comprehension how petitioner properly could complain of an assumed fact "that in any * * * manner he was *prevented* from a fair opportunity to *take* the examinations". (Emphasis added.) Certain it is that such a situation did not obtain herein. In the main, petitioner's complaint consists not in the fact that he was *prevented* from *taking* the examination but is to the effect that in the grading which was given his answers to the questions that were propounded to him he was either imposed upon, or he was treated "unfairly or unjustly"; and in order to illustrate such asserted fact to the ordinary mind, or to induce such a conclusion by this court, he has submitted with his petition a verbatim copy of the several questions and his respective answers thereto. They are as follows, to-wit:

"Questions and Answers as Submitted to John E. Staley in the Bar Examinations of October, 1939.

Book 1.

Question No. 1 Grade 45

Question No. 2. Grade 30

"Question No. 1

Peters owned two cows, Nellie and Bossy, which he grazed upon his ranch, Blackacre. Nellie was stolen in August, 1935, by a neighbor, Daniels, who regularly used her in his dairy until September, 1937, at which time he sold her by bill of sale to one Smith, who was unaware of her previous theft by Daniels. Smith has since kept her together with a calf to which she gave birth in October, 1937.

Bossy was wrongfully converted by Daniels in August, 1938. Peters secured a judgment for her value against Daniels in July, 1939, but has been unable to collect anything thereunder.

In August, 1939, one Jones removed some grain worth $100 from Blackacre in the honest belief that the particular area from which the grain was taken was part of an adjoining tract which he had leased. Jones has made liquor worth $210 from the grain.

All of the above facts occurred in the state of Magenta, which has a statute providing that an action for the recovery of personal property must be commenced within three years. In October, 1939, Peters asks you whether he is entitled to recover either by suit or peaceable self help:

(1) Nellie and her calf from Smith.

(2) Bossy from Daniels.

(3) The liquor or the value thereof from Jones.

"Answer No. 1

(1) It is elementary law that a thief can never give title to the stolen property so it is apparent that Daniels could not confer title in his transfer to Smith.

As the possession of Smith commenced on September, 1937, the three-year statute of limitations is not applicable. Smith

being unable to convey any title; Daniels is regarded as having only the right of temporary possession until such time as the owner, Peters, chooses to take appropriate steps to recover 'Nellie.'

As Daniels did not acquire any title to 'Nellie' from this it follows that he could not convey any and the calf of 'Nellie' is the property of the owner of the animal but as title remained at all times in Peters, the natural increase of the cow 'Nellie', being her calf, is the property of Peters.

The good faith of Smith in buying the cow from Daniels does not enter into the question as a thief cannot pass title.

The right of self help exists on the part of Peters and he may peaceably take Nellie and her calf from Smith and he has the additional legal remedy of what is known in common law states as Replevin and in the code states as Claim and delivery, in instances where a particular chattel or personal property is demanded by the owner.

(2) As Peters has a judgment in the instance of 'Bossy', all of his remedies have been merged in the action in which he secured his judgment. One has an election of remedies and in commencing an action he may take his choice but when action is taken there is a merger of such remedies in the final judgment. Where remedies are inconsistent; the choice of one and its culmination in judgment bars the use of another.

As the right of self help is inconsistent with the action taken by Peters in the case of 'Bossy'; he cannot exercise 'self help.'

(3) As the mistake of Jones was not in any way induced by Peters no element of estoppel exists as to the parties. Something more than an 'honest belief' on the part of Jones must exist. There must have been some act or omission on the part of Peters. The leading case on this subject is the California case of Biddle Boggs v. Mining Co., reported in 14 Cal. 279. This case lays down the law regarding boundaries and estoppel. There must have been a misrepresentation on the part of Peters or a statement as to boundaries made with knowledge of its falsity or in reckless disregard of the truth, coupled with an intention for the other party to act but none of these elements exist.

Peters would have been entitled to the grain and the question arises as to whether the change of the grain into liquor by the process of distillation defeats Peters in his right to recover.

Jones in taking the grain was a mere trespasser and his honest belief does not alter the legal situation for the reasons stated.

The change in character from grain to liquor does not defeat the right of Peters to recover his property and if the law were otherwise the rightful claim of an owner to property could be defeated by a change of form.

This being so Peters has the right of peaceable self help as Jones was a mere trespasser in the acquisition of the grain. The change of form from grain to liquor does not defeat this right and while Peters by taking the liquor acquires the right to seize his property in the altered form as the law regards the liquor as the property of Peters.

Peters has the additional right of legal action. He may sue Jones for conversion of property or bring an action for a money judgment for the value of the grain. He could not recover for the value of the liquor as the law of damages limits him [to] the value of the grain and any injury to his freehold.

As the value of the liquor exceeds that of the grain by $110, it is obvious that the right of self help is the more advantageous of the remedies.

While it might seem harsh that Jones should lose the additional value enhanced in the process of distillation yet the law regards him as a wrongdoer in the first instance even though he acted in good faith.

"Question No. 2

Knapp owned in the state of Magenta two tracts of land, Blackacre and Whiteacre. Blackacre he was induced to sell and convey to Brown through the fraud of the latter. Brown in turn sold and conveyed the land to Black, who had no notice of Brown's fraud and paid value for the land.

Later Knapp discovered the fraud which had been committed against him and went into possession of Blackacre, claiming that the sale to Brown was void. He stayed in possession for one year, planting and harvesting a crop of wheat. While the grain was still lying in sacks on the ground, Black, who, not having occupied the land himself after his purchase, had just learned of Knapp's action, peaceably retook pos-

session of Blackacre and claimed the grain as his own.

Meanwhile Knapp had leadsed Whiteacre to White for five years beginning January 1, 1937, at a yearly rental of $1000, payable on the first of each year. In December, 1937, White abandoned the premises. In February, 1938, he mailed the keys to the farmhouse and other buildings on the premises to Knapp, saying he repudiated the lease. Knapp kept the keys but at no time after White's abandonment attempted to communicate in any way with him, and on February 2, 1939, he relet the premises to another for the remainder of the original term at a yearly rental of $500 the most he could reasonably secure.

Knapp now asks you:

(1) Whether he is entitled to the grain on Blackacre;

(2) What his rights are against White, only the first year's rent ever having been paid under the lease of Whiteacre.

Advise Knapp.

"Answer No. 2

(1) Black was an innocent purchaser for value of Blackacre and he received a good title from Brown as Black acted without any notice, actual or constructive of the fraud of Brown.

Knapp in going onto Blackacre and planting the crop was a mere trespasser and as Black did not know of Knapp's act until after the grain had ripened, there is no element of estoppel present. (Biddle Boggs v. Merced Mining Co., 14 Cal. 279.) Black having not only the title but the right to possession at all times was entitled to the grain.

Knapp is not entitled to the grain.

(2) The legal question involved is whether Knapp in renting Whiteacre after the default of White, has waived his right to recover for the entire term of White's lease. White in mailing back the keys and repudiating the lease clearly demonstrated his intention of noncompliance with the terms of the lease.

Under these circumstances the owner, Knapp, had the right to rent the property to another and treat the lease to White as breached by White. Knapp would not be required to keep the property vacant and subject to the occupancy by White as White has clearly shown he would not reoccupy. Knapp had the right to diminish damages by renting his property to another and Knapp may sue White for the period of January, 1938, to February 2, 1939; at the rate of $1,000 a year, and from February 2, 1939, to date of filing suit at the rate of $500 being the difference in the lease price and the actual second rental and Knapp may sue for such period of rent on the basis of yearly loss of $500; or Knapp may elect to wait until just before the period of four years from December, 1937, the date of default, and sue White for the accumulated damages based upon the yearly rental of $1,000, while the property was vacant and the loss of $500, at a yearly rate under the second letting.

As we have a four year period of limitations for bringing actions under an instrument in writing; Knapp if he elects to wait instead of suing White, each year for the loss; may later sue at the end of the fifth year for the difference in rent; as the breach would have been for the last year of the lease.

Book II.

Question No. 3. Grade 35

Question No. 4. Grade 30

"Question No. 3

Adams, who had for ten years owned Greenacre, having an opportunity to purchase Blackacre at an exceptionally low price, decided to buy the tract and to organize a corporation to which he could sell the two pieces of land. Greenacre had originally cost Adams only $100,000 but its present market value is $200,000. Adams paid $50,000 for Blackacre, although its present market value is $100,000.

In pursuance of his plan, Adams organized the Enterprize Corporation, installed his wife and two sons as the first directors, and caused stock to be issued to the public. The corporation then purchased Greenacre and Blackacre from Adams for $200,000 and $100,000 respectively. Shortly thereafter, a new board of directors was elected and now desires to bring suit against Adams.

(1) What damages, if any, can the corporation recover from Adams as a result of its purchase of Blackacre? Greenacre?

(2) Is the corporation liable to Adams for the reasonable amount of the expenses he incurred in organizing the corporation?

(3) Discuss the liability of the corporation and of Adams on a contract made by Adams prior to incorporation in the name of 'Enterprise Corporation' with one

Thomas, who agreed to furnish certain goods to the corporation for six months after incorporation at a stipulated price.

The corporation received the goods knowing of the contract made by Adams, but now refuses to pay Thomas on the basis that neither its board of directors nor officers had taken any action to affirm the contract.

"Answer No. 3

(1) It is assumed that the time of organization of the Enterprize Corporation is contemporaneous with the 'present market value' of the parcels of land involved. Under this assumption there would have been no fraud or unfairness on the part of Adams.

A corporate officer has a fiduciary relation regarding the corporation. He may not make secret profits and in all his dealings with the corporate property he is required to show good faith.

While there had been an increase in the increment of the parcels of land involved it seems that Adams could have marketed the land at the time he sold it to the corporation for the same price. This being true, there was no advantage gained by Adams. The circumstances that his relatives were also officers does not affect the situation as there is not any breach of fiduciary relation on the part of Adams.

The corporation cannot recover on either parcel as they did not sustain any loss and there was no irregularity as a corporate officer in the conduct of Adams.

(2) A corporation is liable for the reasonable amount of money in the form of expense incurred and paid by one of its officers but where the expense is incurred only the money may never be paid. Adams has only a contingent liability for them but until his liability becomes absolute by payment by him the corporation would not be liable.

(3) While there was no corporate entity at the time that Adams contracted with Thomas, yet when the Enterprize Corporation received the goods, knowing that Adams had contracted with Thomas anticipating the formation of the corporation; the Enterprise Corporation ratified the act of Adams.

Under the law of Agency the acts of an agent, who was not at the time authorized to act, may be ratified and this may be done by assuming the benefit of the acts of the agent.

The corporation cannot both hold the goods and refuse to pay. Formal ratification is not required as the corporation has retained the goods. The retention of the goods purchased by Adams is an act of ratification and the corporation must pay the stipulated price.

"Question No. 4

On a trial for the murder of P, D's defense is that P was the aggressor and that D reasonably believed it necessary to shoot P in self-defense. D offers to prove that P and D had been rivals for the same girl, that P had approached D with a gun in his hand, and that P, as D learned after the killing, had told others shortly before that he would kill D on sight.

D offers testimony of W, a service station attendant, that W saw P shortly before the shooting heading toward D's house, that P 'appeared to be angry' and that he was then carrying a weapon (previously introduced in evidence) which, though in fact incapable of shooting, 'would reasonably be mistaken for a real gun'.

On cross-examination of W the prosecution asks him if he is related to D and the witness answers 'No'. The prosecution then asks W his age. He replies '25.' The prosecution now offers the testimony of C, cousin of W's, that W is a relative of D's and that W had a day before, at W's house, told C of the relationship. The prosecution also offers a certified copy of W's birth certificate showing him to be 30 years old.

(1) For what purposes, if any, may the statements made by P be introduced?

(2) Is W's testimony admissible?

(3) Is C's testimony admissible?

(4) Is the certified copy of the birth certificate admissible?

"Answer No. 4

(1) The statements of 'P' are not admissible for any purpose as it appears that such statements were not communicated to 'D' until after the killing; and as the pretended weapon would not in fact shoot; the declarations of 'P' could not be introduced even for the purpose of proving a plan of action. While statements of an assailant to homicide cases are admissible for the purpose of proving a plan of action or for the purpose of showing that the Defendant had known of the statements and on that basis had reasonable cause to fear for his life; the circumstances of this case do not warrant the introduction of 'P's' statements.

In Self Defense it is required to show that the threats were communicated, that they were believed by the Defendant and that the Defendant also believed that the assailant also had the power to execute the threats at the time of the act.

(2) Under section 2052 of our Code of Civil Procedure, a witness may be impeached by asking him regarding inconsistent statements made at variance with his testimony. The procedure is to ask the witness if he made such statements; if he wishes to explain them, and then to introduce the impeaching testimony. The first step is 'laying the foundation' and the second is the impeachment. The inconsistent statements may have been made out of court and if they are material or relevant and not incompetent, they may be introduced.

W may be impeached by showing that he stated falsely regarding his age as the court or jury may be entitled to this information in forming an opinion as to the maturity of the witness.

His relationship, according to his statements may also be shown as it would prove bias and favor. The principle of *'Falsus in uno falsus in omnibus'* enters.

(3) The statement of 'W' may be proven by 'C' as the latter is an impeaching witness. The law regards one who makes inconsistent statements as subject to impeachment.

(4) Yes. The court or jury estimate the witness by his age, among other attributes; and the copy of the birth certificate being certified it tends to show that 'W' testified falsely. It is conventional procedure, in examining a witness to ask him about his age, among other qualification. The cross examining attorney may impeach the witness by introducing the certificate.

Book III.

Question No. 5 Grade 20

Question No. 6 Grade 15

"Question No. 5

A owned a bull known by him to be extraordinarily vicious. One day the bull escaped from A's pasture without negligence on the part of A, and entered B's land. B saw the bull rush at him, but carelessly waited too long before running for cover and was gored. C, the wife of B, was standing with B when the bull appeared; she ran at once, but in her excitement tripped and fell, thereby suffering a minor injury. She then managed to proceed to safety. However, she sustained fright and mental shock resulting from realization of her own danger and her husband's injuries, and she ultimately suffered a miscarriage therefrom.

For what, if anything, may B and C, or either of them, recover? Discuss fully.

"Answer No. 5

The degree of care which the law requires 'A' to manifest in the custody of a domesticated animal seems to have been satisfied in this case. While an owner of a domestic animal might, under some circumstances, be held liable when the owner had notice or knowledge of the vicious propensities of the animal; in this case it appears that the escape of the bull from the pasture was 'without negligence on the part' of 'A'.

The law does not impose upon the owner of a domesticated animal the same extraordinary degree of care that it imposes upon one who harbors a wild animal. The owner of domesticated animal is not absolutely liable for any damage caused by the animal even tho' he knew it vicious propensities.

Applying the rule above stated in reference to the facts of the case it seems that 'B' in carelessly waiting too long was guilty of contributory negligence and that bars his recovery.

The law consistently refuses to give damages for mere mental shock or nervous fright. The cases hold that there must be some actual, physical injury, before one may recover. The statement of facts concerning 'C' states a minor injury but she managed to proceed to safety. The miscarriage suffered by 'C' was not directly resultant from any actual injury inflicted by 'A's' bull and she cannot recover for that.

The recovery of 'C' would be limited to the minor injury mentioned in her escape; if there had been negligence on the part of 'A' but as there was none there can be no recovery.

"Question No. 6

A agreed in writing with B to sell B a specified pleasure car which he promised to deliver to B 'as soon as it could possibly be secured from the factory'. In consideration thereof, B promised to pay $1500 'if A delivered the car with reasonable promptness after the same could be obtained from the factory'. A delivered the car to B's premises, during the latter's

absence, two days later than it would have been possible for him to do so. B refuses to keep or pay for the car.

B has also written C, his nephew, that in the event C took a trip to Alaska, B would give him a new Packard Six coupe. C did take the trip, but B refuses to give him the car.

A and C now threaten suits against B, who asks you whether:

(1) A has a cause of action for breach of contract;

(2) C has a right to damages for non-delivery of the car.

Advise B.

"Answer No. 6

(1) The provision in the agreement regarding delivery 'as soon as it could possibly be secured from the factory' is modified by the other clauses to the effect that delivery would be made 'with reasonable promptness.' A period of two days, in itself, is not an unreasonable lapse of time for the delivery to the residence of 'B'. While the car could have been possibly delivered sooner; it was delivered with reasonable promptness.

In the absence of any stipulation regarding the place of delivery it was proper for 'A' to deliver the car to 'B's' premises.

'A' has a cause of action against 'B' for breach of contract.

(2) 'C' has no cause of action against either. There was no privity of contract between 'A' and 'C'. 'B' is not liable to 'C' for the reason that the law does not regard a promise of the character of the one that "B" gave to 'C' as actionable. The question is not justiciable.

The advice to 'B' is to accept the car or to suffer suit at the hands of 'A' for the amount of the profit that 'A' would have made from the sale.

Book IV.

Question No. 7 Grade 35
Question No. 8 Grade 10

"Question No. 7

Ben Actor has retired and lives comfortably upon the income and proceeds from large investments made during earlier years when he was world renowned as a playwright and actor. His only activity is the occasional uncompensated coaching of members of the 'Actor Repertory Players, Inc.' a professional dramatic company which regularly sends a troupe of players on tour in the United States. The playbills usually refer to the fact that Actor has personally coached most of the players.

Alex Lear, an unprincipled rival of Actor's in the old days, and presently owner of a competing dramatic company, is writing his memoirs to be published soon in a national magazine of wide circulation. In one of his chapters he describes a certain illicit affair Actor is said to have carried on clandestinely with his leading lady, and states that Actor today is secretly supporting an illegitimate child which resulted from said affair. This story is untrue, as Lear knows.

The articles constituting these memoirs also are to contain the following: 'Now he is patriarchal godfather to the anaemic "Actor Repertory Players, Inc."—which contributes its chapter to the history of the illegitimate stage by subsisting upon the fruits of stolen copyrights and by bribing critics for the few favorable reviews its performers so consistently never deserve.' These charges are false, as Lear knows.

Lear also has hired a number of thugs who are to kidnap Ima Beauty, the leading lady of 'Actor Repertory Players, Inc.' upon the nights of important engagements.

As attorney for Actor, 'Actor Repertory Players, Inc.' and Beauty, give your opinion, with reasons, as to what injunctive relief, if any, will be extended your clients against the threatened wrongs.

"Answer No. 7

Injunctive relief lies, in other proper cases, where there is no plain, speedy nor adequate remedy at law.

While an injunction will not issue merely to restrain the commission of a crime; yet where the threatened act is also a violative of a property right and damages at law would not suffice; injunctive relief may be given.

Ben Actor has no property right to be protected as his services are contributed and voluntary and while his professional reputation might and probably would be damaged, it appears that he is retired from the acting profession.

Ben Actor cannot make out a case for injunctive relief.

The 'Actor Repertory Players' have a property right which can and should be protected by injunctive relief. While there is also a legal remedy, the threatened pub-

lication should be restrained for the reasons that the libel laws would not secure to the 'Actor Repertory Players, Inc.' the full measure of relief which could be obtained by injunction.

The actors themselves are distinct entities from their corporation. While the corporate entity is damaged yet the actors who function under it are likewise injured; even tho' they are not named as individuals. If the corporation, as an artificial person has a property right, and it has; that right may only be fully protected by injunctive relief. A multiplicity of suits is apparent.

Ima Beauty is also entitled to injunctive relief for the reason that the sufficiency of her legal remedy does not meet the test laid down above. A multiplicity of suits would be involved in litigation in behalf of Ima Beauty. Even if such suits were instituted and the Defendants were able to, and did respond in damages, injuries suffered by her might terminate her professional career. The right of 'Ima Beauty' to star in the various performances is a property right which should be protected by injunction. Equity will protect such a right even tho' a crime is also involved.

"Question No. 8

Daniels walked into a drug store operated by Peters, went to the cigar counter, and selected three cigars, handing Peters a twenty-dollar bill. Peters handed Daniels his change, which included a ten-dollar bill.

Daniels then reached in his pocket and said: 'Pardon me, I don't have to take all your change. I just discovered I have a one-dollar bill.' 'Fine,' replied Peters. Daniels then purported to hand Peters the change he had been given, but 'palmed' the ten-dollar bill and did not return it. Peters thanked Daniels and returned the twenty-dollar bill.

Immediately after Daniels left the store Peters discovered his loss. Daniels did the same thing in another drug store a few hours later, but was apprehended as he left the store.

With reference to his activities in Peters' store, of what crime or crimes is Daniels guilty?

"Answer No. 8

Daniels is guilty of Theft as his acts, under common law would amount to embezzlement and under our Penal Code the distinction between larceny and that crime are abolished and both are made Theft. The value being ten-dollars, the crime is petty theft.

Daniels is also guilty of obtaining money by false pretenses as he is using a trick and device within the meaning of our Penal Code. The intent to work a scheme by trick and device is shown by the operations of Daniels in the other store following his commission of the act in the store of peters.

Book V.

Question No. 9 Grade 55

"Question No. 9

Mitchell was a member of the Interstate Commerce Commission. The act under which he had been appointed by the President with the advice and consent of the senate provided that a commissioner could be removed by the President for 'inefficiency, neglect of duty, or malfeasance in office'. The President, however, removed Mitchell because of differences in political philosophy, although disclaiming the imputation of any wrong-doing by Mitchell.

The city of Fairview, state of Magenta, passed an ordinance making it a misdemeanor to maintain a brick kiln, whether established prior or subsequent to the effective date of the ordinance, within a described residential district of the city. Mitchell maintains and had maintained for several years prior to the ordinance, a brick kiln within the prohibited area. Enforcement of the ordinance would decrease the value of his property 50 per cent.

The state of Magenta also enacted a statute setting up a board of censors and prohibiting under penalty of fine and imprisonment the exhibition of motion pictures other than those found by the board to be 'moral, educational, or amusing and harmless in character'. Mitchell owns a motion picture house in Magenta.

Discuss the constitutionality, as applied to Mitchell, of:

(1) His removal by the President from the Interstate Commerce Commission.

(2) The ordinance prohibiting the brick kiln;

(3) The statute providing for censorship of motion picture shows.

"Answer No. 9

(1) This seems to be 'on all fours' with the Humphrey's Case. Humphrey was a Commissioner, appointed under a previous

administration and President Roosevelt sought to remove him from office under substantially the same theory mentioned in the question.

The Supreme Court of the United States in reviewing the Humphrey case held that as the advice and consent of the Senate was necessary to the appointment, that a difference in political philosophy, or social or economic views between the Commissioner and the President was not a ground for the removal of Mr. Humphrey.

The only authority for removal is found in the act and in the course followed the President acted without authority of law. On the basis of the Humphrey case; the removal was contrary to organic law because the mode of removal, provided for in the Statute was not followed. When an office is created by an act under the authority of the Constitution the method of removal under the Act must be followed. It follows that Mitchell is entitled to the office.

(2) It has been generally held that if an occupation or calling is followed, that is not in itself a nuisance *per se,* that ordinances of the nature of the one under consideration are violative of constitutional rights.

While the Police Power extends to the making of laws for the General Welfare, Sanitation, Health, Safety, Morals and like purposes; it has been held that this power cannot be used to prohibit the operation of a business that does not, in itself, conflict with any of these purposes and that where one had established a business or calling prior to the enactment of such an ordinance, that the ordinance conflicts with the right of the proprietor to conduct such business as it would be a taking of property without due process of law.

(3) The valid exercise of the Police Power includes legislation enacted for the protection of the morals of the people. It would be difficult to conceive a more potent and widespread means of propagation of public thought than is to be found in motion pictures.

Motion Picture theatres are to be found in every city and almost every town in the United States.

If films could be made and exhibited without censorship by a State; the State would lose effective control over the most powerful means of influencing public morals than any other agency, with the exception of the press; and probably many of our people are influenced by motion pictures who are not influenced at all by newspapers.

This is because the influence of the paper is usually found in its editorial section while the influence of the movie comes, unconsciously, to the audience in the form of entertainment.

While the language of the statute is very broad and general, it seems to contain sufficient terms to be a valid exercise of the Police Power of the State. The word 'amusing' is liberally defined to mean 'entertaining.'

Each state has the right to enact suitable legislation for the protection of the morals of their people and in this case, it is properly exercised, altho' the language of the Statute could be greatly improved.

Book VI.

Question No. 10 Grade 40

Question No. 11 Grade 75

"Question No. 10

Adams, Blake and Clay constituted the board of directors of the Drumm Corporation. At a meeting of the shareholders a committee was elected to advise the directors on matters of corporate management. The directors having indicated that they were considering executing a certain contract within the scope of the corporate business, the committee counselled against the advisability and the shareholders at a special meeting unanimously passed a resolution in opposition to making the contract. Nevertheless, the directors entered into the contract, which it is conceded was reasonably appropriate for corporate purposes.

Adams was a man of nationwide reputation who had been induced to serve gratuitously as a director in order to lend prestige to the corporation. Inasmuch as he resided at a great distance from the corporation and was extremely busy, Adams was told by the president of the corporation, at the time he became a director, that he would not be expected to attend meetings or engage actively in the management of the corporation.

Had Adams taken an ordinarily active part in the corporate affairs he would have discovered that the corporation's treasurer was engaged in the practice of embezzling from the company's funds. The shareholders demanded of the directors that they take action against the treasurer, but

the treasurer, being a relative of Clay's, the directors refused.

Blake, knowing that the directors had just completed a transaction which would be highly profitable to the corporation, bought the stock of Smith, a shareholder. Blake was not asked about nor did he reveal anything concerning the corporation's affairs. The stock was actually worth twice the amount which Blake paid for it and for which it was selling on the open market.

(1) If loss resulted from the contract which the directors made against the wishes of the shareholders and their advisory committee, would the directors be liable?

(2) Do the shareholders have any way to redress in a civil action the wrong committed by the treasurer? Discuss.

(3) Would Adams be liable for the loss caused the corporation by the treasurer's embezzlement?

(4) Does Smith have a right to avoid the purchase of stock by Blake?

"Answer No. 10

In a corporate structure the directors have specific duties which they, alone, are required to observe and under which they function. Among these duties are the exercise, by the directors of discretionary powers. While stockholders may advise the directors, and as they did in this case elect a commitee; still they cannot displace the discretion of the directors nor the legal authority under which the directors operate.

The directors in their functioning may, and as a matter of pragmatism, often do commit error. Errors of judgment alone, do not render the directors liable. If the directors were solely guided by shareholder's committees they would be liable if they attempted to delegate their discretion as the law places this responsibility on the directors alone.

The proper course for the stockholders who distrust the ability of the directors is to replace the directors.

As the contract was 'reasonably appropriate for corporate purposes' the directors properly exercised their discretion, which is nondelegible; and they cannot be held liable for any loss which might have resulted from the execution of the contract.

(2) The duty of Adams, as a director, required that he give his time and attention to the affairs of the corporation. He could not do this by acting in a perfunctory manner. Had he functioned in the way required by law he must have discovered the defalcations of the treasurer. The Constitution of the State of California for many years embraced a clause requiring that directors of corporations be liable for the embezzling by an employee or officer and similar breaches of trust.

This provision was only affirmatory of the common law in instances where the directors knew, or from the circumstances should have known of the defalcations.

The refusal or failure of the directors to take action in the matter of the treasurer at the demand of the shareholders certainly made the directors, including Adams, liable for the amount lost to the corporation thru the embezzling.

The shareholders may bring an action against the directors.

(3) Yes, explained in '2' above.

(4) The relation of a director concerning the affairs of the corporation and the affairs of a stockholder and the corporation are fiduciary. The law imposes upon the director the duty of acting with the utmost good faith in all such matters. The director may not remain quiescent concerning a secret profit he may have made when the source of knowledge comes to him thru his functioning as a director of the corporation. The director may not tacitly engage in profitable operations for himself when such operations conflict with any duty he owes to the corporation as an artificial entity, or to the stockholders as persons in whose behalf the director functions.

Had the corporation purchased the stock of Smith at the price which Blake paid, it is obvious that the corporation would have enjoyed the same profit, on resale, or would have reduced the outstanding stock. In either event it would have been highly advantageous to the corporation.

Blake, in using knowledge which came to him as a director engaged in an operation which conflicted with his duties in his fiduciary relations.

"Question No. 11

In a personal injury action brought by Phillips against Dodge, Adams, an attorney for the plaintiff, is permitted, over defense objection, to take the stand and testify he saw the defendant shortly before the collision in a drunken condition. The defense, on cross-examination of Adams, is allowed to ask, over the objection of as-

sociate counsel for the plaintiff, whether Adams had not taken the case on a contingent fee basis. The court further rules, over plaintiff's objection, that the defense may ask Adams if Phillips had not been drunk when Adams, an hour after the collision, was called to the jail in which Phillips was incarcerated, and also whether Phillips at such consultation had not admitted that he had been intoxicated.

The court also overrules a defense objection to Adams calling one of the jurors, who thereupon testifies to overhearing Dodge say he had been intoxicated at the time of the injury to Phillips.

After judgment for the defendant the plaintiff moves for a new trial on the ground, among others, that one of the jurors had accepted a bribe for the defendant. At the hearing on the motion, the court, over the defendant's objection, admits an affidavit from one of the jurors that the juror in question had received a bribe.

Discuss the correctness of the court's ruling in each instance.

"Answer No. 11

An attorney may be witness for his client. This is frowned upon as a matter of ethics and it should not be done but it may be done.

When an attorney does become a witness his bias or partiality may be shown, as in the instance of any other witness. How better may the bias of a witness be shown than by proving that he has a financial interest in the outcome of the litigation contingent upon its terminating favorably for the party for whom he testified?

Adams should be compelled to testify as to whether he took the case on a contingency.

An attorney, under our code, may not testify to confidential communications received in the scope of his professional duties, without the consent of his client.

The condition of intoxication is not a confidential communication. Anyone may testify as to that matter. An attorney is not exempted from testifying as to all matters coming under his observation while acting within professional scope. Sharon v. Sharon, 77 Cal. 102, 19 P. 230.

The appearance of the client at the time of the interview, his gait and other matters indicating intoxication may be inquired into and the opinion of the attorney as to intoxication elicited.

However, we cannot compel Adams to testify as to the admission of the client. The law presumes that such a discussion was a confidential communication and comes under the rule of privilege. It appears, from the text of the question that only the attorney, Adams, and the client were present on this occasion, so we cannot inquire as to the admission.

A juror, or the judge, may be called as witnesses in any cause in which they may give admissible evidence. The evidence was a statement against interest on the part of a defendant and comes under section 1870, sub. 2; being 'an act, declaration or omission against interest.' Under the historic development of our law the jurors are competent as witnesses. In fact in the early history of litigation in England they were the 'compurgators' who testified freely concerning the issues.

One of the grounds for a new trial, under our Code of Civil Procedure, is the bribery of a juror and the section specifically provides that the affidavit of a juror may be used for proving the misconduct of the jury in an instance of this kind.

Book VII.

Question No. 12	Grade 25
Question No. 13	Grade 50

"Question No. 12

Abbott, a famous painter of Biblical characters, advertised publicly that he intended painting a life size picture of Elijah and solicited bids for its purchase. Byers' offer of $750 being the highest of several received, Abbott agreed orally with Byers that he would paint the picture and sell it to Byers for that price. He completed the painting and advised Byers it was ready; whereupon Byers, in a personal letter to his wife, mentioned, among other things, that 'I have bought a picture from Abbott for $750'. The letter was read by Mrs. Byers and some mutual friends of hers and Abbott's and destroyed.

Later, Byers wrote Abbott as follows: 'I will pay $200 for a life-size painting of Moses', and the next day he wrote: 'I will pay $200 for a life-size painting of Joshua.' Abbott, without notifying Byers, commenced work on both pictures. Hearing from a friend that Abbott was working on the painting of Moses, Byers, without the knowledge of Abbott, contracted to sell it to a customer for $300. When both pictures were one-half completed, Abbott notified Byers of this fact and that

he had decided not to finish the painting of Moses, but would finish that of Joshua forthwith. Byers immediately advised Abbott that he had had no idea Abbott had commenced on the painting of Joshua, that he no longer wanted it, that Abbott should consider this offer revoked, but that he would hold Abbott for breach of contract unless the painting of Moses was finished. Abbott completed the picture of Joshua but not that of Moses. Byers now refuses to pay for the painting of Elijah and refused Abbott's tender of that of Joshua.

1. Can Abbott recover for Byers' refusal to accept and pay for the painting of Elijah?

2. Does Abbott have a cause of action for Byers' refusal to accept tender of the painting of Joshua?

(3) Does Byers have a cause of action for Abbott's refusal to complete and deliver the painting of Moses?

"Answer No. 12

(1) Our Statute of Frauds does not enter into the matter (sec. 1973, C.C.P.) for the reason that a painting in the process of completion, or to be painted, comes under the excepted classification.

The ad of Abbott was an offer which was accepted by Byers, as the high bidder. The latter was not required to be communicated to Abbott for the reason that this matter is outside the Statute of Frauds, being a class which was to have been created within the meaning of the Statute. As each picture was distinctive and unique.

(2) Byers makes two distinctive offers concerning different subject matters at different times. While an offer should be accepted the parties may by their course of dealing establish what our Supreme Court of California denominates 'contemporaneous construction of a contract by the parties.' The course of dealing shows that Byers made an offer and then assuming the acceptance by Abbott Byers then offered the subject matter for sale. Abbott, relying upon this offer of Byers, commenced the work of artistic production.

Abbott has a cause of action for the failure of Byers to accept the picture of Joshua. The orders for the pictures were separate transactions concerning different subjects and the contracts were individual matters. The offers having been communicated at different times we have two distinct contracts.

(3) Abbott by commencing work on the picture of Moses established the contemporaneous construction and his act was an acceptance of the offer of Byers. Byers offering the picture for sale to a customer confirmed the contemporaneous construction. The artist apparently refused to finish the picture because he had heard of the profit which Byers expected to enjoy from the transaction but as he had commenced the picture, a contract exists.

Byers has a cause of action against Abbot.

"Question No. 13

Intending to make a will, Wilson typed a one-page document entitled 'Last Will'. It contained the usual formal clauses and read in part: 'Such articles as I shall designate in an inventory that will be found pinned to this will, I leave to Jones.' Following various dispositive clauses, one of which named Smith as a legatee, there was a space with three lines for signatures, and, following this, a residuary clause.

Wilson called in Smith and his stenographer. He signed on the first line in their joint presence, stated it was his will, and requested them to sign on the lines as witnesses. Smith signed and left the room, and twenty minutes later the stenographer signed. Wilson remained present throughout.

Two weeks later Wilson listed on a paper entitled 'For Jones' several articles, none of which was otherwise specifically disposed of in the original document, pinned the list to the letter, and placed both in the envelope. A year later Wilson executed a document entitled 'Codicil' which clearly referred to the original instrument as his will and appointed a different executor to act thereunder. This document, witnessed by Allen and Brown, was duly executed by Wilson in compliance with all local statutory requirements. Wilson placed it in the envelope and a month later died.

Was the original document, prior to execution of the codicil, validly executed as a will?

(2) Assuming that the original instrument and the codicil were validly executed as a will, what are the rights of (a) Jones, (b) Smith?

"Answer No. 1

(1) Our code provision requires that the testator sign the will in the presence of the

witness and the witnesses must sign in the presence of each other. As Smith left the room before the signature of the stenographer as a witness the will was not properly witnessed.

The residuary clause followed the signature and must have been below them and as to this clause it was not 'subscribed', which our code requires in a will of this class. As 'subscribed' means to be written below the residuary clause does not satisfy the requirements of the code.

Smith was a legatee and also a witness.

(2) Assuming the validity of the will:

A. There was no testamentary disposition as to the articles to be left to Jones at the time of the making of the will because the testator did not at that time have in mind the things that Jones was to have under the will. While a testamentary clause may refer to other documents or to an inventory then in existence, or contemporaneous with the will, the testator cannot at some future time make testamentary disposition by selecting or inventorying the objects. At the later time he may lack testamentary capacity.

(b) Smith was a witness under the will and cannot, for that reason, take under it.

Book VIII.

Question No. 14 Grade —

Book IX.

Question No. 15 Grade 20

Question No. 16 Grade 35

"Question No. 15

The city of Fairview was repairing some sidewalks. Doss, a supervisor of streets, was directed to do the work as part of his regular employment for the city. He piled bricks and stones between one of the walks that was to be repaired and the curb of the street. The pile was very high, insecure, and overhung the curb, but probably would not fall unless touched. The city of Fairview had an ordinance forbidding the riding of bicycles on the sidewalks.

Tommy Parker, five and a half years old, had received a bicycle as a birthday present from his father and had been told not to ride in the street. Mr. Parker wanted some cigarettes and told Tommy to get them at a store around the corner on the same block. In going Tommy would have to pass the pile of bricks, as Mr. Parker knew. Tommy's father said: 'Don't ride in the streets. Stay on the sidewalk.'. As Tommy, on his bicycle, was passing the bricks, one Daniel, driving carefully, ran into the bricks because of a blowout resulting from a nail penetrating a tire. He struck the bricks lightly, but hard enough to cause a few of them to fall from the top of the pile. Tommy was struck and injured by them.

What action or actions, if any, lie in favor of Tommy? Discuss all points suggested by the facts.

"Answer No. 15

Ordinarily a Municipal corporation is not liable for the acts of its employees which result in tortious injuries.

There are exceptions to this rule, one of them being the instance where the employee is an actor in a series of events which result in damage while the employee is acting within the scope of his duties in some proprietary act of the municipality.

In the repair of streets an employee acts for the proprietary benefit of the city, his employer.

The ordinance of the City of Fairview which proscribed the riding of bicycles does not, in itself, preclude recovery as our courts have held that the act which is forbidden by ordinance must have been the basis of the Plaintiff's injury to preclude recovery.

If in the violation of an ordinance of this kind, the Plaintiff necessarily places himself in a position of danger or harm from which injury directly flows, the violation then bars recovery.

Neither the minority or tender years of Tommy nor the instructions of his Father are material to a discussion of the matter.

The ordinance as enacted was a proper and lawful exercise of the Police Power of the city as it directly concerned the safety and welfare of the people. Courts have held that a city could validly pass such an ordinance, restricting the use of bicycles to the streets and prohibiting them on walks.

The negligence of Tommy's father in sending the boy for the cigarettes cannot be imputed to the son.

Daniel in the manouvering of his car, following the blowout was the causative factor in the injury.

Under these circumstances the courts endeavor to determine the proximate cause of the injury.

As the injury was caused by the toppling of the bricks, and this in turn was caused by the collision from Daniel's car; the proximate cause of the injury was the collision.

If Daniel were not negligent in the management of his car Tommy cannot recover.

The circumstances of Daniel's car veering from the street into the brick pile was the result of unfortutious acts beyond the control of Daniels.

Daniels could not anticipate that his tire would 'Pick up' a nail and blow out at the very point and at the very time that Tommy would be riding by the brick pile.

The proximate cause of the injury being the defection of Daniel's car and that being beyond his control to rectify or avoid; Tommy cannot recover.

"Question No. 16

Jonas owned in the state of Magenta a number of stores engaged in the retailing of bread. Competition in the field became so ruthless as to threaten to destroy the price structure upon which the grain growers depended for their livelihood and the community for its bread supply. Production of grain and distribution of bread is a paramount industry of the state.

There are employed in the harvesting of grain large numbers of Japanese toward whom considerable hostility developed. Labor conditions became demoralized.

In view of these conditions, the state of Magenta passed three laws, as follows:

(1) A law providing for a bread control board with power, in accordance with a standard laid down in the statute, to fix minimum and maximum retail prices for bread. The court fixed 9¢ per loaf as the price. Jonas, however, continued to sell bread for 8¢ per loaf. Can he be convicted under the statute?

(2) Making it a misdemeanor for an employer to exact as a condition of securing employment a promise from an employee not to join a labor union. Jonas required such promises from his employees. Can he be convicted under the statute?

(3) Providing that Japanese should be required to attend schools established separately from schools for whites and classifying anyone with more than one-fifth Japanese blood as being a Japanese within the meaning of the statute. A student with one-fourth Japanese blood attacks the statute. Is it constitutional?

"Answer No. 16

(1) A decade ago most courts would have held that the statute fixing the price of bread interfered with the freedom of contract and for that reason it would have been held to have been an unconstitutional statute.

Questions of constitutional law are not only vexing to the harried law student attempting to write on these great questions in the hurry of the moment but have proven perplexing to the courts themselves.

A compilation of decisions of the Supreme Court of the United States for the past term would have shown that of appeals from the U. S. Circuit Courts, 45 decisions construing the constitution were reversed and 35 were affirmed.

A further study would show that 93 dissenting opinions were given during the term and that in one case 5 different opinions were given by as many different justices concurring but on entirely different grounds.

Additional statistical study would show that the number of dissenting opinions increase from the period, progressively, from 1933 to date.

The exercise of the power to fix bread prices must be justified in the Police Power of the State but if we were to apply the reasoning of the U. S. Supreme Court in the case of United States v. Rock Royal Corp. Inc., recently decided under the commerce power of the U. S., if we were to apply the decisions of the judges and their reasoning to the state of facts embraced in the question; we must arrive at the constitutionality of the statute.

The constitutional doctrine has undergone many changes in the past year. It is in a state of flux, if not radical revolution; considering the law as we thought we knew it.

It might be argued that bread being the very staff of life, to employ a cliche, is bound up with the health and welfare of the people.

It might also be argued, as the U. S. Supreme Court did in the case cited, that bread (like milk) is vital to the very being of the community and that if it were unregulated chaos would result. Prices would tumble at one period and skyrocket at another.

We might say that the gyrations of prices would be uneconomic and that price stabilization is necessary to the furnishing of a reliable supply of the staff of life.

The doctrine of price fixing is novel to the law of the United States of America. It was given impetus in the N. R. A. campaign and had at various times been advo-

cated as the only course to relieve widespread unemployment and uneconomic conditions.

The effort by courts to sustain measures of the kind here under discussion must result in and emanate from some belief in the judges that supply and demand can be and should be regulated. This is not a province of law, if it were possible of fulfillment.

There is nothing in the statute which in any way concerns the health and welfare of the people of 'Magenta' and there is much in the measure that interferes with the freedom of contract.

The Constitution of the United States became the organic law of the land in 1788, on the ratification of the document by the State of New Hampshire; it being the ninth state to ratify, under the terms of the Constitution.

The provisions of that great document are substantially that of our various State Constitutions which embodied or copied the controlling provisions of the Constitution of the United States.

The provisions of our State Constitutions reflect the wisdom of men of affairs, made wise in the hard school of experience.

It is said, in behalf of measures similar to the one under discussion that we are in a new order of things and that we must progress. The advance in industry and science are cited and the efforts of other countries to achieve regulation by statute or bureau are held up as exemplary methods of governmental procedure and control.

Granting that we are living [in] a rapidly changing age there are certain things which are basic in the scheme of things.

Thomas Jefferson said, as nearly as can be recalled, in discussing the sphere of government, 'If we are to be told when to sow and when to reap. * * *' He then related the difficulties attendant to that sort of thing.

The State which attempts to embark on legislative price fixing, or to organize bureaus, delegating to them the authority to do so will inevitably find itself in conflict with the multiplication table!

The fixing of prices is an unconstitutional exercise of power and as the bread control board acted beyond the pale of constitutional functioning; Jones should not be convicted.

(2) Formerly it was held that an employer might require of a prospective employee that he should not be a member of a labor union, nor join a union. Since the N. R. A. campaign there has been a great reversal of opinion on that subject. It will be recalled that the famous section '7A' of the National Recovery Act provided that there be no discrimination. It provided that an employee might join and belong to any labor organization of his own choosing, or none if he so pleased.

If an employer could require an employee to refrain from joining a labor union the employee could in turn require the employer not to join any employers association or group.

Is freedom of contract affected by the Statute? The employer, if he could exact a promise from the employee of the nature mentioned could restrict the employee in his subsequent status.

Most of our courts have held in passing on these questions that industrial advance, the aggregation of great capital and the almost uniform adherence by employers to employers groups and associations make it necessary that the employee be unrestricted in his status as a member or nonmember, of any labor organization. Jones could be convicted.

(3) Conditions may exist where scholars in a neighborhood may be so predominately of a racial group in number that the efficient and proper course of education might require that a certain school should be attended only by a certain racial group but to be reciprocal it would have to be provided that no other classification of scholars, or pupils, could attend such school.

The classification and method of determination of the racial group would have to be reasonable and based on scientific or ethmological factors.

The Statute under consideration provides that a person having more than one-fifth Japanese blood is a Japanese within the meaning of the statute. This is not only an arbitrary but an illogical and paradoxical method of determining racial extraction. The criterion of determination under the Statute is a way of saying that the lesser is as great as the whole. This evaluation violates the dictates of common sense and what is not common sense is rarely good law.

There may be educational merit in the separation of races. Courts could take judicial notice if the *lex loci* were Los Angeles, instead of Magneta, that in the

Japanese district of the City of Los Angeles there are more than 55 thousand Japanese, racially speaking. If the State of Magenta, embraced within its boundaries a similar subdivision, the Courts of Magenta might also judiciously notice; it being a matter of widespread knowledge that the public schools in the Japanese district, at least in the primary grade, were overwhelmingly composed of those Japanese descent.

The court might under the same circumstances also judiciously know that it is common practice among Japanese parents to place their offspring in Japanese Kindergartens where they are taught by native Japanese teachers in the Japanese language. In these private schools the children of tender years are taught only the Japanese language and culture. They learn the 'Kata-Kana', a simplified Japanese alphabet of some 75 characters, as distinguished from the 'Kanjai', the conventional language of Japan; expressed by the calligraphy borrowed from the Chinese.

Thus, the court of Magenta might indicate their realization of the situation that the legislators might have had in mind; in their attempt to establish a racial school.

Probably legislation which did not conflict with the constitutional restrictions regarding race and religion might be drafted but the determination of racial character in the method employed by the legislators of Magenta is racial discrimination and conflicts with the constitutional guarantees against laws which are restrictive under the conventional language invariably utilized in State Constitutions.

Book X.

Question No. 17 Grade 50

Question No. 18 Grade 50

"Question No. 17

John Jones and Mary Smith married in 1935, and have ever since resided in California. From his salary as a store executive during 1936, Jones in 1937 purchased Blackacre, the conveyance thereof being taken in the name of 'John Jones and Mary Jones, grantees.' In 1938, Jones, also from his salary, purchased Greenacre, the deed to which, with the consent of his wife, named the grantees as 'John Jones and Mary Jones, as joint tenants.'

Shortly after his marriage in 1935, Jones took out a policy of insurance on his life, naming his mother as beneficiary, and has paid all premiums thereon from community funds, without the consent of his wife.

Jones now being seriously ill, his wife asks your advice, based on the facts stated, as to:

(1) Their respective interests in Blackacre.

(2) Their respective interests in Greenacre.

(3) Her rights in the proceeds of the insurance policy in the event of Jones' death.

"Answer No. 17

(1) The earnings of the husband during marriage are community property. The subject matter purchased with such earning is also community unless the parties by some act change the nature of the property.

Jones having purchased Blackacre with community funds and the deed having been made to him and his wife in the conventional manner, this parcel is community property.

The husband during the marriage has the right of management of community property.

As Jones is seriously ill we must assume that Mary inquires as to the possible effect of her property interests in the event of her husband's demise.

As no will is mentioned we must assume that none exists and as no children are mentioned the property which is community, being Blackacre, would go to Mary under our code.

(2) Joint Tenancy is a distinct and peculiar estate in the eye of the law. There exists unity of time, title and interest. On the death of a joint tenant, the estate goes to the surviving joint tenant, or tenants. The joint tenants having unity of time, title and interest, they have equal and indivisible rights to management, occupancy and control.

By the terms of the deed under which the parties here held title the estate in joint tenancy is created. While the earning of the husband in the absence of the deed to him and his wife, in joint tenancy, would otherwise have been community property, the parties in this case have, by taking under the deed, created an estate in joint tenancy.

Mary has a co-equal estate with her husband in joint tenancy during her life time and if he should die the entire estate of Greenacre becomes hers by operation of law.

(3) The insurance policy having been maintained and having been executed during the marriage, the payments being made with community funds, is likewise community property, even though the beneficiary is John's mother. As Mary never acquiesced in the payments made under the policy she should avoid the expense of litigation and clarify the matter by asking her husband to change the policy or make some congenial arrangement. In the event of John's death without such policy change litigation would be necessary to establish the nature of the insurance estate.

"Question No. 18

B purchased from S, a retail tobacco merchant, a box of nationally advertised cigars manufactured by M, B having designated that particular brand as his choice. B told S that he was having a party that evening and wanted to be sure the cigars were fresh. That evening when B opened the box by breaking the seal, he discovered that each cigar was carefully wrapped and sealed in cellophane. While B was smoking one of the cigars it exploded and burned a hole in B's coat. Almost simultaneously, P, a guest, had the same thing happen to his cigar which had also come out of the same box. P's eye was so badly injured that it was necessary to remove it by surgical operation. The remaining cigars in the box were excellent in every respect. Neither S nor M had been negligent.

B and P come to you to see whether they have remedies against S or M or both. What you would tell them? Discuss.

"Answer No. 18

It is generally held that a retailer is not liable for a substance sold by him in an instance where the defect is so concealed and he would have no way of knowing of it and where he purchased the goods in the ordinary channels of trade. There are some exceptions to these decisions in the case of foods served by restaurants but ordinarily the law does not give an action against the retailer of so-called package goods for any damage done by a concealed defect or vice.

It is obvious that the explosions were due to some bit of cellophane, which in some way became concealed in the cigars. How this could happen without negligence on the part of 'M' is not disclosed by the question. The wrapping of the cigars in cellophane is a part of the fabrication of the complete box of cigars in the plant of 'M'. While it is difficult to conceive of circumstances wherein a foreign element such as cellophane is concealed with the wrapper of a cigar without negligence in the manufacturing process; yet the question must be discussed as it stands.

It is generally known that cellophane, being a cellulose product, may be highly inflammable and when compressed, explosive.

A manufacturer who utilizes this substance must at his peril see that none of it could be concealed within such an article as a cigar, which in the process of consumption is subjected to heat and fire.

Discussing the question on the basis that the manufacturer, 'M', had utilized the highest degree of care in the manufacture of the cigars, yet the facts of the case clearly demonstrate that some cellophane was concealed within the cigars and the fact that other or all cigars in the box were perfect does not alter the case.

It is not beyond the realm of possibility that the only two cigars in the box that were dangerous were chosen by the guests or that chance determined this happening.

One who utilizes cellophane of the explosive character used in this matter is 'playing with dynamite' considering the effect of heat and fire and 'M' is liable.

Book XII.

Question No. 20	Grade 20
Question No. 21	Grade 40

"Question No. 20

In January, 1938, the Seaside Realty Company, to promote the sale of lots in a subdivision, entered into a written contract with one Wing, a nationally known aviator and stunt flyer, in which Wing, in return for a salary of $500 per month, agreed to make exhibition flights over the property for one year, and to perform exclusively for the Seaside Company during this period.

At the same time Wing also entered into another written contract with the Seaside Company in which he agreed to purchase a lot for $1000 payable in monthly instalments of $100 beginning March 1, 1938, the land to be conveyed upon the payment of the final installment. The contract provided that the instalments were to be paid upon the first day of every month; that time was of the essence and that non-payment of any instalments when due would forfeit all payments previously made.

The instalments were paid promptly until September, 1938, when Wing neglected to tender payment until September 3rd. This was accepted as were the next two instalments, which were both tendered on November 7th. At that time, however, the company notified Wing that future instalments were payable promptly when due. Wing tendered the final instalment December 2nd, which tender was refused as was Wing's demand for conveyance of the lot.

Wing, in the meantime, having secured a better offer from a competing company, is preparing to fly for it. The Seaside Company seeks your advice in regard to:

(1) Securing an injunction to prevent Wing from performing for the rival company.

(2) A suit instituted by Wing to enforce the specific performance of the contract of sale.

(3) The right of Wing to recover the money paid on the purchase price, if he cannot secure specific performance.

"Answer No. 20

(1) The courts have uniformly held that services which were unique in their rendition may be the subject of equitable relief where a contracting party rendering such services attempts to breach the contract. The leading case on this subject, Lumely v. Wagner, involved the services of an opera singer and most of the cases are concerned with the performance of histrionic or artistic talent but the courts, in many instances, have enjoined business executives who possessed unusual and distinctive ability, at the instance of their employers, from becoming the employee of another.

The employee cannot be compelled to continue work but he may be enjoined from entering the service of another or engaging in service.

The services need not be unique, they may only be unusual or distinctive.

The services for which Wing engaged himself were distinctive as he had acquired a national reputation as a stunt flyer. The purpose of the Seaside Realty Company was to exploit their property by an attraction which would lure prospective purchasers to the site.

Were the services rendered and to be rendered by Wing less unusual or distinctive than those of the average movie star? A stunt flyer engages in an occupation in which there is a high degree of mortality. There is not much future in that vocation. Such men must not only practice for years to control their planes in their gyrations but they must be exceptionally endowed physically, mentally and nervously with most unusual qualifications. Vision must be perfect and a high degree of mental and physical coordination is required.

The various 'stunts' consist of complicated maneuvers such as 'wing overs', 'Innelman Turns', 'Whipstalls' and other manipulations which require the highest degree of talent.

The average stunt flyer requires a higher degree of ability and mental and moral stamina, with unusual physical and nervous attributes to perform his work, than does the average movie star.

As the offer from the rival company came to Wing and he is preparing to fly for it during the period of time for which he contracted to fly for the Seaside Realty Company, an injunction could be secured restraining Wing from so doing.

(2) It is a general rule of equity that specific performance lies to compel the transfer of realty under contract because each piece of land is unique. For this reason there is no remedy at law which is plain, speedy or adequate.

Our California Supreme Court, in a case similar to the one presented has held that where the parties to an installment contract accept installments when past due that the parties themselves have established a contemporaneous construction of the contract.

This is the law even tho' the contract contains a clause reciting that time is of the essence, as this one did in the question.

The courts of California, of general jurisdiction, such as the Superior Court have equitable jurisdiction. This is granted under the Constitution of the State of California. They have all the equitable jurisdiction exercised by the Chancery Courts of England. There is an academic question as to whether their jurisdiction, in the subject matter, is determined as of the time of the American Revolution or of the organization of the State as one of the States of the Union.

However, the practical question presented is to be determined by the rule that equity will compel specific performance of contracts for the purchase of land.

While the contracts of service and the contract to purchase were entered into by Wing at the same time they are to be considered as entirely separate and distinct agreements.

Neither has any bearing on the other.

It is an oftquoted maxim of chancery that 'Equity abhors a forfeiture.' Or 'Equity abhors forfeitures.'

Wing having paid all but the last installment would be subjected to a forfeiture and when we consider that the California Courts have observed the doctrine of contemporaneous construction and have given relief to those who substantially fulfilled their contracts; the tardiness of Wing, in a few instances was excused by the acceptance of his money by the Realty Company.

The Seaside Realty Company could not wait until the last payment and refuse to accept it; having condoned the previous instances of dilatory payment by accepting them.

Wing may compel specific performance.

(3) The same doctrine of contemporaneous construction discussed in the previous question applies here, and for the same reasons.

The jurisdiction of our California Courts is somewhat different than most of those of sister states of the union.

Under our Code law and equity are wedded. When the Code was adopted in 1873 it was considered advantageous to give legal and equitable relief in the same action.

While it is unusual to hear a California attorney recite the equitable maxims in court and while too frequently according to Professor Pomeroy in his introduction to his monumental work on the subject of equity, the equitable powers of the courts are overlooked in this jurisdiction, yet our Superior Courts do have, and they are required under our Code to apply equitable and legal rights in an action.

This being true, as a matter of law, Wing could invoke in an action for damages all of the equitable rights, as distinguished from the equitable remedies, that he could invoke in the previous matter.

In other words the substantive law of equity is applied in a legal action but not the adjective law of equity.

Wing can sue in an action for money for breach of contract and his damages are measured by the profit on the lot sale, commission to the salesman, administrative expense on the transaction; and other proper charges which might be deducted from his demand.

"Question No. 21

Adams, through the fraud of Blake, was induced to give the latter a negotiable promissory note for $5,000, dated October 23, 1938, payable one year after date, in consideration of Blake conveying Blackacre to Adams.

Six months later Blake, without fraud, induced Adams, as yet unaware of Blake's prior fraud, to execute to Blake a mortgage on Blackacre securing payment of the note. No new consideration was given for the mortgage, it reciting that it was executed 'as security for that certain obligation in the sum of $5,000 represented by a promissory note bearing date of October 23, 1938'. This mortgage was never recorded.

On October 21, 1939, Clay, who was unaware of the Adams-Blake mortgage, secured against Adams a judgment for $10,000, an abstract of which he immediately recorded in the county where Blackacre was situated, which by statute created a lien.

On October 22, 1939, Blake surrendered the October 23, 1938, note to Adams in exchange for a new negotiable note due October 23, 1940. Adams still being unaware of Blake's prior fraud. No new mortgage was executed.

(1) Assuming Blake retains the new note and at the maturity thereof sues for foreclosure of the mortgage on Blackacre, discuss all points which a careful lawyer would consider as possible defenses for Adams.

(2) If Blake, prior to maturity of the second note, negotiated it to a holder in due course, could such holder at maturity foreclose the mortgage? If so, what would be the priority as between such holder and Clay?

"Answer No. 21

It would be advantageous in the discussion of this question to know the kind and extent of the fraud practiced.

It is difficult to conceive how Blake 'without fraud' secured a mortgage from Adams; as the original transaction was tainted with fraud in its inception and certainly the securing of such an instrument as a mortgage would be, at least, a continuation of the initial fraud.

There being no consideration for the execution of the mortgage that instrument is regarded as having been based upon a past consideration and between the original parties. The recitals of the instrument, altho' specific, do not control. The real consideration of the instrument may always be shown.

Before the execution of the mortgage there was in existence only the note.

'Fraud vitiates everything.' As the original transaction was conceived and executed in fraud, Adams may defend on that ground. The execution of the new note does not alter the situation as Adams was unaware of Blake's prior fraud. Under our Code one may sue for fraud within three years after the *discovery* of the fraud. (338 C.C.P.).

Certainly one could defend on the ground of fraud and there has been no laches nor estoppel in the making of the new note because the maker, Adams, did not know of the fraud.

A very practical question arises as to the value of the property involved.

In defending Adams may take the position of fraud in the original transaction, not discovered by him at the time of execution of the various documents involved.

No consideration for the making of the mortgage.

No new mortgage was executed at the time of the execution of the new note.

No action lies for foreclosure for the reason that the old note was extinguished by the new one and the mortgage is not a security based upon the new note.

(2) An innocent purchaser for value would be regarded as having acquired the second note under the mortgage security and he would take free of all the equities existing between the parties. It follows that he could foreclose.

Clay having recorded the abstract of judgment and the mortgage not having been recorded, Clay has priority.

Book XIII.

Question No. 22	Grade 30
Question No. 23	Grade 55

"Question No. 22

Jones owned and occupied a building adjoining a public highway in the city of Fairview, state of Magenta. He arranged with Green, an odd job man in the neighborhood, for the latter to clean the windows of the building at the rate of fifty cents per hour. As Jones knew, Green had caused two injuries during the past year while engaged in window cleaning through dropping tools on passersby.

An ordinance of the city of Fairview prohibited the use by window cleaners of any brush other than a special type so designed as to strap around the hand. Neither Green nor Jones had such a brush, however, and Jones told Green to use a short mop with which Jones supplied him.

Jones saw that Green was working without a safety belt but made no objection, although a city ordinance required such a belt to be used. He gave no direction or suggesions other than as stated above as to how Green should do the work. While Green was cleaning one of the higher windows, he negligently slipped, and, due to not having a safety belt, was forced to grab the window sash with both hands, as a result of which the unattached mop fell striking and injuring Paulson, who was walking on the sidewalk in front of Jones' building.

Is Jones liable to Paulson? Discuss all possible bases upon which such liability might be predicated.

"Answer No. 22

As the contract of employment is on a time basis for wages, Green is an employee of Jones and not an independent contractor. Green, being an employee, came under the rule of *respondeat superior* as he is a servant of Jones in this undertaking.

We have a violation of two city ordinances here. Ordinances which are reasonable in their scope are proper objects of municipal legislation.

The violation of these ordinances in the acts in which the servant was engaged on behalf of his master; is the very cause of the injury.

The proximate cause of the injury was the failure of the servant to properly use a brush which could have been strapped to his hand, obviating injury by dropping to those below; and the failure to use a safety belt, which failure resulted in his efforts to observe the first law of nature and save himself.

Both of these proximate causes, or the division of the proximate cause into two parts, as you may prefer; was the causative factor in the injury and both had been proscribed by the city ordinance.

All of the 'possible bases' would include:

a. common law liability under Master [and] Servant Doctrine. Relation and negligence established by statement of facts.

b. coupled with the violation of an ordinance prohibiting the act which was the proximate cause.

c. the violation of an additional ordinance, the act being an additional factor or contributing element in the injury.

"Question No. 23

John Smith, a wealthy real estate broker, by his will devised a small apartment house to Trask in trust for the use of Smith's son, Bob, for life, providing that Trask should retain possession of the premises, manage all business transactions in respect thereto, and collect the rents, paying over the net income to Bob quarterly. The will further provided that Bob should have no right to anticipate such income by sale, assignment, mortgage, or in any other manner, and that such income should not be subject to the claims of Bob's creditors. On Smith's death, Trask qualified and entered upon the performance of the trust, his management producing a net income of some $3,000 annually. Bob, aged 22, and studying medicine, was able on account of his apparent affluence to secure almost unlimited credit, and was soon deeply in debt.

The apartment house being in need of replacement of some plumbing fixtures, the new installations were made by Plummer pursuant to a contract with Trask, the latter signing the contract in his own name, as trustee, of the estate of John Smith.

A janitor employed by Trask for the apartment house negligently left a broom on the stairs and Ransom, one of the tenants, fell over it and was injured.

What are the rights of (a) Bob's creditors; (b) Plummer, who has not been paid for his labor and materials; (c) Ransom, the injured tenant? (Do not discuss mechanic's liens.)

"Answer No. 23

Trask is the Trustee of an active, as distinguished from a passive trust. The courts have held that 'Spendthrift Trusts' are valid where the trust created is not in its inception a device for defrauding creditors. As the period of time between the creation of the trust and it becoming effective thru' the death of Smith is sufficient to rebut any inference of that kind the trust is valid; with the proviso that the *cestui que* trust is deprived of control of the subject matter.

The decisions say that one can not create a spendthrift trust and endow the beneficiary with any control over the subject matter to the extent that he may enjoy the increment of its earnings secure from his creditors and at any time control for his own benefit the subject matter of the trust.

The provisions of the trust in the question seem to have fully met all the requirements of the law in this regard.

(a) Bob's creditors cannot successfully attack the trust estate nor the income paid to Bob, with the proviso that after the income is paid to Bob that such income then becomes subject to execution, attachment or other appropriate remedy. Most decisions hold that the only instance in which money paid to a beneficiary may not be subject to legal process [is] where the funds are paid under the protection of a statute which specifically exempts such funds from ordinary legal process.

(b) Plummer, having been engaged by the trustee may compel the estate to satisfy his claim by appropriate legal action. The subject matter of the estate is subject to claims for the improvement or preservation of the estate.

The circumstance of the trustee signing his own name, with descriptive words of representative capacity should not render the trustee personally liable for the amount of the plumber's claim.

The law was formerly different on this subject. The older decisions hold that if an agent sign his name instead of that of his principal, the agent is bound, but the modern trend is to exempt one who acts in a representative capacity from personal liability when the qualifying words appear with the signature, even tho' the words indicative of representation appear below the signature. If the text of the contract indicates an estate purpose, Trask is not liable.

(c) Tenants occupy premises subject to the general rule of contributory negligence, in any injury which they may sustain.

While the janitor was negligent in leaving the broom on the stairs the circumstances ordinarily would indicate the presence of the broom. Attendant circumstances may indicate negligence in an act of that kind; depending upon the amount of light available, the location of the broom on the stairs as to whether it was concealed in the juncture of the tread of the

stair and the riser; the ability of the person injured and a multitude of other factors.

Ordinarily a broom on the stair is a conspicuous object and a tenant, or any other person, would in the act of ascent or descent observe the broom. If they failed to see it in the circumstances as outlined in the query; the law would impute to them contributory negligence and the negligence of the janitor would not permit the recovery.

Book XIV—Blank

Book XV.

Question No. 25	Grade 45
Question No. 26	Grade 50

"Question No. 25

On June 1st, Jones bought Blackacre and Whiteacre in the state of Magenta for $15,000 each, such being the reasonable value of the land. On June 15th he contracted in writing to sell Blackacre to Black for $12,000, payable as follows: $2,000 down and $5,000 on July 1st at which time the deed was to be delivered 'on execution and delivery of a purchase-money note and mortgage on Blackacre in the sum of $5,000 * * *.' Black paid the $2,000 and on June 20th assigned his rights under the contract to Allen. On July 1st, Allen tendered Jones $5,000 in cash and his own note for $5,000 and offered to execute a purchase-money mortgage on Blackacre, but Jones declined to tender, claiming he had made a 'bad bargain' with Black.

Meanwhile, Jones had leased Whiteacre to White for five years. A dyke had been erected on Whiteacre to prevent water on Whiteacre from running over into Greenacre, adjoining farm land owned by Jones. The dyke was in disrepair and leaked, damaging crops on Greenacre, and the lease provided that White was to repair it within two weeks. After White had taken possession, a separate contract was entered into whereby Jones agreed, for adequate consideration, to install on Whiteacre a system of pipes for irrigation. White failed to repair the dyke as agreed, and Jones has failed to install the irrigation system.

(1) Can Allen compel specific performance of Jones' promise to convey Blackacre?

(2) Can Jones compel specific performance of White's agreement to repair the dyke?

(3) Can White compel specific performance of Jones' agreement to install the irrigation system?

"Answer No. 25

(1) Contracts in which personal skill or the credit or probity or personal qualification of a contracting party are involved are not assignable.

Contracts which embody a clause prohibiting assignment are likewise not assignable.

As the contract under question involves none of these features [it] is of an assignable nature.

Allen tendered the money required to be paid and offered to execute the purchase money mortgage so it is apparent that the vendor relied upon the mortgage for security rather than personal credit of the vendee.

The courts grant specific performance of land contracts as each parcel of land is unique and the purchaser has for that reason no 'plain speedy nor adequate remedy at law.'

Allen can compel specific performance.

(2) As specific performance is purely equitable in origin and application one who invokes the remedy and who has failed to carry out his agreements with the Deft. may be challenged with the equitable maxim, 'He who seeks equity must do equity.'

While the subject matter of the dyke and the irrigation are not directly concerned with each other, it is well settled that in equity when jurisdiction is taken concerning one justiciable question between the parties it is assumed for all matters that may be adjudicated, whether they are equitable or legal.

In a previous paper the jurisdiction of our Superior and Appellate Courts in equity was ascribed to the provisions of the State of California constitution and the codes made in pursuance of that jurisdiction and to save time and space, this matter will not be set out at length.

One of the grounds of equitable jurisdiction is the prevention of a multiplicity of legal actions.

If Jones were required to sue on the covenant requiring White to repair the dyke it follows as a logical sequence that such suits would be required to be filed and prosecuted as often as the water, due to natural causes, the terrain and other mat-

ters; might accumulate and run over into Jones land.

Pursuing the ratiocination, this would result in a multiplicity of legal actions.

Jones can compel specific performance.

(3) As was intimated in the previous question White could in a proceeding by Jones for specific performance, in the same action, compel performance. (By cross-complaint)

For the purpose of discussion we will assume that Jones did not sue, as contemplated in the previous subdivision of this question.

If White could not compel specific performance he would be relegated to an action of law. Under the strictly legal situation he would be limited to the damage sustained by the failure of Jones to install the irrigation system, the interim being the elapsed time from the date of the contract for the installation of irrigation to the date of the suit. Damages could not be anticipated as they would depend upon climatic and meterological conditions and other vagaries which would be impossible of ascertainment, or even surmise.

From time to time as damages would accrue during the period of the lease White would be compelled to repair to court. In a semi-arid country irrigation is necessary to most forms of husbandry and White to raise his crop, would be compelled to install some sort of irrigation system, machanical or manual, as the case might be.

Under these circumstances equity would compel specific performance at the instance of White for the purpose of preventing a multiplicity of suits and for the reason that White had no plain, speedy nor adequate remedy at law; which is the basis of all equitable jurisdiction.

"Question No. 26

X, a logger, had been supplying logs for Y's sawmills for several years. On December 26, 1938, X received the following letter from Y: 'Dear X. If you will promise to furnish all the No. 1 logs necessary to run my two Portsmouth mills for the coming year at $15 per thousand feet, the contract is yours. Please accept by return mail. (Signed) Y.' Upon receiving the letter X replied immediately by telegram: 'I accept your terms. Am towing the first raft to your booming grounds as we have done in the past and as is the usual custom. I would appreciate your depositing monthly checks to cover payment to my account at the Portsmouth Bank. (Signed) X.' On February 1, 1939, X received the following letter from Y.: 'Dear X. In reply to your telegram of December 26, 1938, I regret to inform you that my lower mill was completely destroyed by the recent unprecedented flood, and that I have just concluded the sale of my upper mill. You may pick up your log raft at the booming grounds. (Signed) Y.'

(1) Was a contract entered into between X and Y? Discuss fully. (Assume that no question arising under the statute of frauds is involved.)

(2) Assuming that X and Y entered into a binding contract, what is the effect of the sale of one mill and the destruction of the other?

"Answer No. 26

(1) Where a party makes an offer thru' a particular medium of communication and requires a reply thru' a particular medium, the use of a different medium in the transmission of the attempted acceptance does not meet the offer.

This [is] an artificial and technical rule of contractual law so the courts have held that the attempted acceptance may be refused on the ground that it did not meet the terms of the offer by failure to use the medium of communication as directed in the offer.

In this case the rejection of the acceptance was not placed upon the somewhat hyper technical ground mentioned but upon a totally different ground, namely; impossibility of performance.

The text of the letter of 'Y' proves that 'X' had already moored his raft at the booming grounds when 'Y' composed the letter.

This shows us that 'Y' is attempting to revoke the contract upon the grounds stated in his letter.

A contract was entered into because 'X' moored his raft at the booming grounds with the consent of 'Y' who by his act in allowing this waived his right to reject the acceptance of 'X' on the ground mentioned.

(2) It appears from the context of the telegraphic communication of 'X' that 'X' was well acquainted and fully conversant with the plan of operation under which 'Y' functioned and operated as the

telegram refers to what was done in the past and the usual custom of operations.

An essential element in the technique of the lumber industry is the use of a suitable saw mill at some appropriate point in the transportation of logs from the site of growth in the tree to the preliminary operation at the mill where 'logs' become 'lumber.'

As a 'boomer' X must have known this. Under this situation we must assume that the parties contracted with reference to the existence and the operations of the mills. Logs brought to the mill of 'Y' would have small commercial value unless he could undertake their preliminary fabrication by sawing them.

We comprehend the law to be that where parties enter into contract concerning the fabrication of a particular subject matter and where the site of fabrication is destroyed by calamity, such as flood, that the performance of the contract become impossible to the extent that they regarded the site of fabrication as an element of the agreement.

To the extent that the mill destroyed by flood prevented the performance of contract, to that extent 'Y' is released.

The sale of the other mill was the voluntary act of 'Y' and does not excuse him from performance. To the extent that the upper mill might have functioned in receiving the logs which 'X' might have furnished to it under the conditions contemplated by the parties at the time of the agreement; to that extent 'Y' is not released.

As a matter of legal pragmatism in the ascertainment of damages resulting 'Y' is liable to 'X' for the profit on all the logs that 'X' might have delivered to the upper mill; unless the capacity of the upper mill was less than the volume of the delivery of logs, in which case the measure of damages would be the capacity of the mill to consume the logs. (The contract was for the furnishing of 'all the No. 1 logs' etc.)

Book XVI.

Question No. 27 Grade 15

Question No. 28 Grade 25

"Question No. 27

On February 10th A was the owner of record of a tract of vacant land in the state of Magenta. On February 10th A orally contracted to sell the land to B for the sum of $10,000. Pursuant to this contract A executed a deed to B and handed it to B with the oral direction that the deed was not to become operative until B paid the sum of $10,000 to A. B having failed to pay the $10,000 by April 10th, A executed a deed to C on that date and handed it to C with the following oral statement: 'Put this in your safe until I call for its return. If B doesn't pay me shortly, I may make a gift of the land to you.' C disregarded this direction and had the deed recorded on April 12th. On April 13th B learned of this fact and immediately had his deed recorded. On April 15th C executed a deed of this land to D in discharge of an antecedent debt due D. D accepted the deed in payment of the debt without knowledge of either B's deed or of the facts surrounding the execution of C's deed from A. D immediately recorded his deed. B has not paid A the $10,000.

Discuss the state of the legal title as between A, B, and D.

"Answer No. 27

As between A and B, the deed was not to become affective until the purchase price had been paid. The question presented hinges upon the operation of the Statute of Frauds, among other matters.

While partial performance may take a contract to sell realty "out of the statute" there must be more performance than is shown here, up to the time that B recorded his deed. By so doing B, who was entrusted with his deed demonstrated his intention of becoming the owner of the land. True he recorded the deed because he learned of the previous transaction but whatever motive prompted him; he did by this act take the matter out of the Statute.

In determining questions based upon the Statute it is sometimes helpful to recollect the purpose of the Statute and its history throws light on this doubtful and sometimes bewildering application of this universal bit of Anglo-Saxon legislation.

When the quaint 'lawyer's latin' and Norman Frensh in which the Statute is couched, is translated; the preamble assures us that it was devised to 'prevent frauds and perjuries.' The legal history of the day indicates that it did more to prevent the perjuries than the frauds.

In plain language the statute was designed to prevent doubt as to certain transactions therein enumerated. The doctrine

of part performance was developed in instances where the acts of the parties clearly showed that there could be no legal doubt as to the intentions of the parties.

Applying this reasoning to the case the recordation of the deed by B would take the matter out of the statute. The deed then became a matter of public record and doubt resolved.

B is liable to A for the purchase price. A having made it impossible to give title to B because of his deed to C is liable to B for breach of contract on the tender by B to A of the agreed consideration. The retention of B of the deed for the period in which he retained it without payment or tender of payment was lax, as was A; in not demanding the purchase money.

D was an innocent purchaser for value because the extinguishment of an antecedent debt is a good and valuable consideration and D took free of the equities existing between the various parties. The recordation of the deed by C made a good record title and his deed to D put title in D as it was the laxity of A in delivering a deed to C which resulted in the record title having been made.

D has title as against A and B.

"Question No. 28

For value then received, Jones executed and delivered to Smith the following instrument:

'Fairview, State of Megenta,
'October 23, 1938.

'I. O. U. or holder $5,000 on or before 30 days after dissolution of my partnership with James Brown. This note is secured by a mortgage on my ranch, Blackacre. If in the judgment of the holder said collateral depreciates in value, I agree to give when demanded additional security to the satisfaction of said holder; otherwise the holder shall have the option of declaring this note due at once.

'(Signed) John Jones'

Is the above instrument a negotiable promissory note? Discuss all points involved.

"Answer No. 28

No. Our Uniform Negotiable Instruments Act, embraced in our Code, requires that a negotiable instrument be made payable to Bearer Or To Order.

Obviously the word 'holder' does not meet the terms of the statute and the words, 'or order' are not included.

The words 'or order' are not needed when it is payable to bearer for the reason that the bearer may 'order.'

The initials 'I O U' are not equivalent to a promise to pay. While these cryptic symbols are frequently used to denote a personal obligation or express an obligation incurred to the gaming table, so we are told, yet the courts have not extended their latitude to include a promise to pay.

The instrument is conditioned upon the judgment of the maker and a negotiable instrument may not be conditional. The agreement to give additional security is a contingency and the instrument may not be contingent in its terms and be negotiable. The option extended to the holder also destroys negotiability under the terms of the Act.

A promissory note cannot be made one by merely calling [it] that. It must contain the elements of negotiability. The time of payment is uncertain as the dissolution of partnership with Brown is uncertain.

In short all of the clauses save the reference to security destroy the 'negotiability' of the instrument. This under the requirements of the Code.

Book XVII.

Question No. 29 Grade 70

"Question No. 29

Peters, a resident of California, has valid cause of action based on several contract claims against Adams, Blake and Crowley, respectively, none of whom has ever been in California. Blake is a resident of New York but owns an orchard in California. Crowley is a New York business man who has a branch office in California. Peters' claim against Crowley arose out of the business transacted by the latter in California through a local agent.

Advise Peters as to whether:

(1) He can secure a judgment in California capable of binding Adams' assets outside of California.

(2) He can subject Blake's orchard to the payment of the latter's obligation, and, if so, what procedure must be followed.

(3) The state of California has power to provide for personal jurisdiction over one in the position of Crowley.

"Answer No. 29

(1) Peters cannot for reasons that will be more fully discussed below.

(2) The celebrated case of Pennoyer v. Neff (U.S.Sup.Ct.) is determinative of this matter.

A San Francisco lawyer sued Pennoyer in the State Court for a claim based upon the rendering of legal services. No service of process was obtained personally and the attorney published summons and secured what he thought was a judgment for the amount of his claim.

The defendant during the suit was without the State of California but returned and the Plaintiff attorney having sold property of the Deft. levied upon in execution to the Defendant in the Federal case; the client of the Plaintiff attorney instituted proceedings to vacate the judgment and sale as conflicting with the due process of law clause of the 14th Amendment to the U. S. Constitution. Neff had bought the property on execution.

The Supreme Court of the United States held that the attempted jurisdiction thru publication of summons was not good.

If an attachment is issued in a suit based upon publication of summons the demand is good up to the amount of the fair value of the attached property. This is because an attachment is a proceeding *in rem* against the property itself and coupled with the published summons it gives the court jurisdiction to render judgment only in the amount mentioned, not the full amount of the plaintiff's demand, necessarily.

Now applying this rule of law to the case against Blake: An action may be brought in our courts based upon publication of summons and attachment against the orchard for the fair value of the attached property.

Blake may appear or default. If he defaults the judgment will be good up to the amount of the attachment.

The U. S. Supreme Court in reviewing the case cited held that service in the matter of an ordinary action at law must be obtained by personal service or the procedure outlined above.

(3) Yes. We have a code section providing that one who does business in the State of California must comply with the statute by indicating the person or agency upon whom service of process may be made. In compliance with the statute one appoints another within the State who is properly empowered to accept service of process in behalf of the person or agency without the State. This is an intra-state function; within the control of the State of California." [This concludes the quoted material from the official questions submitted to and answers written by petitioner John E. Staley.]

The record herein reveals no showing on the part of the respondents as to how or in what respect (if any) either or any of petitioner's answers to the foregoing questions was or were erroneous or defective, either in "analysis of the facts, * * * discussion of the legal problems involved", or "display of legal reasoning", as was required of petitioner—which requirements are hereinafter disclosed. Conclusively, as will appear from the face of each of the questions, petitioner's answers were simply graded in gross,—no indication being apparent regarding the several items which may have been credited in making up the total mark. I have not the time at my disposal to discuss herein either or any of such answers; but on a consideration of the same, to my mind, it is clear that as to each answer petitioner was accorded a credit that was much less than that to which he was reasonably and justly entitled. True, the "highly skilled * * * recent graduates of different law schools" were not of that opinion; but I submit to the bar of this state the proposition that, if its members will but cursorily examine the said questions and answers, although they may disagree with each of many of petitioner's statements as to the law, nevertheless they must conclude that, taken as a whole, petitioner's answers displayed a knowledge of the law and of the procedure of this state that may be deemed to be far in excess of that possessed by the average member of the bar,—with the consequence that, in fairness and justice to petitioner, he clearly should be entitled to practice law in all the courts of this state.

In addition to the said questions and answers, there is attached to the petition the following certificate, to-wit:

"Certificate of
"Charles E. McGinnis,
"A.B., LL.B., D.C.L.
To
"Honorable Supreme Court
of the
"State of California

"I, Charles E. McGinnis, hereby certify that I was formerly for five years a law editor and member of the regular Editorial Staff of the West Publishing Company, St. Paul, Minnesota, and at such time one of the Editors of the American Digest and National Reporter System. That I later

served as Professor of Law for about 16 years, in 4 schools, the University of North Dakota, Southwestern University, Metropolitan University, and Lincoln University where I was Dean of the School of Law for more than five years.

"That I am not now teaching or connected with any law school.

"That I was admitted to the bar of three States upon examination, Kansas, Colorado and California. That I was admitted to the Bar of the State of California on March 17, 1924 and ever since have been and now am duly qualified to practice in the Courts of this State.

"That I have examined carefully and in detail the questions propounded by the Board of Bar Examiners of the State of California to the Applicant, John E. Staley, and also his answers thereto as they appear herein, and it is my opinion that he is educationally qualified to practice law in the State of California and elsewhere, and that he is entitled upon this examination to admission to the Bar of this State.

"I have assigned to Answers to the numbered questions the following grades:

1. 85%	16. 85%
2. 76	17. 90
3. 85	18. 80
4. 75	19.—Blank
5. 84	20. 86
6. 80	21. 71
7. 75	22. 86
8. 79	23. 90
9. 85	24.—Blank
10. 84	25. 76
11. 86	26. 82
12. 70	27. 66
13. 82	28. 93
14.—Blank	29. 82
15. 79	

"This grading gives the Applicant, Petitioner, a total of 2121 points or percents, making his average well above the minimum passing grade. This average is 81 and 15/26ths per cent.

"I further certify that the Applicant, John E. Staley, has never at any time been a student under me or in any school where and when I was engaged in instructing in law, and that I made his acquaintance for the first time within the present week.

"I further certify that I am now actively engaged in the Practice of Law in the Courts of this State and of the United States.

"Charles E. McGinnis.
"Dated: Los Angeles, California,
"July 27, 1940."

At the outset, on an inspection or examination of such questions and the respective answers thereto, it may be noted that petitioner failed to answer three of the questions which were propounded by the board. As explained by the respondent board, such failure on the part of petitioner is due to the fact that "At recent examinations a total of twenty-nine questions have been given, of which, *through the use of options*, each applicant has been required to answer *twenty-six questions.*" (Emphasis added.)

The respondents' return to the order to show cause consists chiefly in a detailed explanation of the system which is employed by the board in preparing the questions proposed to be submitted to applicants for admission, as well as the method used in grading the respective answers of such applicants thereto. However, such answer of the respondents also contains several independent allegations of fact which appear to have some material bearing on the question submitted for consideration by this court. Among the other facts thus presented it may be noted that, at least in the first instance, if ever, neither any member of the board of governors of The State Bar, nor any member of its "committee of bar examiners" ever reads or grades the answers which theretofore have been made or given by any applicant for admission to practice; but it appears that in the first instance that arduous and all-important duty is delegated to at least fifteen *"recent graduates of a number of different law schools,* out-of-state, as well as California", and that to each such "reader" is assigned not more than two questions "in fields for which he is particularly equipped". However, notwithstanding the lack of practical experience of such "readers" in the practice of the law, by the respondents' answer herein it appears that "petitioner's answers to said examination questions were carefully, fully, and completely read and graded by a corps of *competent,* efficient, trained and *highly skilled* readers, particularly chosen for their ability to perform this special service." (Emphasis added.)

From the respondents' answer it also appears that, contained within the instructions which are given to the said "highly

skilled readers" with respect to the grade which a given answer to a question may merit, is the following statement: "The analyses [formulae] are intended for the guidance of the readers, but they can properly serve that purpose only if it be constantly borne in mind that the applicants need not *duplicate* the completeness of statement found in the committee analyses in order to be given a *perfect* mark. The scope of the analyses has been increased only so that an applicant who includes a discussion *which is not necessary* for *full* credit, but which, nevertheless, is relevant, *may be given a bonus.*" The "analyses" or formulae to which reference has been had are thus defined: "There is prepared for each question a *thorough analysis,* complete not only with statements of the *weight of authority* and minority rules for *each* legal problem, amply supported by the citation of pertinent authorities, but also with an exposition of the various views and approaches of different authorities, and including an application of the relevant rules to the particular facts." (Emphasis added.)

In the first place, it might be interesting to learn when, where, and under what particular circumstances the said "recent graduates of different law schools" were distinguished as "highly skilled"; and by whom were they originally declared so entitled? On a careful consideration of their work in the instant matter, it would seem just possible that they have not sustained their reputation. But that conclusion, of course, would be but a matter of opinion, regarding which experts (if any) as well as individual, common lawyers might differ, one from the other, or the others.

As may be noted, on the face of the respective answers here under consideration nothing appears that is indicative of any credit which was given to any item that properly was involved in the total credit,—the only showing being that 20, or 30, or 60, or some other per cent was accorded. Any one who has had occasion to observe the grades which may have been given by different, independent, "non-expert" graders on examination questions will readily attest the statement that a difference of 25, 50 or 75 per cent may be, and frequently has been, discovered. In the instant matter, that fact is illustrated by a comparison of the respective grades that were given by the "highly skilled * * * recent graduates of different law schools" and those which were accorded by Mr. McGinnis. For example: by the former, to petitioner's answer given to question No. 1 he was awarded 45 per cent,—whereas by the latter has was credited with 85 per cent; on question No. 2 the "highly skilled" gentleman thought petitioner had earned a credit of 30 per cent, although Mr. McGinnis was of the opinion that 76 per cent was nearer the correct mark; on question No. 3 the respective marks were 35 and 85; and on No. 4 the grades were 30 by the one and 75 by the other. In such circumstances, it would seem impossible that any person, however learned, might accurately and with any assurance assert that any given answer was entitled to be rated as "perfect". But however difficult of solution the problem of grading such answers may be, unquestionably the announced conclusion would be more graciously received by an unsuccessful applicant, and more readily approved by the bar in general, if the fact were widespread and greatly publicized that the answers to the questions had been graded by long-experienced, liberal-minded lawyers of unquestioned ability and integrity, rather than by recent law graduates of whatever skill they might possess and however rightfully they might be entitled to the laurels which by some one had been accorded to them.

Remembering that the instant proceeding is before this court by reason of its issuance of an order directed to the *respondents* "to show cause why he [petitioner] should not be admitted to practice law in this state" (page 1 of majority opinion [109 P.2d 667]),—paragraph VII of the respondents' "Return to Alternative Writ of Mandate * * *" presents a point of considerable interest. Said paragraph is as follows: "The respondents allege that the records of the Committee of Bar Examiners show that this petitioner is *not qualified* for admission to practice law in this state *as indicated by the fact that he had taken eight examinations* since the year 1926, at *none* of which has he been successful although each examination was determined on its own merits and in each instance all books remained anonymous during the grading period." (Emphasis added.) And clearly as implying emphasis to that point, in their brief herein the respondents again refer to petitioner's "record"—for the very apparent purpose of supplying a good reason for not making a recommendation to the effect that petitioner be admitted to the practice of law

within this state. Such reference in the respondents' brief is as follows, to-wit: "The petitioner, John E. Staley, is a man 50 years of age. In June, 1926, he first took a bar examination in California. He *failed* that examination. He *has subsequently failed* the examinations given in August 1927, August, 1928, July, 1929, April, 1930, August, 1930, February, 1934, and October, 1939. In each examination his papers were anonymous when graded. *He seeks admission to the bar of California despite this record.*" (Emphasis added.) And as though to clinch the fairness of the respondents' conclusion that petitioner was not nor ever could be entitled to practice law in this state, on the "fly leaf" of their brief herein the respondents include the following statement:

"Question Involved. *A person who has failed to pass eight examinations* given by the Committee of Bar Examiners seeks admission on a petition alleging his answers to the October 1939 examination were arbitrarily and capriciously graded but alleging no facts to substantiate such charge. * * * The petition for rehearing having been granted and an alternative writ of mandate issued the issue is: Does the petition state facts sufficient to entitle the petitioner to the relief prayed for?"

In other words, according to the pleading and the brief of the respondents,—irrespective of petitioner's integrity and his ability as illustrated by his respective answers to the several questions which were propounded to him,—the asserted fact that on each of seven previous examinations petitioner failed to be accredited a passing grade constitutes its real *cause,* and in and of itself presents a good and sufficient reason for a recommendation by the board of bar governors that in the instant matter the petition for admission to practice law in this state should be peremptorily denied. Basically, such a suggestion or conclusion is manifestly unfair and unjust.

However, in apparent contradiction of such conclusion, in another connection in the respondents' answer may be noted the allegation that "no factor other than the applicant's work on the examination *has any bearing* upon his success or failure in the examination". The purport of that language is that whatever may be petitioner's background, scholastically or otherwise, or however extensive and varied and otherwise important may have been his lifework, or his experience or his training in the law, in business, or in other pursuits of life, or whatever may be his established—practical or demonstrated—fitness to practice law by reason of his general legal or other knowledge, or his integrity,—none of nor all such and other qualifications has or have "*any* bearing" but to the contrary, count for naught. Therefore, it would seem that no reason appears for an applicant, prior to being granted permission to take the examination, to be required to make any showing regarding either or any of such various or other matters hereinbefore set forth. (Emphasis added.)

As related to the system employed by the respondents in grading answers to questions, it should be obvious that in grading an examination paper the giving of "a *bonus*" to any applicant "*who includes a discussion which is not necessary for full credit, but which, nevertheless, is relevant*" may or might result in unjust discrimination as to other applicants. As a single illustration of how such rule injuriously may have affected petitioner, it is clear that if on examination of the several questions and the respective answers made thereto by petitioner it should appear that in reality, as to one or several answers, he was entitled to "a perfect mark", the fact that he was not accorded a bonus as to one particular answer, or a bonus as to each of several different answers, may have unjustly affected his total appropriate credit.

Contained within the respondents' "Return to Alternative Writ of Mandate and Brief on Behalf of the State Bar" is the allegation that "At that examination [October, 1939] 718 applicants for admission to practice were examined and of that number 254 were found to have passed the examination and were certified to this court and recommended for admission to practice law in the State of California. Respondents have discharged the duties imposed upon them by law in connection with said examination and the Committee of Bar Examiners has heretofore exercised *the best judgment which it has in the premises* and has rendered to this court its carefully considered determination as to the result of that examination and has already moved the admission of those applicants which it in good conscience could recommend to the court." (Emphasis added.) Apparently that allegation, in its entirety, was made inadvertently or, if not, it must have been made for the ex-

press purpose of inviting adverse and drastic criticism with regard to *the best judgment* of the committee. And although the respondents have placed themselves in that vulnerable position, it may be that the dignity of the court should forbid any direct response to the invitation thus extended.

Suggested as a matter of great consequence, and as impliedly constituting an additional if not an impelling reason why petitioner should not be permitted to practice law in this state,—in effect, the respondents assert that petitioner was afforded a reasonable period of time to consider the questions and to make his respective written answers thereto, in that he was allowed 48 minutes for each answer. In that regard, the statement of the respondents is as follows: "Inasmuch as applicants at the present time are required to answer twenty-six questions given in six three-and-one-half-hour sessions, they have an average of *slightly more than 48 minutes for each answer.*" (Emphasis added.)

In that connection, further requirements on the part of such applicants are set forth by the respondents as follows: "All questions on the examination are of the long-form or essay type. They consist of a hypothetical case involving *several* principal points of law and require from the applicant *careful analysis of the facts* presented and *a full discussion of the legal problems* involved. The questions are from 200 to 300 words in length and are so expressed as not *unduly to confuse the applicant* while yet retaining the *necessity for legal analysis and a display of legal reasoning.*" (Emphasis added.) In view of the points presented by such statement, it might not be inappropriate to refer to some of the questions (without again setting them forth herein) which petitioner was required to answer, in writing, in the allotted space of 48 minutes. To my mind, the situation presented to an applicant of requiring from him, within such allotted time, a "*careful analysis of the facts*", "a *full discussion* of the legal problems involved" and "*a display of legal reasoning*" would be, to say the least, both bewildering and disconcerting, if not actually alarming. It seriously may be questioned whether any reputable lawyer, who has successfully practiced law in this state for a period of 10 years or longer, would consider such a feat possible within a space of 48 minutes, even with respect to any one of the several minor points of law here presented for solution in any of the major questions which the applicant was called upon to answer. Furthermore, as to any one of such major questions, it would be even doubtful that, provided with a well-equipped law office, with all pertinent digests, law reports, secretaries and research workers necessary or advisable for the purpose, any lawyer who valued his good reputation as such would undertake to present, in much less than 48 hours, "a careful analysis of the facts" and "a full discussion of the legal problems involved", together with "a display of legal reasoning". And especially would such performance be doubtful where, in addition to the difficulties already present, the said lawyer would have to bear in mind the fact that the correctness of his answer to such question was to be tested not by a group of experienced, practical and tolerant lawyers, who might recognize the fact that law is not an exact science, but by a body of "15 recent graduates of a number of different law schools", and that the answer given, to be considered "perfect", or even entitled to a passing grade, must first be deemed to practically coincide with the "analysis" or formula theretofore prepared by the committee of bar examiners, and thereafter be graded by the said body of "recent graduates". To my mind, if the conditions prescribed and approved by the respondents, which were required and demanded of petitioner, did not amount to an imposition as to him, and did not result in unfair and unjust treatment as far as he was concerned, it would be difficult to imagine just what conditions should exist in order to invoke the application of the rule reiterated by this court in its opinion in the Salot case. (Salot v. State Bar, 3 Cal.2d 615, 45 P.2d 203.) In that case it was intimated that if an unsuccessful applicant for admission to practice law in this state could show that his application was rejected "through fraud, imposition, or coercion, or that he [had] been treated unfairly or unjustly", this court *would* "listen to his complaint".

But to return to the specific questions and the respective answers thereto that are involved in this proceeding: In the first place, realizing, if possible, my own lack of legal knowledge, nevertheless, with the fullest confidence I venture to predict that if, for the purpose of passing upon the question of the fitness of petitioner to practice law in this state, the identical questions which were propounded to petitioner and the respective answers that

were made thereto by him were submitted to a committee composed of 15 average members of the bar, the result of its consideration thereof would be favorable to petitioner, and would be followed by a recommendation by such committee that petitioner be admitted to practice law in this state.

As hereinbefore has been indicated, most lawyers are painfully cognizant of the fact that law is not an exact science, and that with reference to practically any controversy which involves an admitted set of facts a given conclusion of law regarding the respective rights of the several parties thereto will prove almost impossible of agreement as among any considerable number of practicing attorneys,—which is to intimate that as great a number of attorneys will be found who favor a given legal conclusion as will be found who dissent therefrom. If that were not true, very few actions or suits would ever reach the courts. In every lawsuit, or appeal from a judgment, about as many lawyers appear therein in the interest of the defendant as appear in behalf of the plaintiff.

Although it is vigorously asserted by the respondents that they do not require "a perfect answer" to each or any of the questions that are propounded to an applicant, but that, to the contrary, they accord him some credit for an answer that does not agree with their previously prepared "analysis" or formula (provided such answer be logical and well-reasoned),—nevertheless, the several grades that were given to petitioner herein on his respective answers compel the obvious conclusion that petitioner's answers could not have been accorded more than a negligible credit in those instances where it was apparent that his answers had failed to agree with the analyses or formulae which previously had been prepared by the respondents. A careful check of the cases that are reported in the last two issued volumes of the reports of the United States Supreme Court reveals the following facts: that 7 cases therein were decided by a vote of 8 to 1 of the honorable justices of that court; that 5 cases were decided by a 7 to 2 vote; that 2 cases were decided by a 6 to 2 vote; 3 cases by a 6 to 3 vote; 3 cases by a 5 to 3 vote; and that 2 cases were decided by a 4 to 3 vote. Another illustration of the inability of judges to agree with respect to the law which should apply to a case that has been decided on findings of fact is as follows: where an appeal from a judgment has been taken to the appellate court, a decision thereon contrary to that of the trial court may be rendered by a 2 to 1 vote of the justices of the said appellate court; thereafter, should a hearing be granted in this court, the decision that was rendered by the appellate court may be reversed by a 4 to 3 vote of the members of this court; and if the case should be one of which the Supreme Court of the United States will or may take cognizance, the decision therein may be rendered by a 5 to 4 vote, by which the judgment theretofore rendered by this court will be reversed. Such is the certainty of the law! From which it should follow that the opinion of one lawyer may be deemed to be as good as that of any other, and that each of such opinions is entitled to respect, dependent on the reasoning which may be urged or presented in its support,—at least until after a final decision on the issue therein involved has been rendered by the court of last resort.

As though constituting an additional argument why petitioner should not be accorded the relief sought by him, the respondents direct attention to the fact that when the bar examination under consideration was conducted, although there were 718 applicants for admission to practice law in this state, 463 of that total number were unsuccessful. In that connection, considering the several statutory requirements of an applicant under the age of 25 years with which he must comply before he may even take the examination,—which include "at least 2 years of college work", graduation either from "a law school accredited by the examining committee requiring substantially the full time of its students for three years" or "from a law school accredited by the examining committee requiring a part only of its students' time for four years", or the study of law "diligently and in good faith for at least four years",—to my mind, it amounts to a practical demonstration that there is something radically wrong with the system that is pursued by the respondents in conducting the examination and in grading the answers of the applicants to the questions presented to them. Certainly it taxes one's confidence in the fairness of an examination which will admit of the "flunking" of 463 out of a total of 718 duly accredited applicants. It must be apparent that, ordinarily, young men under the age of 25 years who have had "at least 2 years of college work", and who after 3 or 4 years

of study therein have been graduated from an accredited law school, should not, and I am persuaded would not, be unsuccessful in the taking of any fairly-conducted bar examination. The law does not demand, nor has the public any right to expect, *perfection* in legal knowledge by any person before he may be permitted to practice law in this state. The principal quality to be possessed by such an applicant should be that of personal integrity; and I suggest that if in the future the respondents were to devote a fair percentage of their official time to the task of considering and determining whether an applicant for admission to practice law in this state be unreservedly and unquestionably entitled to be respected as an honest person, and that as a matter of right and justice he should merit the entire confidence of all respectable and respected citizens, whether of this state or elsewhere,—a greater and more meritorious service to the general public would be performed than may be secured by an academic examination of an applicant regarding the questioned legal ownership by John Brown or Peter Smith of either "Blackacre" or "Whiteacre", or, indeed, whether a good title would or could be secured by a bona fide purchaser of a pair of shoes that was made from leather which was obtained from the hide of Nellie's or Bossy's calf (see question No. 1).

The fact that a considerable number of the applicants to practice law in this state were successful in the examination here in question may not be considered as proof that imposition or unfairness was not exercised or present on the part of the respondents in conducting the examination. Rather, on a consideration of the questions that were propounded to the applicants as well as of the various and sundry conditions which were attached to the examination, as hereinbefore has been indicated, to my mind, the result simply is suggestive of the thought that those who were successful were either of superintelligence as compared to the less fortunate applicants, or that each of the successful applicants was a "guesser" of superlative ability.

Additionally, perhaps it should not be intimated that if, as a condition to continued tenure of office as a member of the Supreme Court of this state, each of such members were required to take and to successfully pass a yearly examination under conditions similar to those which were imposed upon petitioner herein,—it would be safe to surmise, if not to assert, that as a result thereof (with certain well-recognized exceptions thereto—to which exceptions I lay no claim to membership) opportunities to the governor of this state to make appointments to fill vacancies on this bench probably would be approximately identical with the number of members of this court. However, of course in no event should such a suggested requirement (in principle) be extended to apply to the membership of any other state agency!

Although precedents may be found and so-called "authorities" may be cited to the effect that no person has a vested right to practice law in this state, nevertheless from the fact that a constitutional privilege inheres in the individual to exert and to use his faculties and energy in any manner that he may see fit,—subject to pertinent constitutional inhibitions and statutory regulations,—a citizen does possess a right to practice law, equally with his right to adopt and to pursue any other vocation, trade or calling. That right is a valuable asset of property—as much as is a right or interest in any other kind of property, real or personal; and the denial of the privilege to practice law usually inflicts a more severe loss to the rejected applicant than would be represented by the total loss to the average man of like age of all his assets of every kind or nature. And the damage suffered by the former may not be, and generally is not, confined to a short or limited period of time following the refusal of the requested privilege, but, to the contrary, may pursue him during a long period of succeeding years, or even throughout his remaining lifetime. The examination of applicants for admission to practice law thus becomes an extremely important matter; and the examiner or person entrusted with the final disposal of so valuable a right should be mindful thereof in the conduct of such examination and the determination of the question presented.

Ordinarily, under our system of government, the determination of conflicting rights or privileges of individuals as between or among themselves, or of the state, is entrusted to judicial officers. Such officers should not be chosen solely because of their admitted theoretical or academic knowledge of the law. Something more than that should be required. They should be, and usually are, chosen or delegated to so act not merely for the reason that they

are presumed to be learned in the law, but rather, particularly, because of their known integrity, open-mindedness and general tolerance in thought regarding human affairs,—and, if practicable, because of their long and varied experience in considering or in dealing with the solution of problems which have affected or which may seriously affect vital interests of their fellows.

All the respondents herein, and including the "readers" who are "highly skilled * * * recent graduates of different law schools" may be, and presumably are, possessed to a marked degree of each and all of the assumed desirable qualifications to which reference just has been had. In that regard, no complaint is or perhaps properly may be made excepting that with respect to the group last mentioned it is obvious that the members thereof could not have had such a length of experience in the practice of the law as might seem desirable.

It is doubtful that if any member of the board of governors of The State Bar, or of the committee of examiners, were to represent a client who was a party in any litigated cause which involved a decision regarding a property right, great or small, he would be willing to have such right determined by any one or more of a group of "highly skilled * * * recent graduates of different law schools". To the contrary, at least as far as might be possible or practicable, it is most probable that he would insist upon having a decision made or rendered by a regularly elected or appointed and thoroughly qualified judge, whether or not such officer possessed each and all of the recognized qualifications for his office.

It seems irresistibly to follow that in the matter of such great importance as that of determining whether an applicant should be admitted to practice law in this state the determination thereof should rest with some person or persons of learning and experience equal to that confidently expected to be possessed by a judicial officer of the government of the state.

To my mind, it becomes manifest that petitioner has sustained the burden which by the terms of the majority opinion is declared to rest upon him,—that is, "to show" either in what manner he was imposed upon, or wherein the conclusion of the board, as to petitioner, was unfair or unjust.

In my opinion, the petition should be granted, and petitioner be admitted to practice law in all the courts of this state.

I concur: CARTER, J.



17 Cal.2d 108

BIEWEND v. BIEWEND.

Sac. 5405.

Supreme Court of California.

Jan. 28, 1941.

1. Divorce ⇐331

An order of court of competent jurisdiction in one state for payment of money as alimony must be recognized by all other states under full faith and credit clause of federal constitution as to all accrued installments not subject to modification by such court, and recovery of amount of such installments may be denied by court of another state only if they are still subject to modification.

2. Divorce ⇐331

As Missouri courts, under law of that state, will not modify divorced wife's right to accrued alimony installments under Missouri divorce decree, she has vested right thereto, enforceable in other states on basis of full faith and credit.

3. Divorce ⇐331

On the question of enforceability in other states of alimony provision of Missouri divorce decree, under Missouri law, neither divorced wife's subsequent marriage to another man, her resumption of marital relations with divorced husband, nor coming of age of their children, automatically releases divorced husband from his obligation under divorce decree to pay alimony for support of divorced wife and such children, but merely affords grounds for court, in its discretion, to modify or vacate alimony order as to future installments on proper application of either party. Mo.St.Ann. § 1355, p. 1564.

4. Judgment ⇐817

A valid judgment rendered by court of any state must be accorded full faith and credit by every other court in United States,

though based on cause of action which is against law and public policy of state wherein enforcement of judgment is sought.

5. Divorce ⇐331, 332

The provisions of California law that divorced wife, awarded alimony for support of herself and spouses' minor children, is no longer entitled to alimony after her remarriage, or rule that court may reduce alimony payments on coming of age of such children, cannot diminish California court's obligation to give full faith and credit to divorce decree, rendered by court of another state, with regard to accrued installments of alimony thereunder. Civ.Code, § 139.

6. Divorce ⇐331

The full faith and credit clause of federal Constitution does not obligate courts of one state to enforce alimony decree, rendered in another state, with regard to future installment payments, particularly when such installments are subject to modification by court of original jurisdiction.

7. Divorce ⇐331

The rule of comity, under which California courts have ordered that foreign divorce decrees providing for future payments of alimony be established as California courts' decrees, with same force and effect as if entered in California, is subject to principle that foreign laws will not be given effect when contrary to settled public policy of forum.

8. Courts ⇐8

For state court to refuse to give effect to another state's laws as contrary to settled public policy of state of forum, it must be clear that enforcement of right obtained under such laws will be prejudicial to recognized standards of morality and general interests of citizens of such state.

9. Courts ⇐8

There is strong public policy favoring enforcement of duties validly created by foreign law.

10. Courts ⇐8

A mere variance between law of state of forum and that of another state wherein cause of action arose does not alone warrant denial of enforcement of foreign law in state of forum.

11. Divorce ⇐331

A divorced wife's right under Missouri law to receive alimony installments under Missouri divorce decree after her remarriage is not perforce inharmonious with California public policy as threatening moral standards or general interests of California citizens, though at variance with California statutes, and hence is not so immoral as to be unenforceable in California. Civ.Code, § 139.

12. Divorce ⇐331, 332

As divorced wife's remarriage and coming of age of divorced spouses' minor children offer grounds for modification of Missouri divorce decree as to future alimony installments for support of wife and such children on application by divorced husband in Missouri court of original jurisdiction, it is not incumbent on California court to refuse to give prospective effect to decree on such grounds. Mo.St.Ann. § 1355, p. 1564.

13. Divorce ⇐331

The California Superior Court's judgment, ordering divorced husband to pay divorced wife weekly alimony installments, provided for by Missouri divorce decree, from date of such judgment, is valid and enforceable until modification of decree by Missouri court which rendered it. Mo.St.Ann. § 1355, p. 1564.

14. Limitation of actions ⇐2(1)

The barring of claim by statute of limitations is procedural matter governed by law of forum, regardless of where cause of action arose.

15. Limitation of actions ⇐2(1)

An action on judgment of sister state is subject to limitations prescribed by law of state wherein action is brought.

16. Limitation of actions ⇐169

The statute providing that action on cause arising in another state, by laws of which action thereon cannot be maintained because of lapse of time, shall not be maintained in California, except in favor of one who has been citizen thereof and held cause of action from time it accrued, applies only to causes of action barred by law of state in which created, not by law of California. Code Civ.Proc. § 361.

17. Limitation of actions ⇐169

Under statute providing that action on cause of action arising in another state, by laws of which action thereon cannot be maintained because of lapse of time, shall not be maintained in California, except in favor of one who has been citizen thereof and held cause of action from time it accrued,

Missouri statute of limitations applies to alimony installments accruing under Missouri divorce decree within five years before bringing of action therefor and on which California statute of limitations has not run. Code Civ.Proc. §§ 336, 361; Mo.St.Ann. § 886, p. 1168.

18. Appeal and error ⇐907(2), 931(1)

Every intendment favors validity of judgment as rendered, and if no evidence is presented in record on appeal therefrom, it must be assumed that sufficient evidence was presented to trial court to sustain its fact finding on which judgment was based.

19. Appeal and error ⇐910

In action for alimony installments payable to defendant's divorced wife under Missouri divorce decree, where defendant appealed from judgment for plaintiff on judgment roll alone, made no showing that any evidence sustaining his burden of proving that cause of action was barred by statute of limitations was introduced below, and did not show that plaintiff failed to take some action on original decree within 10 years after its rendition, as required by Missouri statute of limitations, defendant's contention that action was barred by California five-year statute of limitations cannot be sustained. Code Civ.Proc. §§ 336, 361; Mo.St. Ann. § 886, p. 1168.

CARTER, J., dissenting.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Lottie C. Biewend against Adolph C. Biewend, on a foreign divorce decree to recover the amount of alimony installments payable thereunder. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see Cal.App., 101 P.2d 86.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

Nathan H. Snyder, of Los Angeles, and Lawrence Edwards and Chas. H. Epperson, both of Stockton, for respondent.

TRAYNOR, Justice.

Plaintiff secured a decree of divorce in Missouri on May 10, 1918, which provided that defendant pay her $25 per week for the support of herself and their four minor children. Both parties were before the court and subject to its jurisdiction. Subsequently they came to California. Between the date of the original divorce decree in Missouri and the time of bringing this action all the minor children reached their majority. Meanwhile plaintiff married and divorced a second time after which she again lived with defendant for a period of four years. In 1938 the plaintiff brought suit upon the decree in the superior court of San Joaquin County, and recovered a judgment ordering not only the payment of those installments which had accrued within five years prior to the beginning of the action but also payment to her of $25 per week from the date of the judgment. Defendant has appealed from this judgment.

[1] An order for the payment of money as alimony rendered by a court of competent jurisdiction in one state must be recognized by all other states under the full faith and credit clause of the United States Constitution as to all accrued installments not subject to modification by the court rendering the original order. Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905, 28 L.R.A.,N.S., 1068, 20 Ann.Cas. 1061; Lynde v. Lynde, 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810; Barber v. Barber, 62 U.S. 582, 21 How. 582; Goodrich, Conflict of Laws, 2d Ed., § 135; A.L.I. Restatement, Conflict of Laws § 464; Barns v. Barns, 9 Cal.App.2d 427, 50 P.2d 463; Bruton v. Tearle, 7 Cal.2d 48, 59 P.2d 953, 106 A.L.R. 580; Thomas v. Thomas, 14 Cal.2d 355, 94 P.2d 810; Spalding v. Spalding, 75 Cal.App. 569, 243 P. 445; Rinkenberger v. Rinkenberger, 99 Cal.App. 45, 277 P. 1096; Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 P. 190, 57 A.L.R. 696; Palen v. Palen, 12 Cal.App.2d 357, 55 P.2d 228; Creager v. Superior Court, 126 Cal.App. 280, 14 P.2d 552; Dreesen v. Dreesen, 31 Cal.App. 2d 479, 88 P.2d 223; Handschy v. Handschy, 32 Cal.App.2d 504, 89 P.2d 123; Cummings v. Cummings, 97 Cal.App. 144, 275 P. 245; Morrow v. Morrow, Cal.App., 105 P.2d 129.

Only if such accrued payments are still subject to modification may recovery be denied. Bentley v. Calabrese, 155 Misc. 843, 280 N.Y.S. 454; Weston v. Weston, 177 La. 305, 148 So. 241; Page v. Page, 189 Mass. 85, 75 N.E. 92, 4 Ann.Cas. 296; Bleuer v. Bleuer, 27 Okl. 25, 110 P. 736; Levine v. Levine, 95 Or. 94, 187 P. 609; Hunt v. Monroe, 32 Utah 428, 91 P. 269, 1

L.R.A.,N.S., 249; Henry v. Henry, 74 W.Va. 563, 82 S.E. 522, L.R.A.1916B 1024.

[2, 3] Under the law of Missouri courts of that state will make no modification of the right to accrued installments. The wife thus has a vested right to them enforceable in other states on the basis of full faith and credit. Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066. Neither the subsequent marriage of the divorced wife to another nor her subsequent resumption of marital relations with the defendant nor the coming of age of the children automatically releases the defendant from his obligation to pay alimony. They merely afford grounds for the court in its discretion to modify or vacate the order as to future installments upon proper application. Niedt v. Niedt, Mo.App., 95 S.W.2d 868. Section 1355 of Revised Missouri Statutes 1929, Vol. I, p. 567, Mo.St.Ann. § 1355, p. 1564, provides that the court may modify the order for payment of alimony but only upon application of either of the parties.

[4, 5] It is well settled that once a valid judgment has been rendered it must be accorded full faith and credit by every other court within the United States even though the cause of action upon which the judgment was based is against the law and public policy of the state in which enforcement is sought. Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039; Roche v. McDonald, 275 U.S. 449, 48 S.Ct. 142, 72 L.Ed. 365, 53 A.L.R. 1141; Milwaukee County v. M. E. White Company, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220; Hieston v. National City Bank of Chicago, 51 App.D.C. 394, 280 F. 525, 24 A.L.R. 1434; Westwater v. Murray, 6 Cir., 245 F. 427; Morrow v. Morrow, supra; 24 A.L.R. 1437; Goodrich, Conflict of Laws, 2d Ed., § 207. In the present case the provisions of the California law that a divorced wife is no longer entitled to alimony after she has remarried (California Civil Code, § 139; Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520; Tremper v. Tremper, 39 Cal. App. 62, 177 P. 868; Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; Hale v. Hale, 6 Cal.App.2d 661, 45 P.2d 246) or the rule that a court may reduce alimony payments upon the coming of age of the minor children (Hale v. Hale, supra) can in no way diminish the obligation of the California court to give full faith and credit to the Missouri decree with regard to accrued installments of alimony.

[6] The full faith and credit clause, however, does not obligate the courts of one state to enforce an alimony decree rendered in another state with regard to future payments, particularly when such future installments are subject to modification by the court of original jurisdiction. Sistare v. Sistare, supra; Lynde v. Lynde, supra; Barber v. Barber, supra; Cummings v. Cummings, 97 Cal.App. 144, 275 P. 245; Creager v. Superior Court, supra; Rinkenberger v. Rinkenberger, supra; Barns v. Barns, supra; McCullough v. McCullough, 203 Mich. 288, 168 N.W. 929; Levy v. Dockendorff, 177 App.Div. 249, 163 N.Y.S. 435; Richards v. Richards, 87 Misc. 134, 149 N.Y.S. 1028; Campbell v. Campbell, 28 Okl. 838, 115 P. 1111; Armstrong v. Armstrong, 117 Ohio St. 558, 160 N.E. 34, 57 A.L.R. 1108; Rosenberg v. Rosenberg, 152 Md. 49, 135 A. 840; McWilliams v. McWilliams, 216 Ala. 16, 112 So. 318; Freund v. Freund, 71 N.J.Eq. 524, 63 A. 756; Reik v. Reik, 101 N.J.Eq. 523, 139 A. 385; A.L.I., Restatement, Conflict of Laws, § 464. In the present case the Missouri court clearly retains authority to modify the amount of future installments not yet due upon proper application showing good cause by the defendant. Section 1355, Revised Missouri Statutes, 1929, Vol. I, p. 567, Mo.St.Ann. § 1355, p. 1564; Niedt v. Niedt, Mo.App., 104 S.W.2d 692; Meyers v. Meyers, 91 Mo.App. 151.

[7-10] Upon the basis of comity, however, as distinguished from the requirements of full faith and credit, the California courts have in numerous cases ordered that a foreign decree for future payments of alimony be established as the decree of the California court with the same force and effect as if it had been entered in this state, including punishment for contempt if the defendant fails to comply. Palen v. Palen, 12 Cal.App.2d 357, 55 P.2d 228; Creager v. Superior Court, supra; Straus v. Straus, 4 Cal.App.2d 461, 41 P.2d 218, 42 P.2d 378; Cummings v. Cummings, supra; Bruton v. Tearle, 7 Cal.2d 48, 59 P.2d 953, 106 A.L.R. 580; see, also, Morrow v. Morrow, supra.

Such a rule of comity is subject to the principle that foreign laws will not be given effect when contrary to the settled public policy of the forum. Estate of Lathrop, 165 Cal. 243, 131 P. 752; Whitney v. Dodge, 105 Cal. 192, 38 P. 636; Blythe v. Ayres, 96 Cal. 532, 31 P. 915, 19 L.R.A. 40; Pearson v. Pearson, 51 Cal. 120; Pennoyer v. Neff, 95 U.S. 714, 24 L.

Ed. 565; Green v. Van Buskirk, 72 U.S. 307, 5 Wall. 307, 18 L.Ed. 599; Smith v. Union Bank, 30 U.S. 518, 5 Pet. 518, 8 L. Ed. 212; 5 Cal.Jur. 422; 12 C.J. 439; 15 C.J.S., Conflict of Laws, § 4. It must be clear, however, that the enforcement of the right obtained under the laws of another state would be prejudicial to recognized standards of morality and to the general interests of the citizens in the state of the forum. Dennick v. Central R. Co. of N. J., 103 U.S. 11, 26 L.Ed. 439; Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N.W. 413, 47 Am.Rep. 771; Powell v. Great Northern R. Co., 102 Minn. 448, 113 N.W. 1017; Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198; International Harvester Co. v. McAdams, 142 Wis. 114, 124 N.W. 1042, 26 L.R.A.,N.S., 774, 20 Ann.Cas. 614; Whitney v. Dodge, 105 Cal. 192, 38 P. 636; 5 Cal.Jur. 423; 12 C.J. 439; 15 C.J.S., Conflict of Laws, § 4. Actually as set forth in the restatement: "There is a strong public policy favoring the enforcement of duties validly created by the law governing their creation. Denial of enforcement of the foreign claim will result in an undeserved benefit to the defendant." A.L.I. Restatement, Conflict of Laws, § 612, comment c; see Beach, Uniform Interstate Enforcement of Vested Rights, 1918, 27 Yale L.Jour. 656. A mere variance between the law of the forum and the law of the state where the cause arose does not alone warrant such denial of enforcement. Dennick v. Central R. Co. of N. J., supra; Herrick v. Minneapolis & St. L. Ry. Co., supra; Powell v. Great Northern R. Co., supra; Loucks v. Standard Oil Co. of New York, supra; International Harvester Co. v. McAdams, supra; Whitney v. Dodge, supra; 5 Cal.Jur. 423; 12 C.J. 439, 15 C.J.S., Conflict of Laws, § 4.

[11-13] In the present case the Missouri law differs from that of California in permitting alimony payments to continue after the remarriage of the divorced wife. Gunderson v. Gunderson, 4 Cal.App.2d 257, 40 P.2d 956. Such a right to receive future installments of alimony, however, even though at variance with Civil Code section 139 is not perforce inharmonious with local public policy. It offers no threat to either the moral standards or the general interests of the citizens of this state. To hold that the right created in Missouri is so immoral as to be unenforceable here would involve a complacent attribution of moral superiority to this state. The remarriage and the coming of age of the minor children offer grounds for modification of the original decree for which the defendant can make application in the court of original jurisdiction in Missouri, and it is not incumbent upon the California court to refuse to give prospective effect to the decree upon these grounds. Handschy v. Handschy, 32 Cal. App.2d 504, 90 P.2d 123. Therefore, the judgment of the trial court ordering the defendant to pay to the plaintiff $25 per week in the future from the date of the judgment is valid and enforceable until such time as the Missouri court modifies its decree.

[14, 15] It is a principle of conflict of laws recognized in California that the barring of a claim by the statute of limitations is a procedural matter governed by the law of the forum, regardless of where the cause of action arose. McElmoyle v. Cohen, 38 U.S. 312, 13 Pet. 312, 10 L.Ed. 177; Townsend v. Jemison, 50 U.S. 407, 9 How. 407, 13 L.Ed. 194; Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139; Miller v. Lane, 160 Cal. 90, 116 P. 58. It is a corollary that an action brought upon a judgment of a sister state is subject to the limitations prescribed by the law of the state where the action is brought. Stewart v. Spaulding, 72 Cal. 264, 13 P. 661; 3 Freeman, Judgments, § 1456.

[16, 17] Section 336 of the California Code of Civil Procedure provides that an action upon a judgment or decree of any court of the United States or of any state within the United States must be brought within five years. A decree for future payments of alimony is a continuing judgment. The trial court in this case therefore gave judgment for those installments of alimony which had accrued within five years prior to the bringing of the action, the California statute of limitations having run on all installments accruing prior to that time.

Section 361 of the California Code of Civil Procedure, however, provides: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and

who has held the cause of action from the time it accrued." This section applies only to causes of action barred by the law of the state of creation, but not by the law of this state. Littlepage v. Morck, 120 Cal.App. 88, 7 P.2d 716. Since the plaintiff has not been a citizen of this state from the time the cause of action accrued, this section has the effect of applying the Missouri statute of limitations to those installments accruing within five years, upon which the California statute of limitations has not run. Stewart v. Spaulding, 72 Cal. 264, 13 P. 661; Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, 44 L.R.A., N.S., 710, Ann.Cas.1914B, 932.

Defendant therefore sets up as a bar to this action section 886 of the Revised Missouri Statutes of 1929, Mo.St.Ann. § 886, p. 1168, in force at the time the original alimony decree was secured by plaintiff which provides: "Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

This section has been held effective to cut off the right to continuing alimony installments if no payment is made or action taken upon the original decree within ten years after rendition. Mayes v. Mayes, 342 Mo. 401, 116 S.W.2d 1. It has been interpreted, however, by the Missouri courts as constituting a statute of limitations which must be specially pleaded to be available in defense to an action on a judgment. Excelsior Steel Furnace Co. v. Smith, Mo. App., 17 S.W.2d 378; Flink v. Parcell, 344 Mo. 49, 124 S.W.2d 1189.

[18, 19] Defendant properly pleaded his contention under California law when he alleged by answer that plaintiff's cause of action "is barred by the provisions of section 361 of the Code of Civil Procedure of the State of California". C.C.P. § 458; Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 198, 106 P. 715, 21 Ann.Cas. 1279. The trial court, however, expressly found that "it is not true that said judgment is barred by section 361 of the Code of Civil Procedure of the State of California". Defendant has appealed upon the judgment roll alone. He has made no showing on appeal that any evidence was introduced below to sustain his burden of proving that the cause of action was barred by the statute of limitations. C.C.P. § 458; First National Bank v. Armstrong, 110 Cal.App. 408, 294 P. 25; 16 Cal.Jur. 626. He has not shown that plaintiff failed to take some action upon the original decree within ten years after its rendition. Every intendment favors the validity of the judgment as rendered, and if no evidence is presented in the record on appeal, it must be assumed that sufficient evidence was presented to the trial court to sustain its finding of fact. Morris v. Board of Education, 119 Cal.App. 750, 7 P.2d 364, 8 P.2d 502; Archer v. Harvey, 164 Cal. 274, 128 P. 410. Defendant's contention that the action is barred by section 361 of the Code of Civil Procedure therefore cannot be sustained.

The judgment of the trial court is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; PETERS, J. pro tem.; WARD, J. pro tem.

CARTER, Justice (dissenting).

I dissent.

I concur in that portion of the majority opinion which holds that the judgment should be affirmed as to those alimony payments which had accrued under the Missouri decree within five years immediately preceding the commencement of this action, but I dissent from that portion of said opinion which purports to affirm that portion of the judgment of the trial court establishing the Missouri decree as a California judgment requiring payments henceforth of $25 per week by the husband to the wife although the Missouri award was for the support of both the children and the wife, and the children have now reached majority, and the wife, since the Missouri decree, has remarried. It is true that the second marriage has been dissolved, but when we consider that the

wife has done nothing to enforce the Missouri decree from the time of its entry until 1938, and during that time has lived with the husband for four years and has been married and divorced a second time, considerations of good morals, social principles, natural justice, and fair play require a determination that it is against the public policy of this state to establish the Missouri decree as a California judgment requiring the husband in the future to pay $25 per week to the wife. It must be conceded that whether or not future payments under the Missouri decree shall be so established, lies entirely in the discretion of the trial court, unaffected by the full faith and credit clause of the Federal Constitution; but it is contended that such establishment is not against the public policy of this state as expressed by the legislature in section 139 of the Civil Code, which provides that alimony payments shall cease upon remarriage of the wife. The term "public policy" as used in connection with the enforcement by one state of another state's laws is at best vague and impossible of precise definition, and it is true that a state's public policy ordinarily is not violated merely because there is a variance in the laws of the states involved, and that before there is such a violation of the law of the other state, it must be contrary to good morals or natural justice. But in this instance we have a declaration of policy in California which states that a woman cannot look to her former divorced husband for support and maintenance after she has become the wife of another man. It is undoubtedly a fundamental social principle inherent in the fiber of any flourishing and successful social order, that marriage, and the home life and families that flow therefrom, are to be fostered and encouraged at all times. The law that relieves a man from further alimony payments after his divorced wife remarries, not only encourages a man to remarry and establish a home and rear a family because he is relieved of the burden of supporting his first wife, but in the majority of instances will make his remarriage a possibility; whereas, due to economic circumstances, it would be out of the question, if he has a former wife to support. It necessarily follows, therefore, that natural justice and fundamental social principles are advanced and secured by the policy declared in section 139 of our Civil Code and any law to the contrary is a violation of the public policy involved in the doctrine of comity and should not be countenanced by this court. There is no injustice caused to the woman. When she marries the second time, she takes her new companion for better or worse, and choses, and in justice should look to him and him alone for her maintenance. He should not be relieved from this obligation, nor be permitted to live a life of ease and idleness at the expense of not only the efforts and toil of the first husband, but also at the much greater cost of making it economically impossible for the first husband to remarry. The decision cites Handschy v. Handschy, 32 Cal.App. 2d 504, 90 P.2d 123, for its position, but rather than supporting it, that decision unequivocally states that it is against the public policy of California to enforce a divorce decree of a sister state which requires the payment of alimony after remarriage. In the cited case it is said at page 509 of 32 Cal.App.2d, 90 P.2d at page 126: "Appellant contends also that as the children became of age the amount of alimony awarded was ipso facto reduced to the extent that the same provided for their maintenance and support, and that the trial court erred in refusing to allow him credit accordingly, although no modification had been made of the decree by the Illinois court. No authority is cited by appellant in support of his contention, nor have we found any. There are cases wherein accrued instalments of an award for support and maintenance for wife and minor children were canceled, the wife having remarried and the children become of age, but in those cases it is clear that the remarriage of the wife was the principal factor considered by the court, it being held that to require a husband to pay for the support and maintenance of his divorced wife, following her remarriage to another, would in the absence of extraordinary conditions, violate a sound principle of law and be against a recognized public policy. Hale v. Hale, 6 Cal.App.2d 661, 45 P.2d 246; Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53."

Here the children are of age, and it certainly would do violence to the policy of our state founded on natural justice and basic social principles to permit the establishment of the Missouri decree requiring appellant to make payments to the wife in the future. The portion of the judgment of the trial court so declaring should be reversed.

ROBERTSON v. MAROEVICH.

Civ. 11594.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1941.

Rehearing Denied Feb. 26, 1941.

Hearing Denied March 28, 1941.

1. Appeal and error ⇐713(1)

Technically, minute order included in clerk's transcript on judgment roll appeal was not a part of the judgment roll but appellate court could consider it on motion to dismiss appeal on ground that judgment was a consent judgment where certificate of clerk and trial judge certified as to correctness of the minute order. Code Civ.Proc. § 670.

2. Appeal and error ⇐799

Where on judgment roll appeal certificate of clerk and trial judge certified as to correctness of minute order included in the clerk's transcript, the showings made were substantially the same as if motion to dismiss appeal had been accompanied with a separate affidavit of clerk setting forth the minute order, as regards appellate court's right to consider the minute order in passing on motion to dismiss appeal. Code Civ.Proc. § 670.

3. Appeal and error ⇐125

An appeal will be dismissed, on motion, upon showing that judgment appealed from was entered upon the consent of appellant.

4. Appeal and error ⇐125

Where judgment appealed from was entered upon the consent of appellant, the appellant is conclusively presumed to have waived all errors, at least those not going to the jurisdiction of the court.

5. Appeal and error ⇐125

A party cannot object to a judgment, order, or ruling consented to by him.

6. Courts ⇐24

Jurisdiction over the subject matter may not be conferred on a court by consent of the litigant.

7. Courts ⇐170

Where complaint alleged that plaintiff as accommodation to defendant executed a note to another in sum of $1,250 which defendant agreed to pay, that defendant had omitted to make payments past due on note, and that by reason thereof plaintiff had been damaged in sum of $1,250 for which amount he prayed judgment and also requested $250 for attorney's fees but did not allege that plaintiff paid note, the complaint stated a cause of action within jurisdiction of municipal court of San Francisco. Code Civ.Proc. § 89.

8. Courts ⇐486

When a counterclaim arising out of transaction set forth in complaint as foundation of plaintiff's claim or a cross-complaint is filed by defendant in excess of jurisdictional limit of municipal court, the municipal court must transfer the cause to the superior court. Code Civ.Proc. § 396.

9. Courts ⇐486, 488(1)

Where action is instituted in municipal court and a counterclaim arising out of the transaction set forth in the complaint as foundation of plaintiff's claim or a cross-complaint is filed by defendant in excess of jurisdictional limit of municipal court so that the cause is transferred to the superior court, the superior court then has complete jurisdiction of the controversy. Code Civ.Proc. § 396.

10. Courts ⇐486

The purpose of statute providing for transfer of cause from municipal court to superior court when counterclaim or cross-complaint is filed by defendant in excess of jurisdictional limits of municipal court is to require the entire controversy to be determined in one action. Code Civ.Proc. § 396, and § 439, as amended by St.1939, p. 1940.

11. Pleading ⇐3

The nature of a pleading will be determined from its allegations regardless of its designation.

12. Courts ⇐488(1)

Where complaint alleged that as an accommodation to defendant, plaintiff executed a note which defendant agreed to pay and that by reason of defendant's failure to make payments past due on note, plaintiff had been damaged and requested money judgment, defendant's pleading, designated a cross-complaint, alleging that plaintiff had become indebted to defendant for legal services on which balance of $5,645 was due and owing was probably a "counterclaim" since like the complaint it prayed for a money judgment so that even though it did not relate to or depend upon contract upon which action was brought, the superior court to which municipal court transferred the action had jurisdiction of the entire controversy. Code Civ.

Proc. § 396, and § 439, as amended by St.1939, p. 1940.

See Words and Phrases, Permanent Edition, for all other definitions of "Counterclaim".

13. Pleading ⇐138, 147

A "cross-complaint" must relate or depend upon the contract, transaction, matter, happening or accident upon which action is brought whereas a "counterclaim" need only tend to diminish or defeat the plaintiff's recovery and need not be related to or connected with the cause of action set up in the complaint. Code Civ.Proc. §§ 438, 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross-Complaint".

14. Courts ⇐486

Where action was filed in municipal court but defendant filed pleading seeking recovery of amount in excess of municipal court's jurisdiction, if the defendant's pleading was a counterclaim, the municipal court properly transferred the cause to the superior court and the superior court had jurisdiction of the subject matter regardless of whether the transaction set forth in the counterclaim arose out of or was connected with the transaction set forth in the complaint. Code Civ.Proc. §§ 396, 438, 442, and § 439, as amended by St.1939, p. 1940.

15. Courts ⇐486

Where plaintiff alleged that by reason of defendant's failure to pay note on which plaintiff was accommodation maker plaintiff had been damaged, defendant's pleading alleging that plaintiff was indebted to defendant for legal services for $5,645 and that plaintiff breached promise to assist defendant in payment of note by paying the attorney's fee, even if defendant's pleading was a cross-complaint, the transaction set forth therein "arose out of" or was "connected with" the transaction set forth in the complaint within statutory requirement so that the municipal court which did not have jurisdiction of amount claimed in the cross-complaint properly transferred the cause to the superior court. Code Civ.Proc. § 396.

See Words and Phrases, Permanent Edition, for all other definitions of "Arose Out Of" and "Connected With".

16. Appeal and error ⇐916(1)

For purpose of determining whether superior court to which municipal court transferred cause because amount sought in defendant's pleading exceeded jurisdiction of municipal court, allegations of defendant's pleading were to be accepted as true. Code Civ.Proc. § 396, and § 439, as amended by St. 1939, p. 1940.

17. Appeal and error ⇐125

Where record showed that judgment appealed from was entered upon and with consent of appellant, appeal was required to be dismissed.

18. Appeal and error ⇐477

Where appeal was required to be dismissed because record showed that judgment appealed from was entered upon and with consent of appellant, appellant's petition for writ of supersedeas was required to be denied.

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Action by Joseph E. Robertson against Ivan N. Maroevich for a money judgment wherein defendant filed a cross-complaint or counterclaim. From an adverse judgment, plaintiff appeals. On petition of plaintiff, an order to show cause why a writ of supersedeas should not be granted was issued with a temporary stay in the meantime and thereafter defendant moved to dismiss the appeal on the ground that the judgment appealed from had been entered upon consent of the plaintiff.

Petition for writ of supersedeas denied, order to show cause with temporary stay discharged and motion to dismiss appeal granted and appeal dismissed.

Edward D. Mabson, of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

Hearing denied; PETERS, Justice pro tem., took no part in the consideration or decision of this matter.

PETERS, Presiding Justice.

On petition of appellant this court issued an order to show cause why a writ of *supersedeas* should not be granted, with a temporary stay in the meantime. Thereafter, respondent moved to dismiss the appeal on the ground that the judgment appealed from had been entered upon consent of appellant. Inasmuch as we are of the opinion that the appeal must be dismissed for the reason that the record shows that the judgment appealed from was entered upon, and with the consent of, appellant, the petition for the writ of *supersedeas* must be denied.

After judgment was rendered by the trial court in favor of respondent, appellant perfected a judgment roll appeal. In the Clerk's Transcript appears a minute order, in which it is recited: "*Whereupon, pursuant to stipulation of counsel for respective parties,* the Court ordered judgment for defendant and cross-complainant Ivan N. Maroevich and against plaintiff and cross-defendant Joseph E. Robertson for the sum of Fifteen Hundred Dollars ($1,500.00), payable within 30 days, and that said plaintiff and cross-defendant Joseph E. Robertson assume full liability for and pay to the Morris Plan Company of San Francisco the balance due on note No. 43607A amounting to the sum of $750.00, and that plaintiff Joseph E. Robertson take nothing by his complaint against Ivan N. Maroevich.

"Whereupon the Court further ordered the action dismissed as to cross-defendanants Interstate Mausoleum Company, a corporation, and East Bay Mausoleum Company, a corporation.

"Findings waived in open court." (Italics ours.)

[1, 2] While technically this minute order is not a part of the judgment roll, sec. 670, Code Civ.Proc., there can be no doubt of the propriety of this court considering it on this motion to dismiss the appeal, in support of the contention of respondent that the judgment subsequently entered was a consent judgment. The certificate of the clerk and trial judge certifies as to the correctness of the minute order. Under such circumstances the showing made is substantially the same as if respondent had accompanied his notice of motion to dismiss with a separate affidavit of the clerk setting forth the minute order. It should also be added that appellant, both in the *supersedeas* proceeding, and on this motion, admits that the judgment was entered by, and with, his consent.

[3-5] The law is well settled that an appeal will be dismissed, on motion, upon a showing that the judgment appealed from was entered upon the consent of appellant. Under such circumstances the appellant is conclusively presumed to have waived all errors, at least those not going to the jurisdiction of the court. Reed v. Murphy, 196 Cal. 395, 238 P. 78; Hibernia Savings, etc., Soc. v. Waymire, 152 Cal. 286, 92 P. 645. As was said in Adams v. Southern Pac. Co., 109 Cal.App. 728, 731, 293 P. 681, 682: "It is well-settled law in California that a party cannot object to a judgment, order, or ruling consented to by him. [Citing cases.] This court will not disturb an order or judgment on an appeal taken by a party who consented thereto".

[6] Appellant does not challenge the correctness of this rule, nor deny that the judgment was predicated upon a stipulation in which he participated, but contends that the above rule has no application where the trial court has no jurisdiction to enter the judgment, and that in the instant case the judgment entered was beyond the jurisdiction of the trial court. In Reed v. Murphy, supra, it was intimated that such an exception to the rule may exist. See, also, Guigni v. Ratto, 41 Cal.App. 49, 181 P. 809. The exception contended for is based on the rule that jurisdiction over the subject matter may not be conferred on a court by the consent of the litigants.

If it be assumed that a litigant, after stipulating to the entry of a judgment against him, may, nevertheless, appeal on the ground that the court had no jurisdiction of the subject matter, such assumption is of no avail to appellant in the present case. The record here on file demonstrates that the trial court had jurisdiction over the subject matter of the action.

[7] The pleadings are not as clear as might be desired. The complaint was filed in the Municipal Court of San Francisco. It is therein alleged that appellant, as an accommodation to respondent, executed a promissory note to the Morris Plan Company in the sum of $1,250, which respondent agreed to pay; that respondent has omitted to make payments past due on the note; that by reason thereof appellant has been damaged in the sum of $1,250, for which amount he prays judgment. He also requested $250 for attorney's fees. It is not alleged that appellant paid the note. This complaint stated a cause of action within the jurisdiction of the municipal court, sec. 89, Code Civ.Proc.

Thereafter, respondent filed a pleading entitled, "Answer to Complaint, and Cross-Complaint". By the answer respondent admitted that he solicited appellant to sign the note, but denied that such solicitation was for the sole benefit of re-

spondent. Respondent further admitted that he promised to pay the note, but alleged that, "plaintiff [appellant] agreed to assist said defendant [respondent] in the payment of said promissory note by paying to said defendant moneys due and past due on account of attorney's fees, but that said plaintiff has failed to pay any money or moneys to said defendant, necessitating the full obligation relative to said payments to be assumed and borne by said defendant". In another paragraph of the answer respondent alleges that appellant has failed to perform his promises "relative to payments to be made by said plaintiff [appellant] to said defendant [respondent] on account of attorney's fees due and past due to be applied in liquidation of said note". Respondent denies that appellant has been damaged in any sum.

In his so-called cross-complaint respondent alleges that, within two years last past, appellant and two corporations became indebted to him in the sum of $6,000 for legal services performed by respondent for appellant, of which a balance of $5,645 was alleged to be due and owing. In a second count respondent alleges that appellant and these companies became indebted to him in the sum of $5,645 upon an account stated.

In an answer and amended answer to the cross-complaint appellant seems to deny allegations of the first count of the cross-complaint, while admitting the same allegations contained in the second count of the cross-complaint.

Upon the filing of this cross-complaint a judge of the municipal court, inasmuch as the cross-complaint prayed for judgment in an amount in excess of the $2,000 jurisdictional limit of that court ordered the cause transferred to the superior court.

It is the theory of appellant that the superior court had no jurisdiction of the action because, to use his language, the "cross-complaint is not based upon the transaction or matter or happening upon which appellant's action was brought in the court below, nor does it affect the obligation to which plaintiff and appellant's action relates, and it does not state facts nor supply grounds sufficient to constitute a cause of action for cross-complaint against plaintiff and appellant".

This contention that the cause ought not to have been transferred to the superior court, and that, therefore, the superior court had no jurisdiction is clearly without merit. Section 396 of the Code of Civil Procedure provides that when an action is commenced in a court which has jurisdiction, but "it thereafter appears from the verified pleadings, or at the trial, or hearing, that the determination of the action or proceeding, or of a counterclaim arising out of the transaction set forth in the complaint or petition as the foundation of the plaintiff's claim, or of a cross-complaint, will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending, the court, whenever such lack of jurisdiction appears, must suspend all further proceedings therein and transfer the action or proceeding and certify the pleadings * * * to a court having jurisdiction thereof * * *".

[8-10] Under this section, when a counterclaim arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or a cross-complaint, is filed by defendant in excess of the jurisdictional limit of the municipal court, that court must transfer the cause to the superior court. The latter court then has complete jurisdiction of the controversy. Stratton v. Superior Court, 2 Cal.2d 693, 35 P.2d 393, 43 P.2d 539; Todhunter v. Smith, 219 Cal. 690, 28 P. 2d 916. The obvious purpose of this statute is to require that the entire controversy shall be determined in one action. The same fundamental concept is embodied in a 1939 amendment, St.1939, p. 1940, to section 439 of the Code of Civil Procedure. In that year the following sentence was added to the section: "If the defendant pleads a counterclaim in an amount in excess of the jurisdiction of the court in which the action is filed, the court shall thereupon order the case transferred to a court whose jurisdiction extends to the amount of the counterclaim."

[11-14] It is to be noted that section 396 of the Code of Civil Procedure quoted, supra, applies to both a counterclaim and cross-complaint. Respondent designated his pleading as, "Answer to Complaint, and Cross-Complaint". However, the nature of a pleading will be determined from its allegations regardless of its designation. Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474; Cornblith v. Valentine, 211 Cal. 243, 294 P.

1065. This pleading, although designated a cross-complaint, is probably a counterclaim, since it, like the complaint, prays for a money judgment. Luse v. Peters, 219 Cal. 625, 28 P.2d 357. The only importance, so far as this proceeding is concerned, as to whether the pleading is a counterclaim or cross-complaint is that a cross-complaint must relate or depend "upon the contract, transaction, matter, happening or accident upon which the action is brought", Code Civ.Proc., sec. 442, while a counterclaim, under section 438 of that code, need only "tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action". A counterclaim no longer need be related to, or connected with, the cause of action set up in the complaint. Terry Trading Corp. v. Barsky, supra; Luse v. Peters, supra. This becomes important because section 439 of the Code of Civil Procedure as amended in 1939, supra, requires the cause to be transferred to the superior court when any counterclaim in excess of the jurisdiction of the municipal court is filed. It is not required under that section, as it is by section 396 of the Code of Civil Procedure quoted, supra, that the counterclaim arise "out of the transaction set forth in the complaint". If the questioned pleading is a counterclaim, then under section 439 of the Code of Civil Procedure the municipal court properly transferred the cause to the superior court, and the latter court clearly had jurisdiction of the subject matter, whether or not the transaction set forth in the counterclaim arose out of, or was connected with, the transaction set forth in the complaint.

[15, 16] However, even if the pleading is a cross-complaint, or if section 396 of the Code of Civil Procedure is controlling, so that in either event it would have been improper to transfer the cause to the superior court unless the matter set forth in the cross-complaint or counterclaim arose out of, or was connected with, the transaction set forth in the complaint, nevertheless we are of the opinion that the transaction set forth in this pleading arose out of, or was connected with, the transaction set forth in the complaint. The allegations of the so-called cross-complaint are such as to clearly show that they refer to the same transaction as is set forth in the answer. The answer alleges that appellant agreed to assist respondent in paying the note by paying to respondent moneys past due for attorney's fees. If this is so, and, for purposes of jurisdiction, these allegations must be accepted as true, the transaction set forth in the so-called cross-complaint was integrally connected with, and arose out of, the transaction set forth in the complaint—in fact, the execution of the note and respondent's promise to pay it were part of the very transaction set forth in the so-called cross-complaint. To defeat recovery on the cause of action set forth in the complaint respondent alleged that appellant, at the time the note was executed, agreed to pay a debt owing to respondent, and that respondent was to use these funds to pay the note. A rule that would require respondent to defeat his liability in the municipal court in the action on the note by showing that his agreement to pay the note was conditioned upon appellant paying the indebtedness, and then compel him to sue in the superior court to recover the balance of the indebtedness, would tend to defeat the very purpose of sections 396 and 439 of the Code of Civil Procedure. Those sections were intended to prevent such piecemeal trying of cases.

[17, 18] For the foregoing reasons appellant's contention that the superior court did not have jurisdiction of the subject matter is without merit. Appellant having stipulated and consented to the entry of the judgment, under the authorities already cited, cannot lawfully appeal, and the appeal should be dismissed. Since this is so, the petition for the writ of *supersedeas* must be denied.

The petition for the writ of *supersedeas* is denied and the order to show cause with a temporary stay is discharged; the motion to dismiss the appeal is granted and the appeal dismissed.

We concur: KNIGHT, J.; WARD, J.

SORENSEN et al. v. LASCY et al.
LASCY v. ARATA.

Civ. 11168.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1941.

Hearing Denied March 28, 1941.

1. Appeal and error ⇐154(4)

A judgment or order will not be disturbed on an appeal prosecuted by party who consented to it.

2. Appeal and error ⇐154(4)

Where prospective purchasers brought action against vendor and broker to recover deposit paid on purchase of real property, and vendor filed cross-complaint against broker to recover deposit and, during trial, when court asked broker what he intended to do with the deposit, he answered that he wanted to give it to whoever the court decided should receive it, and court rendered judgment for vendor for the deposit and broker appealed, judgment must be affirmed, since broker "waived" any claim to the deposit.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Carl G. Sorensen and others against A. G. Lascy and B. P. Arata in which defendant Arata filed a cross-complaint against defendant Lascy to recover a deposit made by plaintiffs to defendant Lascy on a purchase price of realty owned by defendant Arata. The court found that plaintiffs were entitled to no relief and that Arata was entitled to recover from Lascy, and from the judgment, Lascy alone appeals.

Affirmed.

Aylett B. Cotton, of San Francisco, for appellant Sorensen.

Thomas T. Califro, of San Francisco (George D. Perry, of San Francisco, of counsel), for appellant Lascy.

Norman S. Menifee, of Redwood City, for respondent.

Hearing denied; PETERS, Justice pro tem., took no part in the consideration or decision of this matter.

PETERS, Presiding Justice.

Plaintiffs Carl G. Sorensen and Mary M. Sorensen, his wife, brought this action against B. P. Arata and A. Lascy to recover a $500 deposit paid by them to Lascy on the purchase price of certain real property owned by Arata in San Mateo County. Plaintiffs contended that Lascy, a real estate agent, and Arata had falsely represented that the land contained 120,000 square feet, when in fact it contained but 83,998 square feet. Defendant Arata filed a cross-complaint in which he sought recovery of the $500 from Lascy. The court found that plaintiffs were entitled to no relief, and that Arata was entitled to recover the $500 from Lascy. From this judgment Lascy alone appeals.

The main contention of appellant Lascy is that, in accepting the $500 deposit from the Sorensens, he was not acting as the agent for Arata, but was acting on his own account. He describes himself as an "option vendor". He refers to the rule that one may lawfully contract to sell property which he does not own, and contends that this was his relationship with the Sorensens. He also challenges the sufficiency of the findings to support the judgment.

These contentions are made in spite of the fact that at the trial appellant waived any claim he might have to the $500. He made this waiver after evidence had been introduced showing that he had received the $500 deposit from the Sorensens on January 9, 1937; that he refused for several months thereafter to inform Arata, the owner, the amount of the deposit that he had received; that Arata finally wrote to the Sorensens and also filed charges against appellant before the Real Estate Board before he could ascertain the amount of the deposit. When these facts developed upon the trial, and while appellant was on the witness stand, the following occurred:

"The Court: You weren't selling any of your own property? A. No sir.

"Q. Did you tell Arata what you were getting for his property? A. Not at that time.

"Q. Is that the way you do business? A. What is that?

"Q. You sell a man's property, and you do not tell him what you are getting for it, is that the idea? What are you going to do with this $500? A. *I want to give it back to whoever the court decides I should give it to.*

"The Court: That is all.

"Mr. Califro [attorney for Lascy]: That is all.

"Mr. Cotton [attorney for the Sorensens]: Submitted.

"(Discussion.)

"The Court: I have not made up my mind what I am going to do, submitted."

The statement above italicized, when read with the rest of appellant's testimony, was reasonably calculated to convey to the trial judge the impression that appellant intended to waive any claim he might have to the $500, and that he was consenting to give this deposit either to the Sorensens or to Arata as the court might decide. That this was the interpretation placed upon the statement by the trial court and by appellant's own counsel is indicated by the fact that immediately upon appellant making the waiver, appellant's counsel stated that he had no further questions, and the trial judge submitted the case.

[1, 2] It is an elementary and fundamental rule of appellate procedure that a judgment or order will not be disturbed on an appeal prosecuted by a party who consented to it. Adams v. Southern Pac. Co., 109 Cal.App. 728, 293 P. 681; Reed v. Murphy, 196 Cal. 395, 238 P. 78; Hibernia Savings, etc., Soc. v. Waymire, 152 Cal. 286, 92 P. 645. See, also, cases collected in 2 Cal.Jur., p. 225, § 62; p. 849, § 498. Under the authority of these cases the judgment must be affirmed, without further consideration of the appeal. La Societe Francaise D'Epargnes v. Beardslee, 63 Cal. 160; Pacific Paving Co. v. Vizelich, 1 Cal.App. 281, 82 P. 82.

The reason behind this rule is well illustrated by the situation presented on the present appeal. When this cause went to trial appellant Lascy had in his possession the $500 deposit. The Sorensens were claiming the return of their deposit. Arata claimed the money as the owner of the land. Lascy also claimed the money. There was, therefore, a three-cornered contest over the deposit. The trial court was attempting to ascertain the theory upon which Lascy claimed the money when appellant stated that he waived his claim to it. Thereafter, the trial court prepared its findings, apparently in the belief that the only question left for determination was whether the Sorensens or Arata was entitled to the money. Judgment was then entered. Appellant then discovered certain defects in the findings, in so far as they relate to him, and prosecuted this appeal. It would be highly unfair to the trial court and to respondent to permit appellant to attack the judgment after they had been led to believe that he had abandoned his claim to the money.

It should also be added that we have read the reporter's transcript. A reading thereof demonstrates that an affirmance of the judgment will not result in a miscarriage of justice.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.



42 Cal.App.2d 698

MEYER v. LINDSLEY.

Civ. 2472.

District Court of Appeal, Fourth District, California.

Jan. 30, 1941.

1. Appeal and error ⇐110

An order denying a motion for new trial is not an appealable order.

2. Appeal and error ⇐1170(7)

In order to justify reversal on ground of erroneous admission or rejection of evidence, reviewing court must be of opinion, after examination of entire cause including the evidence, that error complained of resulted in miscarriage of justice. Const. art. 6, § 4½.

3. Appeal and error ⇐901, 1032(1)

Burden rests upon party complaining not only to show error, but also to show that error is sufficiently prejudicial to justify reversal. Const. art. 6, § 4½.

4. Appeal and error ⇐907(4)

Every intendment is in favor of finding, decision, and judgment, and in support thereof it will be presumed that omitted evidence authorized the same unless there is something in record to overcome the presumption.

5. Appeal and error ⇐691

Where transcript filed on appeal contained only part of evidence, if testimony of certain witness contained some hearsay

and if court erred in refusing to allow appellant to recall another witness to lay foundation for further impeachment of a witness, such errors would not be ground for reversal; there being nothing before District Court of Appeal to indicate that prejudice may have resulted therefrom.

6. Appeal and error ⇐701(1)

In absence of any evidence relating to main issues involved, reviewing court could not say that instructions were improperly given or refused, nor that, if there were errors, they were prejudicial.

7. Appeal and error ⇐701(1)

In order to secure reversal because of claimed error in giving and refusing of instructions, appellant must bring before reviewing court enough of the evidence to show that error claimed would have, or at least might have, affected result. Const. art. 6, § 4½.

8. Appeal and error ⇐907(4)

On appeal from judgment for plaintiff in malicious prosecution action, where trial lasted 9 days and some 40 witnesses were examined, but reporter's transcript contained only a fragment of testimony, reviewing court could assume in support of judgment that evidence disclosed without conflict that plaintiff did not do the act with which he had been charged in criminal complaint, and that there was not even shadow of probable cause for initiating of criminal action by defendant, and, under such circumstances, any minor error in connection with instructions could not have been misleading or prejudicial.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by R. G. Meyer against Floyd R. Lindsley for malicious prosecution. From a judgment for plaintiff, defendant appeals. He also attempted to appeal from an order denying his motion for new trial.

Attempted appeal from order denying new trial dismissed, and judgment affirmed.

Turner & Walde, of Santa Ana, for appellant.

Winthrop O. Gordon, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

[1] This is an action for malicious prosecution, the complaint alleging that the defendant had initiated a criminal action in which this plaintiff was charged with drawing and exhibiting a pistol in violation of section 417 of the Penal Code. A jury returned a verdict in favor of the plaintiff in the amount of $1,500, and the defendant has appealed from the ensuing judgment and has attempted to appeal from an order denying his motion for a new trial, which is not an appealable order.

The appellant filed a written request for a transcript in which he asked only for that part of the record which contained the instructions, cross-examination of one witness, the testimony of one other witness, and offers of proof made in connection therewith. While it is stated in respondent's brief, and not denied in the appellant's closing brief, that the trial of this case lasted nine days and that some forty witnesses were examined, the reporter's transcript filed herein contains only, in addition to the instructions given and refused, the testimony of one witness on cross-examination and re-direct, the testimony of another witness given in rebuttal, the testimony of a third witness given in sur-rebuttal, and certain offers of proof. All of this evidence relates to whether or not the first two of these witnesses were biased against the appellant. There is no evidence before us as to any fact relating to the issues which were presented by the pleadings, and no evidence, pro or con, as to what happened on the occasion when the respondent was charged with having exhibited a gun.

[2-5] The appellant complains that the testimony of the first of these witnesses on redirect examination contains some hearsay, and that the court also erred in refusing to allow him to recall another witness in order to lay the foundation for further impeachment of one of these witnesses. It appears from the limited record before us that the testimony first objected to came in incidentally in explanation of the witness' previous testimony. The other matter, with the offers of proof, related to further attempts to show bias on the part of the two witnesses first mentioned and was purely cumulative. It would seem that the court was not unduly strict with the appellant in this regard since the only evidence now before us, consisting of ninety-five pages of the transcript, relates solely to bias on the part of these two witnesses.

Moreover, if we assume error in these respects, there is nothing before us to indicate that prejudice may have resulted

therefrom. As was said in Coleman v. Farwell, 206 Cal. 740, 276 P. 335, 336: "In order to justify the reversal of the judgment on the ground of erroneous admission or rejection of evidence, the reviewing court must be of the opinion, after an examination of the entire cause, including the evidence, that the error complained of has resulted in a miscarriage of justice. Const. art. 6, § 4½. The burden rests upon the party complaining not only to show error but also to show that the error is sufficiently prejudicial to justify a reversal. 2 Cal.Jur. p. 1008 and cases cited. Confronted with the foregoing stipulation of counsel and the certificate of the trial judge reciting that the bill of exceptions contains only a part of the evidence offered by both the plaintiff and the defendant, and since, therefore, the record does not contain all of the evidence, we are unable to fulfill the constitutional requirement and declare that the errors complained of were prejudicial. See Foster v. Young, 172 Cal. 317, 156 P. 476. Every intendment is in favor of the findings, decision, and judgment, and in support thereof it will be presumed that the omitted evidence authorized the same unless there is something in the record to overcome the presumption. Owen v. Morton, 24 Cal. 373; 2 Cal.Jur. p. 852 et seq. For aught that appears in the record there may have been evidence of sufficient competency and weight to overcome any detriment caused by the erroneous rulings."

[6, 7] The appellant also contends that portions of certain instructions given were erroneous and that an instruction requested by him and refused should have been given. Both the giving and the effect of instructions necessarily depend on the evidence to which they relate and upon which they are based. And again, in the complete absence of any evidence relating to the main issues involved, it is neither possible to say that any of the matters here presented are erroneous nor that, if so, they are prejudicial. In order to secure a reversal because of claimed error in the giving and refusing of instructions it is incumbent upon an appellant to bring before the reviewing court enough of the evidence to show that the error claimed would have, or at least might have, affected the result. Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86; Thompson v. M. K. & T. Oil Co., 5 Cal.App.2d 117, 42 P.2d 374.

[8] If we assume that portions of these instructions were technically incorrect, the instructions as a whole seem to present the issues which apparently must have been raised at the trial in a complete and rather fair manner. Many of the instructions, including some of which the appellant complains, were entirely too favorable to him. Insofar as here appears, it may well be that the evidence disclosed, without conflict, that the respondent did not do the act with which he had been charged in the criminal complaint and that there was not even a shadow of probable cause for the initiating of that criminal action by the appellant. Under such circumstances, which may be assumed in support of this judgment, any minor error in connection with the instructions could not have been misleading or prejudicial.

The attempted appeal from the order denying a new trial is dismissed. The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



42 Cal.App.2d 669

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12725.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1941.

1. Workmen's compensation ⇐1939

Question of duration of employee's disability was one of fact for the Industrial Accident Commission, and if there was substantial evidence to support finding and order of commission, District Court of Appeal could not substitute its views for those of the commission and annul the award.

2. Workmen's compensation ⇐1653

Testimony of employee to effect that he was unable to work because he had pains in his back presented substantial evidence to support finding of Industrial Accident Commission that disability had not ceased.

3. Workmen's compensation ⇐1416

The Industrial Accident Commission may not disregard opinion of medical experts, where the question is one within the knowledge of experts only and not within the common knowledge of laymen.

4. Workmen's compensation ⇐1418

In determining whether disability from injury to employee's back and head had ceased, opinions of expert witnesses were not conclusive on probable duration of pain, since employee himself was in best position to tell whether he was suffering pain, and question was not one which could be determined only by resorting to the sciences.

5. Evidence ⇐508

Expert testimony must be relied upon in cases where the truth is occult and can be found only by resorting to the sciences.

6. Workmen's compensation ⇐1939

Where insurance carrier claimed that disability of employee who testified he was unable to work because of pains in back had ceased, and claimed that guardian ad litem should have been appointed for employee, and that value of employee's testimony was lessened because of physician's report that employee was suffering from a mental disease, contention was overruled where both matters were before Industrial Accident Commission for consideration and referee was in position to judge value of employee's testimony, especially where employee had been in psychopathic ward for six days and had been discharged.

7. Workmen's compensation ⇐1001

Where Industrial Accident Commission conceded that finding that part of medical treatment furnished to injured employee was furnished by county and that he was entitled to reimbursement for reasonable medical expenses to be subsequently determined was erroneous, it was necessary to remand proceedings to commission.

8. Workmen's compensation ⇐1937

Where Industrial Accident Commission did not specifically find that employee's head injury had ceased on October 21, 1939, but commission conceded that employee did not suffer from head injury after such date and in view of fact that proceeding was required to be remanded for further action, petitioner was not injured by failure of commission to specify liability for back injury only.

Proceeding under the Workmen's Compensation Law by Joseph E. Christian, claimant, opposed by the Otis Elevator Company, employer and the Employers' Liability Insurance Corporation, Limited, insurance carrier. The Industrial Accident Commission awarded compensation in favor of the claimant, and the insurance carrier petitions for writ of review.

Award annulled, and proceeding remanded.

Joe Crider, Jr., Clarence B. Runkle, and John J. Haydon, all of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

WOOD, Justice.

Joseph E. Christian was injured on August 11, 1939, while in the employ of Otis Elevator Company. There is no question but that the injury arose out of and in the course of his employment. Petitioner is the insurance carrier for the employer and seeks to annul an award by the commission in favor of the employee.

Christian fell and struck his back and head while hoisting sections of an escalator. The commission found that he suffered "injury to his back and head * * * said injury caused temporary total disability beginning August 11, 1939, to and including January 8, 1940, and continuing indefinitely thereafter * * *". Petitioner admits some injury to both the back and head of the employee but contends that all of the disability had disappeared as of October 21, 1939, the date on which it stopped payments of disability indemnity to the employee.

The respondent commission concedes that the head injury did not endure later than October 21, 1939, but contends that the back injury continued beyond that date and that the evidence is sufficient to uphold the award. Petitioner presented reports of a number of medical experts holding that the employee was suffering from a mental affliction having no bearing upon his employment and also holding that the disability caused by the injury to the back did not continue beyond the date on which payment ceased. It is contended that there is no substantial conflict in the evidence and that the opinions and findings of the experts must be followed by the commission. Dr. C. W. Irish was on January 15, 1940, ap-

pointed by the commission as expert medical adviser and he reported: "Tenderness was reported on palpitation over the sacroiliac synchondroses, but particularly of the gluteli muscles, entirely bilaterally". The employee stated that he had not been able to do any work since the time of the accident. He testified: "The reason I am unable to work at this time is because I have pains in the back, and I can't do any heavy lifting; that is why I can't work.

"Q. Have you tried to do any work? A. I haven't tried to. I changed a tire on my car, and I had a terrible time doing it."

[1-5] The question of the duration of the disability is one of fact to be determined by the commission and if there is substantial evidence to support the finding and order of the commission this court may not substitute its views for those of the commission and annul the award. Hartford A. & I. Co. v. Industrial Accident Comm., 202 Cal. 688, 262 P. 309, 58 A.L.R. 1392. It appears from the reports of the physicians that the employee did in fact receive an injury to his back. The testimony of the employee presented substantial evidence to support the finding of the commission that the disability had not ceased on January 8, 1940. We are not unmindful of the rule that the commission may not disregard the opinion of medical experts in cases where the question is "one within the knowledge of experts only, and * * * not within the common knowledge of laymen". William Simpson Const. Co. v. Industrial Accident Comm., 74 Cal.App. 239, 240 P. 58, 59. The present case, however, is not one in which experts only could supply information, for the injured person naturally was in the best position to tell whether he was suffering pain. The experts could give opinions as to the probable duration of the pain, but their opinions would not be conclusive in a particular case. Expert testimony must be relied upon "in cases where the truth is occult and can be found only by resorting to the sciences". State Comp. Ins. Fund v. Industrial Accident Comm., 195 Cal. 174, 231 P. 996, 1000. The question whether Mr. Christian was suffering such pain as would prevent his working at the time of the hearing by the commission was not one which could be determined only by resorting to the sciences. In Los Angeles County v. Industrial Accident Comm., 14 Cal. App.2d 134, 57 P.2d 1341, the employee suffered a severe pain in the lower part of his back while lifting a heavy tire wheel. The commission made an award for permanent injury based upon the testimony of the employee without the evidence of experts. This court refused to annul the award.

[6] Petitioner contends that a guardian ad litem should have been appointed for Mr. Christian, basing the contention upon the reports of physicians that he was suffering from a mental disease. It is also argued that the mental condition of the employee was such as to lessen the value of his testimony given before the commission. Both of these matters were before the commission for its consideration and the referee was in position to judge the value of the testimony of the employee in view of the claims of his mental incapacity. Moreover, the evidence on the subject of the mental condition of the employee is not without conflict. Mr. Christian was in the psychopathic ward of the General Hospital for observation for a period of six days and was discharged on the recommendation of the physician in charge, Dr. Carter stating: "Patient may have had some episode before coming here as described, but since he has been here he has been perfectly all right. I see no reason why he could not go outside".

[7] The commission found that part of the medical treatment furnished to Mr. Christian was furnished by the county of Los Angeles and that he is entitled to reimbursement for the reasonable medical expenses to be subsequently determined. The commission now concedes that this finding is erroneous and it will therefore be necessary to remand the proceeding to the commission.

[8] Petitioner complains that the commission did not specifically find that the head injury had ceased on October 21, 1939, and expresses the fear that it may be held liable indefinitely for the mental unsoundness of the employee. The commission concedes that the employee did not suffer from the head injury after October 21, 1939. In view of this concession on the part of the commission and in view of the fact that the proceeding must be remanded for further action, we fail to see how petitioner has been injured by the failure of the commission to specify liability for the back injury only. This point may be clarified by the commission in a subsequent award.

The award is annulled and the proceeding is remanded to respondent commission for further action not inconsistent with this opinion.

We concur: MOORE, P. J.; McCOMB, J.



42 Cal.App.2d 676

VOTAW v. MILLER et al.

Civ. 11561.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1941.

1. Venue ⇐68

The burden of excusing delays in the making of a motion for change of venue rested on the defendant seeking the change of venue.

2. Venue ⇐77

Whether defendant which sought a change of venue acted with reasonable diligence was a fact question to be determined by the trial court.

3. Venue ⇐77

Where defendant made no motion for change of venue when it appeared on August 19 to have default judgment vacated, and did not serve a notice of motion to change the venue until August 25, reciting that the motion would be made on September 6, and defendant did not appear when order denying motion to change the venue was denied on October 7 and made no showing as to the reason for the delays, trial court did not abuse its discretion in denying motion for change of venue.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit in equity by V. J. Votaw, etc., against Mervin Miller, Mervin Miller, Inc., Limited, and others. From an order denying the motion of Mervin Miller, Inc., Limited, for change of venue, Mervin Miller, Inc., Limited, appeals.

Order affirmed.

John Preston King, of Lindsay, for Appellant.

Nichols, Cooper & Hickson, of Pomona, for respondent.

STURTEVANT, Justice.

On August 27, 1937, the plaintiff filed a complaint in equity against Mervin Miller Incorporated, Ltd., and three individuals alleged to be the sole stockholders. On November 5, 1937, the default of the corporation was entered. On December 17, 1937, the action was dismissed as to the personal defendants. On August 19, 1938, the motion of the corporation to vacate its default was granted. On August 25, 1938, the corporation served a notice of motion to change the place of trial from Los Angeles county to Tulare county and at the same time it served a copy of a written demand, an affidavit of merits, and a demurrer. The notice of motion recited that the motion would be made on the 6th day of September, 1938. On October 7, 1938, the plaintiff filed an affidavit in opposition to the motion to change the venue. On the 7th day of October the trial court caused to be entered an order as follows: "Demurrer of defendant Mervin Miller Incorporated, Ltd., to complaint and motion for change of venue come on for hearing, Nichols, Cooper & Hickson appearing as attorneys for plaintiff, and John Preston King, attorney for the defendants but not present. Said demurrer is overruled; defendant named is given ten days to answer. Motion for change of venue is denied." From the order denying the motion to change the venue the defendant has appealed.

[1-3] The defendant calls to our attention that its affidavit was regular in form and set forth that its principal place of business was in Tulare county. Continuing it asserts that the affidavit in opposition was insufficient because in part it was made on information and belief. The defendant contends that its motion should therefore have been granted. The plaintiff replies that the order made by the trial court was general in terms and, nothing to the contrary appearing, it will be assumed that the trial court based its ruling on the fact that the defendant had not acted with due diligence. We think the reply is entirely sufficient. The record is entirely silent as to why the defendant did not make its motion to change the venue when it appeared on August 19.

1938. The record is also silent as to why the defendant did not bring its motion to a hearing on September 16, 1938. Furthermore, the record is silent as to why the defendant did not appear and present its motion on October 7, 1938, the day on which the order was made. The burden of excusing these delays rested on the defendant. Hart v. Forgeus, 184 Cal. 327, 330, 193 P. 764. Whether the defendant acted with reasonable diligence was a question of fact to be determined by the trial court. Smith v. Pelton Water Wheel Co., 151 Cal. 399, 401, 90 P. 932, 1135; Davison v. Gentry, 136 Cal.App. 423, 428, 29 P.2d 266. On the record as made it may not be said that the trial court abused its discretion.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



42 Cal.App.2d 641

MONROE v. SAN JOAQUIN LIGHT & POWER CORPORATION.

Civ. 6436.

District Court of Appeal, Third District, California.

Jan. 28, 1941.

Rehearing Denied Feb. 27, 1941.

Hearing Denied March 28, 1941.

1. Negligence ⇐2, 56(1)

In order to constitute "actionable negligence", it is necessary to show a legal duty to use due care, a breach of such legal duty, and that such breach is the proximate cause of the resulting injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Negligence".

2. Electricity ⇐16(1)

If power company was negligent in the installation of transformation facilities for milk products company and such negligence constituted proximate cause of injuries received by employee of products company to whom power company owed duty to use due care, lack of ownership, control, or obligation to maintain such electrical equipment was immaterial in determining power company's liability for employee's injuries.

3. Electricity ⇐14(1)

One who supplies electricity is under a duty to use due care in the construction and installation of the necessary electrical facilities.

4. Electricity ⇐14(1), 15(1)

The duty of one who supplies electricity to use due care in the construction and installation of the necessary electrical facilities is extended to any person who might with reasonable anticipation be endangered by faulty or improper electrical equipment or installation, and the duty is obviated only as to trespassers or individuals who may be unlawfully upon the premises at time of injury.

5. Electricity ⇐19(5)

Evidence that power company, in installing transformation facilities under contract with milk products company for purpose of facilitating use of electrical power by products company, installed a wire carrying 6,600 volts encased only in a weatherproof covering within three feet of ground in the enclosed transformer yard, supported finding that electric company was negligent in installation of transformation facilities and that such negligence was the "proximate cause" of injuries resulting from electric shock sustained by employee of products company when he came in contact with wire while cutting weeds in the transformer yard.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

6. Negligence ⇐4

The conduct of an individual is "negligent" when it creates an unreasonable risk of harm to some general class of persons.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligent".

7. Electricity ⇐14(1)

The duty of due care required in use of electricity is such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise under the circumstances, in order to prevent injury.

8. Electricity ⇐14(1)

Where death may be caused by an agency lawfully in use such as electricity, ordinary care requires that every means known,

or that with reasonable inquiry would be known, must be used to prevent it.

9. Negligence ⇐142

Trial court's finding that defendant's negligent conduct was the proximate cause of plaintiff's injuries was necessarily a finding against any contention in regard to an independent intervening act as a superseding cause of the injuries.

10. Negligence ⇐56(1)

The doctrine of "proximate cause" is based on principle that consequences which follow from the original wrong in unbroken sequence, without an intervening sufficient independent cause, are natural and proximate, and for these the original wrongdoer is responsible.

11. Electricity ⇐16(7)

In action by employee of milk products company against power company for injuries sustained as result of electric shock when he came in contact with an uninsulated wire while cutting weeds in transformer yard installed by power company under contract with products company, finding that power company's negligent installation of transformation facilities was "proximate cause" of employee's injuries, and that act of products company's foreman in admitting employee into transformer yard without calling on power company to turn off electric power was not a "superseding cause", was proper.

See Words and Phrases, Permanent Edition, for all other definitions of "Superseding Cause".

12. Electricity ⇐19(5)

In action by employee of milk products company against power company for injuries sustained as result of electric shock when he came in contact with an uninsulated wire while cutting weeds in transformer yard installed by power company under contract with products company, evidence supported finding that employee was not contributorily negligent, so as to prevent recovery.

13. Negligence ⇐82, 122(1)

The burden of proving contributory negligence is on defendant, and, in order to find that plaintiff's negligence constitutes a defense, such negligent conduct must proximately contribute to the injury.

Appeal from Superior Court, Merced County; J. D. Garibaldi, Judge.

Action by Eugene Monroe against the San Joaquin Light & Power Corporation for personal injuries resulting from electric shock. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Thos. J. Straub and W. H. Spaulding, both of San Francisco, and F. H. Pearson, of Fresno, for appellant.

C. Ray Robinson, Willard B. Treadwell, and W. Eugene Craven, all of Merced, for respondent.

PER CURIAM.

This is an appeal from a judgment by the court awarding damages to respondent for personal injuries. The injuries, resulting from electric shock, were received by the respondent while he was performing work as an employee of The California Milk Products Company. Respondent's employment with the products company consisted in carrying out duties both as fireman and common laborer. Upon the occasion of the injury, Mr. Monroe, the respondent, and a fellow employee, Mr. Lopez, were directed by their foreman to enter the company transformer yard or sub-station for the purpose of clearing out a growth of weeds. The men were supplied with the proper tools for their work and were repeatedly warned by the foreman as to the dangerous nature of the sub-station electrical equipment, and to keep away from the electric wires. There was also a large warning sign placed upon the outside of the wire fence enclosing the transformer yard, which read: "High Voltage, Danger, High Voltage". Both men admittedly read this sign.

The two men proceeded to their work as directed, and had been working for perhaps a half hour prior to the time of the accident. Lopez testified that he heard a sputtering of electricity and a loud groan, and that upon looking around he perceived that respondent was up against the electric wire which was connected to the first of the three transformers; that the electricity was sputtering on respondent's shoulder and that after a brief interval respondent dropped to the ground. Respondent testified that he had cleaned out some weeds near the first transformer and that he had then walked over to discuss their disposal with Lopez; that he had returned to work when the accident happened. He testified as follows: "Well,

all I knew it hit me all at once and I felt as though something was going to tear me to pieces,—I couldn't holler or make any noise,—I couldn't see,—I just finally went down to the ground on my head there." Lopez and respondent were the only witnesses present at the time of the accident. There is no evidence in explanation of the immediate cause for the contact with the electric wire. There were no eyewitnesses to that circumstance, as Lopez had turned his back to respondent, and the testimony discloses a failure on his part to perceive the contact with the wire.

The transformer yard, which was the scene of the accident, is located adjacent to the products company plant, and the electrical equipment therein, consisting of transformers, poles, wiring, etc., was provided and installed by appellant power corporation for the purpose of facilitating the use of electrical power necessary for production carried on by the products company. This equipment, which may be termed "transformation facilities", was installed by the power company under a contract entered into with the products company on September 27, 1929, and the transformation facilities were completely installed by the early part of 1930. The contract provided that the products company should pay the power corporation in five equal annual installments,—the title to the transformers and equipment to remain in the power corporation until payment in full by the products company. It was also provided the power corporation would repurchase the transformation facilities from the products company in the event of certain changes taking place in the power corporation's schedule. The products company made their last and final payment on the transformers under this contract in 1934.

During the period of service under this contract, and until the date of respondent's injury on May 12, 1937, the operation and maintenance of the sub-station electrical equipment was taken care of by employees of both the power corporation and the products company. There were two padlocks on the sub-station gate. One lock was owned by the power corporation and the other owned by the products company. The opening of either lock permitted access to the transformer yard, as the two padlocks were interlocked within one another.

The products company employed their own electrician for the purpose of operating the sub-station and he took care of the repair work, with the exception of a few instances when employees of the power corporation did certain repair work, which was necessary from time to time, subsequent to the installation of the electrical equipment.

It appears that the power corporation was called upon for assistance only when the electrician employed by the products company was unable to perform the repair work, and with few exceptions, the only employee of the power corporation having occasion to enter the transformer yard was the meter reader. Except for the work performed by the product company's electrician, the only occasion for sending employees within the enclosure was for the purpose of clearing out the weeds about once a year.

The three transformers in this enclosure were fixed to concrete bases set in the ground and were approximately two feet apart. The wires supplying current to these transformers drop from an overhead service and connect with leads between the transformers in pairs. Leading out from the first transformer in line, which transformer is adjacent to the meter box, another wire, which extends from a position some three feet from the ground, carries up and across at an angle contacting an insulator which is fixed to a cross-arm on a pole. This cross-arm is located approximately five feet from the ground.

The respondent came in contact with this wire at a point approximately four feet from the ground and some twelve inches from the position of the insulator located upon the cross-arm. Mr. Simonson, an expert electrical engineer, testified that this was a copper wire insulated with a weather-proofing cover. This covering consists of two or more cotton braids or a tape and braid which has been saturated with a compound, and resembles in outward appearance an insulated wire. Mr. Simonson testified that this type of covering was of very little, if any, value as an insulation against electric current. Appellant, power corporation, does not contend that the weather-proof covering enclosing the wire with which respondent came in contact, was sufficient insulation against 6,600 volts to ground, which was being carried by the wire.

With the exception of a few minor changes the electrical equipment within the transformer yard, including the weather-proof covered wire, was in the same

condition at the time of injury to respondent as existed at the time of installation.

The complaint alleges negligence on the part of appellant in the installation and maintenance of the transformation facilities and alleged that such negligence constituted a proximate cause of the injuries to respondent.

The answer of appellant denies any negligence in the construction or installation of the electrical equipment and further denies maintenance or operation of such equipment subsequent to the installation thereof in September of 1929, and alleges ownership and operation of the transformers in the California Milk Products Company since September of 1929. It is denied that installation of the electrical equipment was not in accordance with General Order No. 64–A of the California Railroad Commission, and as a separate answer and defense alleges contributory negligence on the part of respondent.

The findings of the trial court are that subsequent to September, 1929, and prior to May 12, 1927, appellant power corporation did carelessly and negligently construct, install, and maintain the transformation facilities upon the premises of the California Milk Products Company; that the construction and installation of the transformers and equipment was not in accordance with General Order No. 64–A of the California Railroad Commission; that, as a proximate result of appellant's negligent conduct, a current of electricity passed through the body of respondent, causing injury to him; that the allegation of ownership of the transformers by the products company since September of 1929 is untrue; that the allegations contained in the separate answer and defense of contributory negligence on the part of respondent were untrue, and that therefore respondent is entitled to judgment against appellant, power corporation.

The briefs disclose a dispute between the parties as to ownership of the transformation facilities and as to the obligation of maintenance thereof up until the time of the accident on May 12, 1937. It is necessary that the issues of ownership and obligation of maintenance be settled before discussing the fundamental question of appellant's liability for respondent's injuries. The issues of ownership and maintenance, do not, however, control the question of appellant's liability under the circumstances presented by this case. The trial court does find, and there is ample support therefor, that subsequent to September, 1929, and prior to May 12, 1937, appellant, power corporation, "maintained and operated" the transformers upon the premises of products company, etc. The retention of title to the electrical equipment by the power corporation until final payment under the contract on May 19, 1934, was in conformity with the duty to maintain and service such equipment. Consequently the evidence does disclose that there was a duty to, and the company did, maintain this electrical equipment during the life of the contract, but the finding that there was a duty of "maintenance and operation" subsequent to the date of transfer is not supported by the evidence. And as the meaning of the term "operated" as used in conjunction with "maintained" in the findings, is not made sufficiently clear, we conclude that the evidence does not support a finding that the power company operated the transformation facilities.

[1] The question as to whether appellant has been guilty of actionable negligence is to be determined by a consideration of the circumstances preceding and attendant at the time of respondent's injury. In order to constitute actionable negligence, it is necessary that the following three elements be present: (1) The legal duty to use due care; (2) a breach of that legal duty; and (3) that such breach is the proximate or legal cause of the resulting injury. Johnstone v. Panama Pacific I. E. Co., 187 Cal. 323, 202 P. 34.

[2] Assuming that appellant was negligent in regard to the installation of the electrical equipment, and that such negligence constituted the proximate cause of injuries received by respondent, to whom, we shall assume, appellant owed a legal duty to use due care, we are then of the opinion that the lack of ownership, control, or obligation to maintain such electrical equipment is immaterial in determining liability.

[3, 4] One who supplies electricity is under a legal duty to use due care in the construction and installation of the necessary electrical facilities. This legal duty is necessarily extended to any person who might with reasonable anticipation be endangered by faulty or improper electrical equipment or installation. The duty to use due care is obviated only as to trespassers

or individuals who may be unlawfully upon the premises at the time of the injury. If the facts in a particular case disclose negligence on the part of an electric company in the installation of electrical equipment, either in the omission to do something which an ordinarily prudent person would have done under the given circumstances, or in the doing of something which an ordinarily prudent person would not have done under such circumstances, the transfer of ownership and maintenance does not in and of itself relieve the electric company from liability to an individual who has been injured as a result of the acts or omission constituting the negligence. Consequently, where the injury results from improper installation or material, and this be proven negligent, it is immaterial that the wire or equipment which carries the electric current is not owned or controlled by the negligent party at the time of the injury. 20 Corpus Juris, 365; Appalachian Power Co. v. Mitchell's Adm'x, 145 Va. 409, 134 S.E. 558.

If the particular wire causing the injury to respondent had been sufficiently insulated at the time of installation and became defective through weathering or neglect, for instance, after transfer of the equipment to the products company, the ownership and duty of maintenance as to such equipment would be material in determining liability.

The foregoing principle pertaining to the liability for negligence of one failing to use due care in the installation of electrical equipment is not inconsistent with, nor contrary to, any of the conclusions reached in the cases cited by appellant. Those cases, which include Hill v. Pacific Gas & Electric Co., 22 Cal.App. 788, 136 P. 492; Roberts v. Pacific Gas & Electric Co., 102 Cal.App. 422, 283 P. 353, and Ray v. Pacific Gas & Electric Co., 3 Cal.App.2d 329, 39 P.2d 812, do not raise the question of liability for negligence in the original construction or installation of electrical facilities.

[5] We are of the opinion that there is substantial evidence to support the finding of the trial court that appellant did carelessly and negligently construct and install the electrical equipment and further conclude that the evidence supports the finding that the injuries received by respondent were caused as a proximate result of such negligent installation.

[6] The conduct of an individual is negligent when it creates an unreasonable risk of harm to some general class of persons. Unquestionably, as clearly disclosed by the evidence, the particular wire with which respondent came in contact was insufficiently insulated against shock. This wire carried 6,600 volts to ground and was only encased in a weather-proof covering. The fact that such a covering was insufficient as insulation against the particular voltage being carried was not denied by appellant.

There being no doubt, therefore, as to the probable resulting effect of contact with this particular wire at a time that it was charged with 6,600 volts of electricity, the question then arises, as to whether the installation of the wire within three feet of the ground constituted an unreasonable risk of harm to a class of persons, within which class respondent may be deemed a member. We believe that this question should be answered in the affirmative, and consequently conclude that the conduct of appellant amounted to the breach of a legal duty of due care owed to respondent.

The appellant, power corporation, had knowledge of the fact at the time of the erection and installation of the electrical equipment, that employees of the products company would necessarily be required to work in and about the sub-station enclosure. This conclusion follows from the fact that the transformation facilities were to become the property of the products company as so provided by the contract. It is no more than reasonable that appellant should have anticipated that some employee, such as respondent, would be required to perform some type of manual labor within the enclosure.

In applying the test of foreseeability, for the purpose of determining negligent conduct, it was not necessary that appellant have knowledge of the fact that employees might be required to clear out weeds within the transformer yard. A considerable portion of the transformer yard was left in its natural state, and the growth of weeds therein was simply a normal act of nature. The necessity of requiring employees to clear out the growth of weeds from time to time was one of the circumstances which an ordinarily prudent person should have anticipated.

[7, 8] The duty of due care required in the use of electricity is well stated in 1 Joyce on Electricity, section 438a as follows: "The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it."

Appellant was under a legal duty to use due care in avoiding injury to respondent, and there was a breach of that duty in the negligent installation of the electrical equipment. In view of the existing circumstances, appellant should have either properly insulated the high power wires, or placed them beyond the danger of contact with individuals who would be required to work within close proximity to such wires. Either safeguard against injury might have easily been taken. As disclosed by the evidence, insulation was readily obtainable, which would have been sufficient as against shock from a wire carrying up to 7,500 volts to ground. Mr. Simonson testified that such types of wire were commercially sold and used in the vicinity. Appellant had the choice of an alternative safeguard, either insulation of the high power wires or the placing of the transformers and wires upon an elevated platform. This would have prevented injury to employees working about the transformer yard.

As indicated, the negligence of appellant consisted in a failure to use due care under the circumstances, and this being true, it is immaterial as to whether or not the installation of the transformation facilities was governed by General Order No. 64–A of the California Railroad Commission. Consequently, we do not deem that it is necessary to discuss the question of the applicability of the particular order of the commission.

[9, 10] Appellant strongly urges that the sole proximate cause of the accident in this case, aside from respondent's contributory negligence, was the act of the products company foreman in admitting respondent into the transformer yard without calling on appellant to turn off the electric power. The trial court having found that the negligent conduct of appellant was the proximate cause of respondent's injuries, such finding is necessarily against any contention in regard to an independent intervening act as a superseding cause of the injuries. A well stated rule of proximate cause is found in Merrill v. Los Angeles G. & E. Co., 158 Cal. 499, at page 503, 111 P. 534, at page 536, 31 L.R.A.,N.S., 559, 139 Am.St.Rep. 134. The language is as follows: "* * * Consequences which follow from the original wrong in unbroken sequence, without an intervening sufficient independent cause, are natural and proximate and for these the original wrongdoer is responsible."

[11] Applying the foregoing rule of causation to the circumstances in the present case we can find no error in the conclusions of the trial court in regard to the proximate cause of respondent's injuries. It certainly would be transgressing the power of that court to decide, as a matter of law, that the conduct of respondent's superior constituted an independent intervening act sufficient to break the chain of causation, and be deemed a superseding cause.

[12, 13] The trial court having found against appellant in regard to the separate defense of contributory negligence, we have examined the record, and it is our opinion that there is substantial evidence in support of such finding. The burden of proving contributory negligence was on appellant, and in order to find that respondent's negligence constituted a defense, such negligent conduct must proximately contribute to the injury. Proof of careless conduct or acts amounting to mere negligence is insufficient to establish such a defense. Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Gaster v. Hinkley, 85 Cal.App. 55, 258 P. 988.

We conclude that the injuries to respondent were proximately caused by appellant's failure to use due care in properly insulating the high power wire with which respondent came in contact, and that such injuries were not proximately contributed to nor caused by any failure to exercise due care on the part of respondent.

The appellant has not contended that the damages allowed by the trial court are excessive and consequently we are not concerned with that issue.

The judgment is affirmed.

42 Cal.App.2d 632

MEYER v. CALIFORNIA PRUNE & APRICOT GROWERS' ASS'N et al.

Civ. 6358.

District Court of Appeal, Third District, California.

Jan. 27, 1941.

1. Agriculture ⇐6

In action against state and county co-operative marketing associations by member of county association to recover sum claimed to be due for prunes delivered to defendants by plaintiff, allegation of amended complaint that state association notified plaintiff that it would make advance payment for plaintiff's prune crop did not set out new oral contract superseding original membership agreement, which provided for advance payments, but recognized continued existence thereof, as "advance payment" signifies partial payment to be followed by other payments which go to make up full payment.

See Words and Phrases, Permanent Edition, for all other definitions of "Advance Payment".

2. Agriculture ⇐6

Where membership agreement between prune grower and county co-operative marketing association authorized state co-operative marketing association to act for county association, fact that state association notified grower that it would make advance payment for his prune crop did not indicate new oral contract superseding membership agreement which provided for advance payments.

3. Agriculture ⇐6

Where membership agreement between prune grower and county co-operative marketing association provided for termination thereof by either party solely by registered mail notice between certain days of year, notification of grower by state co-operative marketing association, authorized by agreement to act for county association, that state association would make advance payment for grower's prune crop, did not supersede membership agreement.

4. Agriculture ⇐6

A co-operative marketing agreement, specifying exactly how it may be terminated, cannot be abrogated or modified by any party thereto in violation of rights of other parties.

5. Agriculture ⇐6

In action against co-operative marketing associations for sums claimed to be due for prunes delivered by plaintiff to defendants pursuant to marketing agreement providing for payment of best price obtainable, less certain deductions, amended complaint, alleging such price to be stated sum, but not how such sum was determined, what best price obtainable was, what deductions were, or various grades or sizes of prunes delivered, stated no cause of action.

6. Appeal and error ⇐882(3)

In action for sum claimed to be due plaintiff for prunes delivered to defendant co-operative marketing associations, plaintiff, not having framed complaint on theory of indebitatus assumpsit or for goods sold and delivered, cannot support his allegations and proof on such theory, but is limited by issues of his own pleading on appeal from judgment for him.

7. Agriculture ⇐6

One suing on contract for sum claimed to be due for prunes delivered by him to defendant co-operative marketing associations and not for damages must establish such contract, terms thereof, and amount due thereunder, and cannot show that prunes were lost to him because of defendants' neglect.

8. Appeal and error ⇐173(2)

In action for sum claimed to be due plaintiff for prunes delivered by him to defendant co-operative marketing associations, where no pleading presented issue of fraudulent grading of prunes, such question cannot be considered on appeal from judgment for plaintiff.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by John Meyer against the California Prune & Apricot Growers' Association and another to recover a sum due for prunes delivered to defendants by plaintiff. From a judgment for plaintiff against named defendant, it appeals.

Modified with directions, and affirmed as modified.

Calkins, Hagar, Hall & Linforth, of San Francisco, and Curtiss E. Wetter, of Red Bluff, for appellants.

Pugh & Pugh, of Red Bluff, for respondent.

PULLEN, Presiding Justice.

Plaintiff, a prune grower of Tehama county, brought this action against the Tehama County Dried Fruit Association and the California Prune and Apricot Growers' Association (each a nonprofit cooperative marketing association) to recover the sum of $448, claimed to be due him for some 16,000 pounds of prunes delivered by him to defendants in 1937.

The amended complaint alleges, in substance, that plaintiff entered into a written contract with the Tehama County Dried Fruit Association (hereinafter referred to as the Local), wherein he agreed to sell to said Local his entire crop of dried prunes grown on his ranch during the season of 1937, and to deliver them to the warehouse of defendant California Prune and Apricot Growers' Association (herein referred to as the Association) in Red Bluff, and for which the Local agreed to pay plaintiff the best price obtainable therefor, less costs of marketing. It is further alleged that on or about September 1, 1937, defendant Association notified plaintiff that it would pay him an advance payment for the 1937 crop at a certain rate for specified grades. It is then alleged the prunes were inspected on the ranch, and plaintiff was, by defendants, directed to deliver the crop to the warehouse of the Association in Red Bluff. It is also alleged plaintiff made delivery and received receipts therefor from the Association, and thereafter plaintiff received grade sheets, and was paid for some 12,000 pounds, but the defendants failed to grade or pay for an additional 16,000 pounds here in question, of the asserted value of $56 per ton, or a total of $448.

The answer admitted the membership of plaintiff, and the payments made, but denied any failure to grade the 16,000 pounds here in dispute, and alleged affirmatively this lot of prunes was graded and declared unfit to be marketed, and a tender to plaintiff of $80.37 in full payment therefor. During the trial it developed the theory of plaintiff was that the notification to him by the Association as to the advance payments constituted a new contract between him and the Association which superseded the membership agreement between plaintiff and the Local. The trial court adopted this theory, and judgment was rendered for plaintiff against the Association only.

Five points are presented as grounds for reversal,—first, the amended complaint failed to state a cause of action; second, the court erred in finding that the notification as to advance payments constituted an oral or any contract which superseded the membership agreement; third, the court erred in finding that defendants failed to grade the prunes; fourth, the court erred in giving judgment for plaintiff in an amount in excess of $80.37, and lastly, that the court erred in failing to render any judgment as to the Local.

We need not consider in detail all of these objections as the conclusion we have reached makes it unnecessary.

[1] It is the contention of plaintiff that the following allegation in his amended complaint sets out a new oral contract—"that on or about the 1st day of September 1937, the defendant California Prune & Apricot Growers Association notified plaintiff that they would pay him an advance payment for said 1937 prune crop * * *."

With this interpretation we cannot agree. This notification of an advance was not an offer or a new agreement but was in strict conformity with the terms of the written agreement already in existence between the parties. The original agreement provides for such advance payments (not an unusual provision in marketing contracts) in paragraph 6(b) of the marketing agreement entered into between plaintiff and the Local, as follows:

"6(b) The Local agrees to pay as substantial an advance payment on the prunes as the market and financial conditions will permit, as determined by the Board of Directors in each season, and such payments shall be made as soon as practicable after delivery of the prunes to it; and such advance payments may be proportionately higher for fruit classifying in more desirable grades or sizes from a commercial standpoint."

It seems clear that by this allegation in the amended complaint plaintiff recognized the continued existence of the membership agreement, for an advance payment signifies a partial payment with other payments to follow, which go to make up the full payment. What that full payment was to be is found in the membership agreement, where it is provided:

"5. The Local agrees to resell such prunes, * * * at the best prices obtainable under market conditions and to pay over the net amount received therefrom as payment in full to the Grower * * * after deducting therefrom * * *" (certain specified charges).

[2] Whether the notification as to advance payments came from the Local or from the Association is immaterial. Plaintiff claims because the notification came from the Association it was indicative of a new contract, but the membership agreement authorizes the State Association to act for the County Association. Paragraph 7 provides:

"7. This local may exercise all of the packing, marketing and grading and inspection or other powers and rights herein granted to it through California Prune and Apricot Growers Association as a Central Sales Agency, the Grower recognizing that this Local will become a member of the California Prune and Apricot Growers Association and will contract with the California Prune and Apricot Growers Association to deliver all of the prunes and apricots handled by it to the California Prune and Apricot Growers Association for packing and marketing, and the Grower agrees that the Local may enter into any contract with the California Prune and Apricot Growers Association for such purposes and may agree to pool the prunes delivered hereunder with prunes of a similar grade and quality delivered by similar Locals under marketing agreements substantially similar to this, and the proceeds thereof shall be divided ratably according to deliveries from such Locals and shall be distributed to the grower members thereof as above provided."

[3] A further reason for holding the notification as to advances cannot be accepted as superseding the membership agreement is that the agreement itself provides the sole method of withdrawal. The first part of the membership agreement provides:

"This agreement may be terminated at any time during any year after 1936 by the Local or by the Grower by notice mailed to the Grower or the Local by registered mail between February 15th and the last day of February of said year, said termination to take effect on March 15th of the year in which said notice is delivered, provided, however, that this agreement shall remain in full force and effect as to all prunes delivered to the Local prior to such termination and until the sale of such prunes and the payment of the proceeds thereof to the Grower. Notice must be mailed within the period named herein to be effective, and shall be mailed to the Local at its principal place of business and to the Grower at his last-known address."

And in paragraph 13 thereof, it is further provided:

"This agreement is one of a series generally similar in terms comprising with all such agreements, signed by individual growers, or otherwise, one single contract between the Local and the said Growers, mutually and individually obligated under all terms thereof."

[4] We are here considering such a co-operative marketing agreement. The agreement specifies exactly how it may be terminated, and it cannot be abrogated or modified by any one in violation of the rights of others to the contract. Obviously the court erred in holding the advance created a new or different contract, or that it superseded the membership agreement.

[5] A further ground for reversal is that the amended complaint failed to state a cause of action. In view of the allegations of the original amended complaint that the rights of the parties were based upon a written agreement, and the theory apparently upon which the cause was tried and the judgment entered, that the plaintiff and the Association had entered in a new and oral agreement by virtue of notification of certain advance payments, it is difficult to know just what complaint is under scrutiny. It is clear, however, plaintiff is suing upon a contract wherein he was to be paid by some one, "the best price obtainable less certain deductions". He has alleged that price to be $56 per ton, but the amended complaint does not allege how that figure was determined or what the best price obtainable was, or what the deductions were or what were the various grades or sizes of the prunes delivered. These facts are essential as a part of plaintiff's case.

[6-8] Plaintiff attempts to support his allegations and proof upon the theory of indebitatus assumpsit, or for goods sold and delivered, but plaintiff did not so frame his complaint and he is now limited by the issues of his own pleading. Neither does plaintiff show that the prunes were

lost to him by reason of neglect on the part of defendants, as he did not sue for damages. He has sued upon a contract, and he is obligated to establish that contract and its terms, and the amount he claim to be due thereunder. Plaintiff also asserts that the grading was fraudulent, but no pleading of fraud has presented that issue, so it cannot be now considered.

The judgment is modified with directions to enter judgment in favor of plaintiff and against defendants for the sum of $80.37 which amount is conceded by defendants to be due. As so modified the judgment is affirmed. Each side to bear their own costs.

We concur: TUTTLE, J.; THOMPSON, J.



42 Cal.App.2d 664

In re HEBERT'S ESTATE.

FLANIGAN et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 12833.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1941.

As Corrected on Denial of Rehearing Feb. 20, 1941.

Hearing Denied March 28, 1941.

1. Adoption ⇐18

The status of an adopted child is determined by the laws of the state in which the adoption was effected.

2. Descent and distribution ⇐5

Rules of inheritance concerning personalty are determined by laws of the state where decedent was domiciled at time of death.

3. Descent and distribution ⇐4

Rules of inheritance concerning realty are determined by laws of state in which realty is situated.

4. Adoption ⇐23

The right of heirs of decedent's adopted son who predeceased decedent to inherit personalty of decedent, whose domicile was in California at time of his death, was governed by California law. Probate Code, §§ 221, 222, 257.

5. Adoption ⇐23

Heirs of decedent's adopted son who predeceased decedent, whose death occurred in California, were the "heirs at law" of decedent, and were entitled to inherit his personalty. Probate Code, §§ 221, 222, 257.

See Words and Phrases, Permanent Edition, for all other definitions of "Heirs at Law".

6. Statutes ⇐225¾

Where statutes were judicially construed and were later re-enacted in same or substantially same terms, it was presumed that Legislature was familiar with construction which had been placed upon the statutes, and that such construction was adopted by the Legislature, in absence of express provisions requiring different construction. Civ.Code, §§ 227–229.

7. Adoption ⇐23

The provision of the Probate Code relating to succession of an adopted child to estate of his adoptive parent did not change pre-existing law so as to preclude heirs of decedent's adopted son who predeceased decedent from succeeding to decedent's personalty as his "heirs at law," in view of fact that the Probate Code provision was a mere restatement designed to express clearly and correctly the existing provisions of the law as interpreted by the courts. St.1929, p. 1428; Probate Code, §§ 221, 222, 257.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Georgia Anna Hebert, deceased. From orders determining heirship and decreeing partial distribution, Laura Loland Flanigan and others appeal, and the appeal is answered by the Security-First National Bank of Los Angeles and others.

Orders affirmed.

Louis Thomsen, of Los Angeles, for appellants.

O'Melveny & Myers, of Los Angeles, for respondents.

WOOD, Justice.

The decedent Georgia Anna Hebert, who died intestate as to most of her estate, during her lifetime legally adopted Howard Hugh Hebert as her son. At the time of

the adoption the interested parties were residents of the state of Washington and the order of adoption was made by a court of that state having the proper jurisdiction. The adopted son predeceased the decedent, leaving as his sole heirs two daughters, his legitimate issue by blood. The appellants, who are cousins of the decedent and would be entitled to inherit as next of kin if it be declared that the daughters of the adopted son are not entitled to inherit, have appealed from orders determining heirship and decreeing partial distribution which were made by the probate court in favor of the daughters of the adopted son. The question for determination is whether the daughters of the adopted son are heirs at law of the party who adopted their father.

[1-4] The status of an adopted child is determined by the laws of the state in which the adoption was effected, but the rules of inheritance as to personal property are to be determined by the laws of the state where the decedent was domiciled at the time of death and as to real property the rules of inheritance are to be determined by the laws of the state in which the realty is situated. Although expressing "some doubt" as to whether the laws of California or the laws of Washington should be held to be controlling upon the question involved in this appeal, respondent argues that the Washington laws should govern and cites In re Williams' Estate, 102 Cal. 70, 36 P. 407, 41 Am.St.Rep. 163, in which the court quotes with approval from the opinion in Ross v. Ross, 129 Mass. 243, 246, 37 Am.Rep. 321. In the Williams case the question involved was the sufficiency of the adoption proceedings. The Ross case was therein cited on the question of the status of the adopted child, but the Ross case, in which the adoption had been effected in the state of Pennsylvania, also sets forth the rule to be followed in determining the rights of inheritance. In a comprehensive annotation in 73 A.L.R. at page 970 the author points out that the Ross case has been frequently "misquoted and miscited by the courts" but summarizes the holding in the Ross case as follows: "In short, the court in effect held that the question whether the child had the 'capacity' to inherit land in Massachusetts should be determined by the laws of the state of his adoption, but that the question whether, assuming that he had the capacity, he had the 'right' to inherit, should be determined by the law of Massachusetts." Under this rule the laws of California, the domicile of the decedent, must govern as to rights of inheritance since the property involved is personalty. It is not contended that the status of an adopted child under the laws of Washington is different from the status of a child adopted under the California law.

Without conceding that the inheritance laws of Washington are not controlling, respondent contends that under the California statutes the two daughters of the adopted son have the right to inherit. The statutes applicable are sections 221, 222 and 257 of the Probate Code. Appellants rely particularly upon section 257, which is as follows: "An adopted child succeeds to the estate of one who has adopted him, the same as a natural child; and the person adopting succeeds to the estate of an adopted child, the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption, nor does such natural parent succeed to the estate of such adopted child." It is argued that the legislators in adopting this section have expressed the entire rights of inheritance of adopted children and that adopted children can have no rights other than those expressly stated in the section.

The decisions of the reviewing courts of California rendered before the adoption of the Probate Code in 1931 clearly sustain the contentions of the respondents. In Re Estate of Winchester, 140 Cal. 468, 74 P. 10, the decedent had adopted a daughter and had left legacies to the natural children of the daughter. The question before the court for determination was whether legacies for the benefit of the children of the adopted daughter were subject to the Collateral Inheritance Act of 1893, p. 193. It became necessary to determine whether the children were lineal descendants of the decedent. In holding that they were in fact heirs and lineal descendants and were accordingly exempt from the tax the court said that "the children of such adopted child take by inheritance as issue of the adopting father. * * * Otherwise the child adopted and the adopting parent would not sustain towards each other the relation of parent and child". The Winchester case has been cited with approval in Re Estate of Hunsicker, 65 Cal.App. 114, 223 P.

411; In re Darling's Estate, 173 Cal. 221, 159 P. 606; In re Estate of Moore, 7 Cal. App.2d 722, 47 P.2d 533, 48 P.2d 28; In re Estate of Mercer, 205 Cal. 506, 271 P. 1067. Appellants rely upon In re Estate of Darling, supra [173 Cal. 221, 159 P. 607], in which it was held that an adopted child is entitled to succeed to the share in the estate of his grandfather by blood which his father by blood would have succeeded to had he survived his own father. This decision is not in conflict with the Winchester decision, but rather the Winchester decision was approved therein in this language: "One other consequence in the matter of inheritance may be noted as arising from the same relation, viz., that the children of the adopted child take by inheritance from the adopting parent as issue of such adopting parent. This was practically the question decided in Re Estate of Winchester * * *."

[5-7] Prior to the adoption of the Probate Code in 1931, the decisions of the Supreme Court had, as we have shown, established the right of those in the position of the respondents to inherit in accordance with the contentions which they are now making. It remains to be determined whether by enacting the Probate Code the legislature changed the rules which had theretofore been established. The legislature which created the code commission instructed the commissioners to prepare "such restatement as will best serve clearly and correctly to express the existing provisions of law". Stats. of 1929, page 1428. The commissioners realized that they were not authorized to propose changes in the substance of the existing laws, for in the report which they submitted with the draft of the Probate Code they stated: "By the statute creating the code commission, its powers are limited to preparing such 'restatement as would best serve clearly and correctly to express the existing provisions of law', and it is not within the province of the code commission to embody in its report any substantial changes in the existing law". California Probate Code, Commissioners' Report, 1930, p. 10. The same legislature which enacted the Code section above quoted also enacted section 222 of the Probate Code, which was based upon section 1386 of the Civil Code. Both of these sections provide that the issue of a decedent shall inherit by right of representation. At the same time the legislature continued in effect the adoption provisions of the Civil Code, sections 227–229. These sections had theretofore been construed as granting inheritance rights to the children of a predeceased adopted child of the adopting parent. In re Estate of Winchester, supra, In re Estate of Darling, supra. If a statute has been judicially construed and is later re-enacted in the same or substantially the same terms it is presumed that the legislature was familiar with the construction which had been placed upon the statute by the courts and that such construction, in the absence of an express provision requiring a different construction, was adopted by the legislature as a part of the law. Dalton v. Lelande, 22 Cal.App. 481, 135 P. 54. It is clear that if section 257 had been omitted when the Probate Code was enacted it would have been the clear duty of the court to declare the respondents to be the heirs of decedent. We find nothing in section 257 requiring any other determination, since it is a "restatement" designed to "clearly and correctly express the existing provisions of law" as interpreted by the courts.

The orders are affirmed, respondents to recover costs from appellants.

We concur: MOORE, P. J.; McCOMB, J.



KACSUR v. BOARD OF TRUSTEES OF SOUTH WHITTIER ELEMENTARY SCHOOL DIST. et al.*

HILL v. SAME.

Civ. 12262, 12263.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1941.

Rehearing Denied Feb. 24, 1941.

Hearing Granted March 31, 1941.

1. Mandamus ⇐174

Where permanent teachers sought a writ of mandate to compel school board to fix teachers' salaries at certain sum and to draw a warrant upon county treasurer for such sum and alleged that reduction in their salaries was discriminatory, decision adverse to teachers was not against law on ground that

* Subsequent opinion 116 P.2d 593.

there was failure to make findings upon material issues, where court specifically found that salaries were fixed at certain sum upon recommendation of superintendent of school district and that in fixing such salaries the board did not act arbitrarily but in good faith and not from any improper or illegal motive, even though the decreased salary should be regarded as a "reduction" rather than a "fixing" of salary. School Code, §§ 5.731, 5.751.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixing" and "Reduction".

2. Mandamus ⇦174

In proceedings by permanent teachers to compel school board to fix teachers' salaries at certain sum and to draw a warrant upon county treasurer for such sum, finding of trial court that salaries were fixed upon recommendation of superintendent of school district and that in fixing salaries board did not act arbitrarily, which finding was so framed that teachers could intelligently specify particulars in which finding was not supported by the evidence as to presence or absence of discrimination or unreasonableness with reference to change made in salaries, and which clearly disclosed theory upon which it was grounded as to controverted issue, was sufficient. School Code, §§ 5.731, 5.751.

3. Mandamus ⇦174

In proceedings by permanent teachers to compel school board to fix teachers' salaries for the year 1938–39 at certain sum and to draw a warrant upon county treasurer for such sum, court's failure to find upon issue of existence or nonexistence of a salary schedule for years preceding 1938–39 did not constitute a material omission where court was concerned only with question of salary schedule for the year 1938–39, and an express finding was made that for such year there was no salary schedule. School Code, §§ 5.731, 5.751.

4. Mandamus ⇦174

In proceedings by permanent teachers to compel school board to fix teachers' salaries for year 1938–1939 at certain sum and to draw a warrant upon county treasurer for such sum, court's failure to make a finding upon action of board in reclassifying teachers' duties or as to whether such action was taken in good faith was not error where teachers were not seeking reinstatement to their previous particular positions. School Code, §§ 5.731, 5.751.

5. Mandamus ⇦174

In proceedings by permanent teachers to compel school board to fix teachers' salaries at certain sum and to draw a warrant upon county treasurer for such sum, when court found that action of board in fixing salaries was not arbitrary or unreasonable, it became unnecessary to make a finding upon whether teachers' assignment to other duties was made in good faith. School Code, §§ 5.-731, 5.751.

6. Schools and school districts ⇦141(1)

The board of trustees of elementary school district which had under 850 pupils average daily attendance was empowered to transfer permanent teachers to other duties when in so doing board did not impair teachers' status in violation of the School Code. School Code, §§ 5.731, 5.751.

7. Schools and school districts ⇦144(4)

The law does not require that all certificated employees of a school district should be paid the same salary. School Code, §§ 5.731, 5.751.

8. Schools and school districts ⇦144(4)

The right of school district governing boards to fix salary of a permanent employee must be reasonably exercised, and may not be exercised in a discriminatory or arbitrary manner. School Code, §§ 5.731, 5.751.

9. Schools and school districts ⇦144(4)

The School Code, which empowers school boards to "fix" the compensation of permanent teachers, confers upon such boards discretionary power to regulate such compensation and in exercise of such power to decrease as well as increase such salaries, provided that when reductions in salary are made such decreases are not unjust, but made in good faith and without any purpose to discriminate. School Code, §§ 5.731, 5.751.

See Words and Phrases, Permanent Edition, for all other definitions of "Fix".

10. Schools and school districts ⇦141(1)

A school board, despite permanency of a teacher's tenure, is clothed with authority to change such teacher's assignment and to prescribe his or her duties from time to time, when such power is exercised reasonably and the duties prescribed are in line with

teacher's profession, and such teacher is not required to teach outside the district. School Code, §§ 5.731, 5.751.

11. Schools and school districts ⇐144(4)

The legislative enactments which give to teachers under certain conditions a tenure permanency carry with them no assurance against change in salary. School Code, §§ 5.731, 5.751.

12. Schools and school districts ⇐133

The position of a "teacher" in the public schools of California is not an "office" but is strictly and essentially an "employment", and such employment is initiated by a contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment", "Office", and "Teacher".

13. Schools and school districts ⇐141(1), 144(4)

Teachers, who had attained status of permanency prior to effective date of statute by which it was made optional with boards in school district of certain classification to classify certificated employees as "permanent", had right to continue as permanent teachers, but school board had right, if it acted in good faith as well as reasonably and without discrimination, to reclassify duties to be performed by teachers and to fix their compensation under new contract. School Code, §§ 5.731, 5.751.

14. Schools and school districts ⇐141(1), 144(4)

That two out of twenty-five teachers employed by elementary school district were the only permanent teachers, standing by itself, did not establish such fact as the motive behind school board's action in fixing such teachers' salaries at a lower figure than they had received and in reclassifying their duties. School Code, §§ 5.731, 5.751.

15. Schools and school districts ⇐141(1), 144(4)

Evidence was not insufficient to show that action of school board in fixing permanent teachers' salaries at a lower figure than they had received and in reclassifying their duties was taken in "good faith" because no charges were made against teachers and it was not alleged that they were incompetent, since board was vested with discretion in fixing their salaries and in reclassifying their duties and it was not necessary to prefer charges against teachers as a prerequisite to exercise of such discretion. School Code, §§ 5.731, 5.751.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Faith".

16. Schools and school districts ⇐144(4)

Other than restriction as to minimum salary to be paid teachers, school board is free to contract with teacher as to salary to be paid, and hence, when permanent teachers' contracts as to salaries for year expired, board was authorized in exercise of its discretion to offer either a higher or lower salary in the contracts for the ensuing year. School Code, §§ 5.731, 5.751.

17. Schools and school districts ⇐144(4)

Except for a clear abuse of discretion exercised by school board, amount of salary allowed by the board to permanent teachers may not be interfered with by the courts. School Code, §§ 5.731, 5.751.

18. Schools and school districts ⇐141(1), 144(4)

Evidence was not insufficient to show "good faith" on part of school board in fixing permanent teachers' salaries at a lower figure than they had received and in reclassifying their duties because board was opposed to the tenure law, since such alleged opposition to teachers' tenure did not impair exercise of reasonable discretion in fixing salaries, if under all circumstances such action was not motivated by injustice or discrimination. School Code, §§ 5.731, 5.751.

19. Schools and school districts ⇐141(1), 144(4)

Evidence was not insufficient to show "good faith" on part of school board in fixing permanent teachers' salaries at a lower figure than they had received for preceding year and in reclassifying their duties because teachers had been requested to resign when board had been advised that teachers were permanent and could not be dismissed on account of marriage, where personnel of board at time of request for resignations was entirely changed when salary decrease was made and there was no showing that attitude of board members who had requested resignations had anything to do with influencing changed personnel of the board six years later. School Code, §§ 5.731, 5.751.

20. Schools and school districts ⇐141(1), 144(4)

The alleged facts that salary of a probationary teacher was maintained at previous level while salaries of permanent teachers were reduced, that rates for other

teachers were increased, that substitutes were paid practically the same salaries as those paid to permanent teachers, that new teachers were employed at higher salaries than the permanent teachers, that salaries of re-employed teachers were increased, and that permanent teachers were transferred to other grades, were not determinative of good or bad faith of board in reducing permanent teachers' salaries and reclassifying their duties in view of broad discretionary power vested in board to fix teachers' salaries. School Code, §§ 5.731, 5.751.

21. Schools and school districts ⇐144(4)

In view of broad discretionary power vested in school board to fix teachers' salaries, there must be clear and convincing evidence of abuse of such discretion before a court will vitiate the action of the board. School Code, §§ 5.731, 5.751.

22. Schools and school districts ⇐141(1), 144(4)

The action of board of trustees of elementary school district in fixing permanent teachers' salaries at a lower figure than they had received for preceding year and in reclassifying their duties was not an abuse of discretion, in view of evidence disclosing that school superintendent advised board that such teachers were not carrying out superintendent's philosophy of teaching and that in his opinion a reclassification would be to their benefit. School Code, §§ 5.731, 5.751.

23. Schools and school districts ⇐144(4)

A permanent teacher whose duties were transferred to "home teaching", which required teacher to go into homes of pupils throughout the district for purpose of teaching them, was entitled to recover from school board traveling expenses necessarily incurred in such travels throughout the district. School Code, § 5.532.

24. Mandamus ⇐167

In proceedings by permanent teachers to compel school board to fix their salaries for certain year at certain sum and to draw a warrant upon county treasurer for such sum, wherein board denied teachers' allegations that fixing of salaries at lower figure was unfair, discriminatory, and unreasonable or was prompted by any improper motive, testimony showing that teachers were inefficient was properly admitted to meet the issue of unfairness and bad faith, especially where teachers were permitted to introduce evidence to show their competency and right to continuance of previously paid salaries. School Code, §§ 5.731, 5.751.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceedings by Eleanor Roehr Kacsur and by Thelma Weagley Hill against the Board of Trustees of South Whittier Elementary School District and others, for a writ of mandate to require respondents to fix salaries in certain sums and to draw warrants upon the county treasurer therefor. From adverse judgments, the plaintiffs appeal.

Affirmed in part and in part modified and, as modified, affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

WHITE, Justice.

Each appellant herein, a teacher in the South Whittier Elementary School District, sought a writ of mandate in the superior court to require the respondents to fix her salary for the school year 1938-39 at the sum of $1,600 and accordingly to draw a warrant upon the county treasurer of Los Angeles county therefor. Appellant Eleanor Roehr Kacsur also sought the recovery of certain traveling expenses incurred by her in connection with her assignment as a home teacher. The cases were tried together under a stipulation that all the evidence introduced should be considered in both cases. From a judgment denying the relief prayed for these appeals are prosecuted, and by stipulation are presented upon a single set of briefs.

In general, the question before this court is the correctness of the trial court's conclusion that the board of trustees, in tendering to each appellant a contract for the year 1938-39 at a reduction in salary from $1,600 to $1,325, acted within the bounds of its legal discretion and did not unlawfully discriminate against the appellants.

From the record, it appears that appellants are the only permanent teachers among 25 employed by the respondent district, they having attained such status prior to August 14, 1931, the effective date of the amendment to section 5.501 of the School Code, by which it was made optional with boards in school districts, such as the one

here in question, which have under 850 pupils average daily attendance, to classify certificated employees as "permanent". Respondent district availed itself of such option and decided not to classify any teachers as "permanent".

Appellant Thelma Weagley Hill has been employed by the district since 1927, and appellant Eleanor Roehr Kacsur since 1928. Their salaries for the years 1933-34, 1934-35, 1935-36, and 1936-37, had been $1,570. For the year 1937-38, pursuant to a salary schedule adopted by the board which provided for annual increments if certain requirements of special study were met, their salaries were fixed at $1,600. A new contract of employment was made each year. For three years prior to the occasion of the present dispute appellant Hill had taught the eighth grade and petitioner Kacsur had taught first grade, fourth and fifth grade, as well as domestic science.

[1-3] It is first contended by appellants that the decision is against law in that there was a failure to make findings upon material issues. In this connection it is asserted that there was contained in the answers a denial of the allegations contained in the complaint that the reduction in petitioners' salaries was discriminatory, unreasonable and without any just cause or legal ground. In this claim appellants cannot be upheld, because the court specifically found "that the salary for petitioner (s) for the services as a certificated employee in aforesaid school district for the school year 1938-39 was fixed by the respondents at the sum of $1,325 upon the recommendation of the superintendent of said school district; that in fixing said salary the governing board of the district did not act arbitrarily or fix an unreasonable salary for said petitioner (s), but said salary was fixed by said board in good faith and not from any improper or illegal motive." Even though we regard the decreased salary fixed for the year 1938-39 as a "reduction", rather than a "fixing" of salary under a new yearly contract, the finding nevertheless declares the grounds which prompted the board to determine the salary at a lesser figure than was paid for the preceding year and finds that such grounds absolve the board of any arbitrary or discriminatory motive or purpose. This finding was so framed that the defeated parties could intelligently specify the particulars in which it was not supported by the evidence as to the presence or absence of discrimination or unreasonableness in the action of the board with reference to the change made in petitioners' salaries. This is all that is required. The finding clearly discloses the theory upon which it is grounded as to the controverted issue above referred to. Neither did the failure of the court to find upon the issue of the existence or non-existence of a salary schedule for the years preceding 1938-39 constitute a material omission, because the court was concerned only with the question of a salary schedule for the year 1938-39, and an express finding was made that for such year there was no salary schedule.

[4-6] Because petitioners sought only a mandate compelling the board of trustees to fix their salaries for the year 1938-39 at $1,600 and to draw a warrant upon the county treasury for such sum, and were not seeking reinstatement to their previous particular grades and classroom teaching positions, it was not error for the court to fail to make a finding upon the action of the board in transferring petitioners from performing the kind of services rendered by them prior to 1938-39 to a different type of service during the last-mentioned year, or as to whether such action was taken in good faith. When the court found that the action of the board of trustees in fixing the salaries for the year 1938-39 was not arbitrary or unreasonable, it became unnecessary to make a finding upon whether their assignment to other duties was made in good faith. The board was empowered to transfer teachers to other duties when in so doing it did not impair their status in violation of the School Code. Therefore, so far as the findings are concerned, the judgment rendered is amply supported thereby.

[7-13] We come now to a consideration of appellants' claim that the action of the board of trustees in fixing the salaries of petitioners at a figure less than that received by them for the school year immediately preceding 1938-39 was without authority in law. Appellants concede that the law does not require that all certificated employees of a school district must be paid the same salary, but base their claim of illegality herein upon the ground that the right of such school district governing boards to fix the salary of a permanent employee must be reasonably exercised, and may not be exercised in a discriminatory or arbitrary manner. This uniformly has been held to be the law. The board may not substitute its arbitrary determination in opposition to rights guaranteed teachers by

law that they shall not be dealt with in an arbitrary or discriminatory manner. Section 5.731 of the School Code is as follows: "Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to fix and order paid the compensation of persons in public school service requiring certification qualifications, employed by such boards, unless the same be otherwise prescribed by law." We hold, upon the authority of Fidler v. Board of Trustees, 112 Cal.App. 296, 301, 296 P. 912, and cases therein cited, that the California School Code, which empowers school boards to fix the compensation of permanent teachers, confers upon such boards discretionary power to regulate such compensation and in the exercise of such power to decrease as well as increase such salaries; provided, of course, that when reductions in salary are made such decreases are not unjust, but made in good faith and without any purpose to discriminate against an employee. It is also the established law of this state that a school board, despite the permanency of a teacher's tenure, is clothed with authority to change such teacher's assignment and to prescribe his or her duties from time to time, when such power is exercised reasonably and the duties prescribed are in line with the teacher's profession, and such teacher is not required to teach outside the district. Abraham v. Sims, 2 Cal.2d 698, 711, 42 P.2d 1029. The legislative enactments which give to teachers under certain conditions a tenure permanency carry with them no assurance against change in salary. Abraham v. Sims, supra, 2 Cal.2d at page 711, 42 P.2d 1029. The last-cited case, as well as Martin v. Fisher, 108 Cal.App. 34, 39, 291 P. 276, 278, is authority for the statement that "the position of a teacher in the public schools of California is not an office". It is strictly and essentially an employment, and such employment is initiated by a contract. Appellants herein had the unquestioned right to continue as permanent teachers, but the school board had the right, if it acted in good faith, as well as reasonably and without discrimination, to reclassify the duties to be performed by appellants and to fix the latter's compensation under the new contract entered into with them for the school year 1938-39. This power is expressly conferred upon respondent board of trustees.

Therefore we must now examine the record in this case to determine whether the evidence supports the findings and judgment of the trial court that the action of the board in fixing appellants' salaries at a lower figure than they received for the year immediately preceding and in reclassifying their duties, was just, reasonable and not discriminatory. In their attack upon the sufficiency of the evidence to show that the action of the board was taken in good faith, appellants assert:

[14] (1) "* * * that appellants are the only permanent teachers in the district." This may be true, but standing by itself does not establish that fact as the motive behind the board's action.

[15-17] (2) "* * * that no charges have ever been made against them and it is not alleged or contended that they are incompetent." The board was vested with a discretion in fixing appellants' salaries and reclassifying their duties. It was not necessary to prefer charges against the teachers as a prerequisite to the exercise of such discretion. True, before teachers who have attained permanent tenure may be discharged, the law requires that they shall be apprised of charges against them and afforded an opportunity to meet such accusations, but the question of dismissal is not here involved. As was said in Fidler v. Board of Trustees, supra [112 Cal.App. 296, 296 P. 915]: "A distinction must be kept in mind at all times in consideration of the instant case between the right to permanent tenure of the office and the right to compensation during each year. * * * It is an important distinction, for his status as a permanent teacher is conferred upon him by the statute, and is not dependent upon contract; while his right to compensation is a proper subject of contract." Other than the restriction as to the minimum salary to be paid teachers, School Code, sec. 5.751, the board is free to contract with the teacher as to the salary to be paid. When, therefore, appellants' contracts as to salaries for year 1937-38 expired as they did, the board was authorized in the exercise of its discretion to offer either a higher or lower salary in the contracts for the ensuing year. Except for a clear abuse of this discretion the amount of salary allowed by the board may not be interfered with by the courts. Chambers v. Davis, 131 Cal.App. 500, 22 P.2d 27.

[18] (3) "That the board of trustees is opposed to the tenure of law." Conceding that to be true, nevertheless we can-

not see that such opposition to teachers' tenure impairs the exercise of reasonable discretion by the board in fixing the salary, if under all the circumstances such action is not motivated by injustice or discrimination.

[19] (4) "That the appellants were each requested to resign near the end of the third year of employment for the purpose of 'breaking' their tenure and then re-employed, their teaching service being continuous to the present time," and (5) "that appellants and the only other permanent teacher in the district at that time were requested in April, 1932, to resign when the board was advised by the county superintendent of schools that they were permanent teachers and could not be dismissed on account of marriage." We fail to perceive the relevancy of this argument, because the personnel of the board at the time of the request for such resignations was entirely changed when the salary decrease with which we are here concerned was made in 1938. There is no showing that the attitude of the board members in 1932 had anything to do with influencing the changed personnel of the board six years later.

[20-22] The remaining grounds upon which appellants rest their contention of injustice, unreasonableness and discrimination on the part of the board are:

"(6) That the salary of Miss Harrington, a probationary teacher, was maintained at $1,600.00 while appellants were reduced to $1,325.00.

"(7) The fixing of higher salaries for the school year 1938-39 at much higher rates for many other teachers.

"(8) The payment to substitutes of practically the same salary as those paid to appellants.

"(9) The employment of new teachers at higher salaries than those of appellants.

"(10) Increasing the salaries of re-employed teachers while reducing appellants.

"(11) Transferring appellant Hill to the third grade.

"(12) Transferring appellant Kacsur to so-called 'home teaching' and clerical work in the superintendent's office."

As we view the record in this case, none of these reasons are determinative of the good or bad faith of the board in its reduction of appellants' salaries and the transferring of them to other duties during the school year 1938-39. When we consider the broad discretionary power vested in the board to fix teachers' salaries, there must be clear and convincing evidence of abuse of such discretion before a court will vitiate the action of the board. Appellants introduced considerable evidence to establish the fact of their competency and willingness to cooperate and work with the school superintendent, yet the action of the board in decreasing appellants' salaries was prompted by the recommendations of such superintendent. While testifying as a witness, and in explanation of his recommendations to the board, the superintendent read excerpts from the "Intermediate Guide, Teachers' Guide, Intermediate Unit, Los Angeles County Schools", after which he testified as follows:

"A. (After reading) * * * Now, I have repeated these excerpts to bear out the idea of what is expected of a teacher in a room. They must have definite ideas, definite requirements and very definite suggestions, and the amount of interest that a teacher will create will depend entirely on the individual teacher. And under these captions here everything was given to bear that out. Now, in my observation of the classrooms of these teachers—do you want both of the teachers or just one, shall we consider them together?

"Q. We are considering them together, yes. A. In my observation of these classrooms of these two teachers and in conference with the teachers, I couldn't find that they had the philosophy expressed in these paragraphs. I tried to search the school philosophy rather than the subject matter, in other words, what is behind their teaching of the subject matter, and it appeared to me that both Mrs. Hill and Mrs. Kacsur failed to get the underlying philosophy of these paragraphs.

* * *

"Q. Did you observe anything in Mrs. Hill's teaching that would lead you to believe that she would be more adaptable for activities of a manual character than those that were employed in the eighth grade? A. You mean in regard to my recommendation that she be assigned to the third grade?

"Q. That is what I mean. A. My opinion in regard to her was that she was trained as a formal classroom teacher, but if she remained there it might be very hard, if not impossible, for her to become a good informal teacher, and I thought if she

would be put in a different grade, say the third grade, for example, that it would be entirely foreign to her and that she would have to realign her work and her method of teaching, and there would perhaps be a better chance to adapt her to the methods which I would like to see her employ and possibly remove her present theories from her mind.

"Q. Did you think it would be helpful to Mrs. Hill, or did you think it might be difficult for her to enjoy the third grade? A. I thought she would enjoy her work. I didn't think she was going to be antagonistic to the work. I didn't think she was going to be a success as a third grade teacher, but I thought she might be a greater success as a third grade teacher than an eighth grade teacher."

In the final analysis, therefore, we find that the superintendent was dissatisfied with the mode and method of appellants' system of teaching, and it was his claim that they did not adjust themselves to the philosophy of teaching which he had. He so reported to the respondent board and recommended a change. There is substantial evidence in the record that, based upon such recommendation of the superintendent, respondent board determined to reclassify appellants' duties, and further concluded that the services of appellants in the discharge of their duties under the reclassification for the term covered by the contracts proffered them, if they chose to continue teaching in the district for the school year 1938-39, was $1,325. After all, the right and power to fix salaries rests with the board of trustees, and we cannot conclude in the face of the record before us that in adopting the views and recommendations of the district superintendent, employed as he was to advise and counsel with the board on such matters, that the latter abused the discretion vested in it to determine and fix appellants' salaries.

[23] While we conclude that the board was authorized to reassign and transfer appellant Eleanor Roehr Kacsur to what is referred to as "home teaching", we nevertheless are in accord with her contention that when such transfer was made and she was required to go into the homes of pupils throughout the district for the purpose of teaching them, the respondent board was obligated to pay her reasonable traveling expenses necessarily incurred in such travels throughout the district. The allegations in the complaint of appellant Kacsur that she incurred necessary traveling expenses of $20.50 while acting in the capacity of a "home teacher" during the school year 1937-38 were not denied and were found by the court to be true. Section 5.532 of the School Code provides as follows: "The governing board of any school district shall have the power *and the duty* to provide for the payment of the actual and necessary traveling expenses of any employee of the district when performing services for the district under the direction of the governing board thereof. * * *" By reason of the foregoing provision, appellant Kacsur was entitled to payment of her claim.

[24] The trial court did not err in its ruling admitting into evidence testimony designed to show that appellants were inefficient. Appellants base their claim in this regard upon the fact that by the pleadings it was admitted that no charges had ever been preferred against them. However, the answer of respondents did deny appellants' allegations that the fixing of their salaries at $1,325 for 1938-39 was unfair, discriminatory and unreasonable or was prompted by any improper motive. Just as appellants were permitted to introduce evidence to show their competency and right to a continuance of the salary paid them during the preceding year, respondent board was also entitled to present testimony to show the reason why appellants were offered a decreased salary in the contracts proffered them for the school year 1938-39. Such evidence was competent, relevant and material to meet the issue of unfairness and bad faith charged against the board.

In the appeal taken by Thelma Weagley Hill the judgment is affirmed; and in the matter of the appeal taken by Eleanor Roehr Kacsur the judgment is modified to provide that appellant is entitled to the sum of $20.50 expended by her as necessary traveling expenses incurred by her in performing services directed by said defendants for the school year 1937-38, and is further entitled to be paid her necessary traveling expenses incurred in performing like services under the direction of respondent board during the school year 1938-39. In all other respects such judgment is affirmed. All parties will bear their respective costs on appeal.

We concur: YORK, P. J.; DORAN, J.

42 Cal.App.2d 652

SMITH v. SMITH.

Civ. 6454.

District Court of Appeal, Third District, California.

Jan. 28, 1941.

1. Divorce ⇐277

Where divorce decree awarded alimony payable monthly and $500 for legal expenses, and at time only $125 was due on delinquent installments of alimony, wife accepted $200 and signed receipt for "all moneys due to date under any and all orders", the release covered the matter of attorney's fees, notwithstanding wife's contention that she did not know that she had anything to do with that matter.

2. Appeal and error ⇐1011(1)

Findings based on conflicting evidence would not be disturbed on appeal.

3. Divorce ⇐277

Where divorce decree awarded alimony payable monthly and $500 for legal expenses, and at time only $125 was due on delinquent installments of alimony, wife signed receipt for "all moneys due to date under any and all orders" in consideration of payment of $200 and husband's promise to forego right to appeal, the release was supported by sufficient "consideration", notwithstanding it covered matter of attorney's fee.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

4. Divorce ⇐277

Where divorce decree awarded alimony payable monthly and $500 for legal expenses, and trial court found that wife's receipt for "all moneys due to date under any and all orders" signed at time when only $125 was due on delinquent installments of alimony constituted release of husband's liability for legal expenses and was supported by husband's payment of $200 and his promise to forego right to appeal, letter written by husband about a month after issuance of receipt did not throw light on interpretation of receipt, as against wife's contention that husband's testimony regarding transaction was directly contrary to letter, and could not support court's finding.

5. Appeal and error ⇐1012(1)

The District Court of Appeal cannot weigh evidence, in reviewing a finding.

6. Appeal and error ⇐994(1)

The District Court of Appeal cannot pass on the credibility of witnesses.

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Action for divorce by Elaine T. Smith against Sidney V. Smith, Jr. From an order denying a motion for execution upon a modified final decree of divorce, the plaintiff appeals.

Affirmed.

See also 87 P.2d 863, 31 Cal.App.2d 272.

Charles A. Wetmore, Jr., and Treadwell & Laughlin, all of San Francisco (Robert A. Grantier, of San Francisco, of counsel), for appellant.

Loyd E. Hewitt, and James R. McBride, both of Yuba City, for respondent.

PULLEN, Presiding Justice.

A modified final decree of divorce between the parties hereto was entered on July 14, 1936, wherein defendant was required to make certain monthly payments to plaintiff as alimony, and to pay to plaintiff the sum of $500 for legal expenses. Thereafter defendant, having failed to pay this sum of $500, was cited for contempt, but after a hearing the same was dismissed.

On May 27, 1938, a motion for execution upon the modified final decree of July 14, 1936, was heard and denied. From that order this appeal is taken on the ground the evidence was insufficient to support the findings that there was not due to plaintiff the sum of $500 for legal expenses; that any sum had been paid on account thereof; that plaintiff had, for a consideration, released or discharged the defendant from the payment thereof, or that any of the matters there involved had been previously adjudicated in the contempt proceeding, or that the judgment in the contempt proceedings were a bar to these proceedings.

The determination of this case depends largely upon the effect of a receipt given by plaintiff to defendant in these words: "Received of Sidney V. Smith Jr. all moneys due to date under any and all orders in the above entitled matter, including the order made by Judge Dierup on the 14th. day of July 1936, from which

an appeal was taken by the above entitled defendant. Dated June 8, 1937.

"Elaine T. Smith DeWitt,
plaintiff."

[1] This receipt and $200 had been sent to Mr. Eugene D. Bennett, an attorney in San Francisco by the attorney of defendant, and he was directed to deliver to plaintiff the $200 upon her signing the receipt. On June 8, 1937, plaintiff called at the office of Mr. Bennett and offered to sign the receipt. Mr. Bennett expressed the desire to discuss the matter with Mr. Treadwell, her attorney, but she said such was unnecessary. Nevertheless, Mr. Bennett called the office of Mr. Treadwell, but he was out of town. He then explained to the secretary for Mr. Treadwell the request of plaintiff that he, Mr. Bennett, had been directed to pay her the $200, and that in view of the request and his instructions he would have to do so. Plaintiff then signed the receipt and Mr. Bennett gave her the $200. Plaintiff claims she did not know her release covered the matter of attorney fees or that she had anything to do with that matter, but there is no claim here of undue influence or any misrepresentation. In fact there is no evidence of anything of that nature, and the language of the receipt seems clear and comprehensive.

[2] It is to be noted, however, that she knew there was only $125 due on the delinquent installments of alimony at that time, and she does not clearly state what she believed the remaining $75 was for. In addition to this $200 defendant orally promised that he would terminate proceedings to appeal from an order of this court, and the appeal was subsequently dismissed. Plaintiff denied any such agreement, but the evidence upon that subject is conflicting and the trial court having found in favor of defendant, its finding will not be disturbed by us.

[3] It is now urged by defendant that the release of a judgment in consideration of the payment of a part thereof is not binding, and cites among other cases, Siddall v. Clark, 89 Cal. 321, 26 P. 829. There a note was given in payment of a judgment for a larger amount and the court held that a payment of a part of the amount due upon a money judgment under an agreement that it shall operate as satisfaction in full will not discharge the judgment. Here, however, in addition to the sum of $200, was a promise by defendant to forego his right to appeal. Forbearance to sue, or the giving up of a legal right is sufficient consideration. Wells Fargo v. Enright, 127 Cal. 669, 60 P. 439, 49 L.R.A. 647.

[4] Appellant also claims the testimony of defendant as to the transaction between the parties, being directly contrary to his written statement in a letter to his former wife, cannot support a finding. However, the trial court apparently believed defendant when he testified his letter had nothing to do with the $200 settlement. In examining the letter of July 15, 1937, written about a month after the issuance of the receipt, we cannot find that it throws any light either way in interpreting the receipt. It reads: "As to the money paid you and the $150.00 note, the original agreement was that if I paid you that, you were, in consideration, to sign and to have your attorney sign a stipulation reducing the court order here to $75.00 per month. This you failed to do. However, I sent you down $200.00 when you telephoned you were in great distress, and you promised that as soon as you could you would go ahead with your end of the agreement. The only difference between my agreement with you and the one drawn up by your attorney Treadwell was the amount of money involved,—$350.00 against $500.00. * * *" Defendant testified, "It would take a lot of explaining all that letter meant. It was previously agreed that it has nothing to do with the $200.00 settlement at all."

[5, 6] It is not for this court to weigh the evidence or pass upon the credibility of the witnesses.

The order is affirmed.

I concur: THOMPSON, J.

42 Cal.App.2d 691

In re DE NEEF.

Cr. 2173.

District Court of Appeal, First District, Division 2, California.

Jan. 30, 1941.

1. Constitutional law ⇐70(3)

The privilege against testifying to communications between husband and wife is a matter of "evidence", which is a subject within province of legislature to control, and District Court of Appeal will not concern itself with reason for rule or its effect upon administration of justice. Code Civ.Proc. § 1881, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

2. Statutes ⇐190

A statute which is clear and unambiguous does not admit of judicial interpretation or construction.

3. Statutes ⇐228

Where a statute itself specifies its exceptions, other exceptions cannot be added under the guise of judicial construction.

4. Witnesses ⇐21, 192

Under statute relating to privilege against testifying to communications between husband and wife without the consent of the other, a wife suing as beneficiary of policy on life of deceased husband could not be required to answer insurer's interrogatories regarding communications made by husband to wife regarding husband's physical condition, and hence order of commitment of wife for contempt based on such refusal was void, where wife expressly refused to give her consent. Code Civ.Proc. § 1881, subd. 1.

5. Witnesses ⇐219(2)

A "waiver" by deceased husband of privilege against testifying to communications between husband and wife must have been such as would amount to consent of husband to examination of wife. Code Civ.Proc. § 1881, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

6. Estoppel ⇐53, 54

The primary essentials of a "waiver" are knowledge and intent, and before one may be deemed to have waived a right granted by statute, he must be shown to have knowledge of the right and an intent to waive or forego such right.

7. Insurance ⇐146(3)

In construing life policy, District Court of Appeal would assume that, in accord with the usual practice, application and policy were both prepared by insurer, and hence would construe application and policy strictly against the insurer.

8. Witnesses ⇐219(2, 6)

A provision in life policy application prepared by insurer, by which insured waived privilege of physician and patient, would be deemed to have intended that which was written and nothing more, and hence did not operate as a waiver of privilege against testifying to communications between husband and wife. Code Civ.Proc. § 1881, subds. 1, 4.

Proceeding in the matter of the petition of Lillian De Neef for a writ of habeas corpus to secure petitioner's release from a commitment for contempt.

Petitioner discharged and her bail exonerated.

Frank J. Perry and George Olshausen, both of San Francisco, for petitioner.

Hartley F. Peart and Sylvester J. McAtee, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The petitioner seeks her release in habeas corpus from a commitment for contempt based upon her refusal to answer certain interrogatories. Petitioner's husband took out a policy of life insurance on December 16, 1939, with the California Western States Life Insurance Company. He died on February 15, 1940, and petitioner sued the company as beneficiary of the policy. The company answered setting up the defense that the policy had been secured by fraudulent representations as to the physical condition of the insured. In taking the deposition of the petitioner, questions were asked regarding communications made by deceased to the petitioner regarding the physical condition of the insured. Her refusal to answer the questions was based upon the provisions of subdivision one of section 1881 of the Code of Civil Procedure. Other objections to the questions—that they called for hearsay, and were incompetent,

irrelevant, and immaterial—need not be discussed as the case is closed by the code section.

The first subdivision of this section reads: "A husband can not be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, or for a crime committed against another person by a husband or wife while engaged in committing and connected with the commission of a crime by one against the other; or in an action for damages against another person for adultery committed by either husband or wife." The petitioner correctly directs attention to the fact that two distinct privileges are granted by the section—(a) the privilege making husband or wife incompetent as a witness in an action for or against the other; (b) the privilege against testifying to communications between husband and wife. The distinction is an important one. We are here concerned with the second privilege only. For that reason we will not discuss the many decisions or the observations of text writers which relate to the first privilege mentioned.

[1-4] The privilege relating to testimony disclosing confidential communications between husband and wife is like that stated in the other subdivisions of section 1881 relating to attorney and client, physician and patient, and a clergyman and one making a confession. We are not concerned with the reason for the rule or its effect upon the administration of justice. It is purely a matter of evidence which is a subject within the province of the legislature to control. The legislature has declared that neither husband nor wife can be "examined as to any communication made by one to the other during the marriage" without the consent of the other. It has also made certain specified exceptions to the rule none of which is applicable here. Thus we are confronted with two well known rules of statutory construction—that when the language of a statute is clear and unambiguous it does not permit judicial interpretation or construction; and that, when the statute itself specifies its exceptions, no other may be added under the guise of judicial construction. With the husband not able to give his consent to the disclosure of these communications, and the wife expressly refusing to give hers, the inhibitions of the statute that the wife cannot be examined regarding these communications effectively bar the examination and it makes little difference whether we call it a matter of privilege or incompetent testimony.

[5-8] To avoid the operation of the section the respondent argues that the privilege was waived. If this is so the waiver must have been such as would amount to the consent of the husband to the examination of petitioner. But since the husband is dead and unable to give his consent, the respondent argues that he must be deemed to have consented at the time of the execution of the policy. There are two answers to the argument. First, primary essentials of a waiver are knowledge and intent. Before one may be deemed to have waived a right granted by statute he must be shown to have knowledge of the right and an intent to waive or forego it. There is nothing in the conduct of the deceased which would support an inference that he had either knowledge of the right or an intention to waive it. The only reasonable inference is to the contrary because of what follows. Second. When the policy was executed the insurer required the insured to sign as a part of his application an express waiver reading: "I expressly consent, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, or in the proceeds thereof, that any physician may disclose to California-Western States Life Insurance Company, its successors or assigns, any facts, information or knowledge, heretofore, or hereafter communicated to or acquired by him as my physician for any purpose, and I expressly waive any and all privilege or provision of law which now or may hereafter exist, either exempting or prohibiting any physician from disclosing any such facts, information or knowledge so communicated to or acquired by him in his professional capacity as my physician, or rendering such physician incompetent as a witness in any court of law or equity. The word 'physician' as used herein shall be construed to include 'practitioner' of every character." We may assume that, in accord with the usual practice, the application and the policy were both prepared by the insurer, and so they must be construed strictly against the company. It is manifest that

this express waiver relating to subdivision four of section 1881 was not intended, by either insurer, or insured, to cover the provisions of subdivision one of that section. Having prepared the application and the policy, and having required a waiver of the privilege of physician and patient, the insurer must be deemed to have intended that which was written and nothing more.

Since the statute expressly declares that one spouse may not be examined under these circumstances the order of commitment was void.

The petitioner is discharged and her bail is exonerated.

We concur: STURTEVANT, J.; SPENCE, J.



42 Cal.App.2d 678

VICKERSON v. WEHR.

Civ. 11471.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1941.

1. Executors and administrators ⇐436

The proper county in which to institute an action on rejected claim against a decedent's estate is the county in which the executor or administrator resides, regardless of where the estate is pending settlement or where decedent might have been sued. Code Civ.Proc. § 395.

2. Venue ⇐40

The statutory rule that the county in which defendants or some of them reside at commencement of action is proper county for trial of action is not absolute, and a party who is substituted involuntarily as sole defendant or comes in as a real party in interest may apply for change of venue. Code Civ.Proc. § 395.

3. Venue ⇐40

Where action on claim against decedent's estate was brought in county of administrator's residence and subsequently the administrator resigned and his letters were revoked, and special administratrix who resided in another county was appointed, and upon her motion she was substituted as sole defendant, administratrix was not entitled to a change of venue to county of her residence. Code Civ.Proc. § 395.

4. Executors and administrators ⇐453(2)

In action on rejected claim against estate of decedent, any judgment which might be obtained could go no further than to direct that the claim be paid in the course of administration out of the assets of the estate and no judgment in personam could be rendered against the defendant representative of the estate. Probate Code, § 730.

5. Venue ⇐40

Where action was brought on rejected claim against estate, against administrator in county of his residence, and upon resignation of administrator special administratrix who resided in another county was appointed and was substituted as defendant, the decedent's estate was the "real party in interest," and administratrix was not entitled to change of venue to county of her residence on ground that she came into the action as the real party in interest. Probate Code, § 730; Code Civ.Proc. § 395.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

6. Venue ⇐21

The general spirit and policy of statute providing that the county in which defendants or some of them reside at commencement of action is proper county for trial of action is to give defendant right of having all personal actions tried in the county of his residence. Code Civ.Proc. § 395.

7. Venue ⇐21

Where action on rejected claim against decedent's estate was properly brought in county in which administrator resided at time of commencement of action, such county was the proper county for trial of the action, subject to power of court to transfer cause as provided by statute, even though administrator resigned and special administratrix who resided in another county was appointed and on her motion was substituted as defendant. Code Civ.Proc. § 395.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Julia Vickerson against A. Terkel, as administrator with the will annexed of the estate of Charles D. Wehr, deceased, on a rejected claim for money which plaintiff allegedly furnished and loaned to decedent during the two years preceding his death. Subsequently, the administrator resigned and his letters were revoked, and Alicia Wehr was appointed special administratrix and on her motion was substituted as defendant. From an order granting motion of Alicia Wehr for change of venue, the plaintiff appeals.

Reversed.

Leo R. Friedman, of San Francisco, for appellant.

Clark & Heafey, of Oakland, for respondent.

KNIGHT, Justice.

This is an appeal from an order granting respondent's motion for a change of venue. The question involved concerns the right of a party substituted as sole defendant to a change of place of trial upon the ground of residence.

The action was filed in the superior court in and for the city and county of San Francisco by the appellant, Julia Vickerson, against A. Terkel, as administrator with the will annexed of the estate of Charles D. Wehr, deceased, on a rejected claim for money which appellant alleges she furnished and loaned to the decedent at various times during the two years preceding his death. The decedent was a resident of Alameda county, and his estate is pending settlement therein; but Terkel at all times mentioned in the complaint and at the time of the filing thereof was a resident of San Francisco; and summons was served on him therein on January 15, 1940. By written stipulation his time to appear in the action was extended to February 25, 1940; but prior to the expiration of the extended time and without having appeared in the action, to-wit, on February 15, 1940, he resigned as such administrator and his letters were revoked; whereupon and on the same day the respondent, Alicia Wehr, widow of the decedent and a resident of Alameda county, was appointed special administratrix with full power of a general administrator. Thereafter and on February 21, 1940, pursuant to a motion made by her in that behalf and after notice to appellant, the court in which the action was pending made an order substituting respondent as sole defendant in the place and stead of Terkel; and two days later she filed notice of motion, supported by the necessary demand and affidavit, for change of venue to the county of Alameda. The grounds of the motion were: "That at the time of the commencement of this action defendant was, and since that time has continued to be and still is, a resident of the County of Alameda, State of California, and that said Superior Court in and for the County of Alameda, State of California, is the proper court for the trial of the above entitled cause." The motion was contested by appellant, and after a hearing the same was granted.

[1] In some states the venue of actions against executors and administrators is specially declared to be where it would have been necessary to sue the deceased, but in this state it has been definitely held, in conformity with the common-law rule, that the proper county in which to institute an action on a rejected claim is in the county in which the executor or administrator resides, regardless of where the estate is pending settlement or where the decedent might have been sued. (Thompson v. Wood, 115 Cal. 301, 47 P. 50; Chiapella v. County National Bank, 217 Cal. 503, 19 P.2d 983); and section 395 of the Code of Civil Procedure declares in part that except as noted therein "and subject to the power of the court to transfer actions or proceedings as provided in this title [Title 4, Part 2, Code Civ.Proc.], the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action".

[2] It is appellant's contention that the wording of the foregoing Code provision is plain, explicit, and unambiguous; and that since it is expressly declared therein that the county in which the defendant resides at the commencement of the action is the proper county for the trial of the action, the trial court's ruling granting the change clearly contravenes the mandate of the statute. Appellant concedes, however, that the statutory rule embodied in said section is not absolute, nor in all cases controlling as against a party substituted as sole defendant; that two of the well organized exceptions thereto are where a party "is substituted involuntarily as sole defendant, or * * * comes in as the real party in interest", and that under those circumstances he may apply for a change of venue. 67 Cor.Jur., p. 140. The case at

Howell v. Stetefeldt Furnace Co., 69 Cal. 153, 10 P. 390, has been cited by both sides as showing that such is the rule in this state.

[3] There is, however, a sharp disagreement between the parties as to whether the present case falls within either of the exceptions noted. Respondent argues that it is in all material respects similar to Howell v. Stetefeldt Furnace Co., supra, and that therefore the decision therein is here controlling. A comparison of the cases demonstrates, however, that they are essentially different. In that case the furnace company, whose place of business was in San Francisco, was in possession of a certain sum of money which was claimed respectively by John Howell, a resident of Santa Clara county, and James Thompson, a resident of San Francisco; and Howell brought suit in Santa Clara county against the furnace company to recover the money. The furnace company made no defense, but pursuant to the provisions of section 386 of the Code of Civil Procedure and after notice to Howell and Thompson, paid the money into court, obtained an order substituting Thompson in its place as party defendant, and ceased to have any further connection with the action. Thereupon Thompson filed a demand for a change of venue to San Francisco, where he resided; and the motion was denied. He appealed, and the order was reversed, the ground of the reversal being that he was brought into the action in invitum under section 386; that he had not come in as a voluntary intervenor; that the appearance of the corporation was not his appearance, and that not until he became a party to the action did he have the opportunity nor was he entitled to move for a change of venue. In the present case respondent was not brought in as an interpleader under the provisions of said section 386, nor as the result of any move whatever on the part of the appellant. She came in voluntarily. At her request she was appointed special administratrix, and upon her motion she was substituted as sole defendant. Respondent points out that having been appointed special administratrix with full power of a general administrator, it was her legal duty to defend the action, and that if she had not obtained the order of substitution it would have been necessary for appellant to have done so, before proceeding with the case. Conceding that to be true, the undisputed facts show, nevertheless, that she came into the action voluntarily. Whether a different conclusion would be reached if the order of substitution had been obtained by appellant rather than by respondent involves a situation not here present; consequently whatever might be said in this regard would amount to nothing more than dictum.

[4, 5] Nor can it be successfully maintained that respondent came into the case as the real party in interest, for the reason that the action does not involve any personal liability of the party sued. The relief is sought against the decedent's estate; and any judgment which appellant might obtain as the result of the action can go no further than to direct that the claim be paid in the course of administration, out of the assets of the estate, Prob. Code, sec. 730; no judgment can be rendered against the representative in personam. 11B Cal.Jur. p. 342. It follows, therefore, that since from the beginning the estate and not the legal representative has been the real party in interest, no new or different interest was brought into the case by respondent's substitution.

In further support of the order of transfer respondent relies on certain language used in deciding the cases of McClung v. Watt, 190 Cal. 155, 211 P. 17; Kallen v. Serretto, 126 Cal.App. 548, 14 P.2d 917; and Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381, to the effect that the right of a moving party to a change of venue to the place of his residence is to be determined by the condition of things existing at the time the moving party first appeared in the action, as those conditions are revealed by the pleadings at the time the demand for change of venue is made. In this connection respondent contends that upon the revocation of Terkel's letters of administration he ceased to be a party to the action as absolutely as if he had died (More v. More, 127 Cal. 460, 59 P. 823), and that since his relation to the case terminated and she was substituted before he appeared in the case, she was entitled as a matter of right to have the place of trial of the action removed to the county of her residence. An examination of the three cases respondent relies upon discloses, however, that in none of them was the court, as here, dealing with the situation of a substituted defendant, and it is apparent that the language there employed has no application to such a case. To be more spe-

cific, in McClung v. Watt, supra, the action was filed in San Francisco against a corporate defendant and the appellant Watt. The corporation maintained its place of business in San Francisco; but Watt was a resident of Sacramento, and he moved for a change of place of trial to Sacramento county on two grounds: that he was a resident of that county, and that the corporation was joined as a party defendant solely for the purpose of having the action tried in San Francisco. The motion was denied, and in affirming the order the court stated that a motion for a change of place of trial to the county of the party's residence must be made by the moving party and determined by the court in advance of any other judicial action in the case; hence that the right to a change of place of trial to the residence of the defendant must necessarily be determined by the status of the parties joined as defendants in the action as revealed by the pleadings existing at the time the party claiming the right first appeared in the action. The court then went on to hold that the complaint therein, in apparent good faith, attempted to state a cause of action against the parties so joined as defendants, and that therefore the moving defendant had not the right to have the place of trial changed to the county of his residence. Obviously, in so holding there was no intention to deviate from the statutory rule embodied in said section 395, because, referring especially thereto the court said [190 Cal. 155, 211 P. 19]: "Section 395 of the Code of Civil Procedure, under which defendant here claims the right to have the action transferred, provides that 'the action must be tried in the county in which the defendants, or some of them reside.' If under this section an action is commenced in the county of the residence of one of the defendants, another defendant resident of a different county does not have the right to have the action changed to the county of his residence, and this is so even though it may happen that all of the defendants join in the demand." In the second case, Kallen v. Serretto, supra, an action for damages growing out of an automobile collision was instituted in San Francisco wherein the appellants Serretto and two fictitious persons were joined as parties defendant. The accident happened in San Mateo county, and the Serrettos were residents thereof. They filed a demand and motion for change of venue to that county, and thereafter the plaintiff was permitted to file an amended complaint wherein she changed the allegations relating to the operation of defendants' car and in an affidavit filed in opposition to appellants' motion averred that "First Doe" was one Irani, a resident of San Francisco. Apparently, so the decision states, Irani was never substituted as a party defendant. The trial court denied appellants' motion, and on appeal the order was reversed, mainly on the authority of McClung v. Watt, supra, the court holding in conformity therewith that the right of a moving party to a change depended upon the conditions existing at the time the demand was made, as those conditions were then revealed by the pleadings. In the third case, Ah Fong v. Sternes, supra, an action for damages was filed in Nevada county against a resident of Sutter county, who moved for a change of venue on the ground of residence, and the motion was denied. On appeal the court pointed out that if the action were to be regarded as one for false imprisonment, appellant was entitled to a change of venue; and that if it were to be regarded as one for the recovery of a penalty under section 1505 of the Penal Code, for having disobeyed a writ of habeas corpus, appellant was not entitled to a change of venue. With respect to that matter the court said that it believed the complaint stated a good cause of action for false imprisonment, and that it doubted whether it stated a cause of action for a penalty under section 1505 of the Penal Code. It was held, however, that the plaintiff in thus framing the complaint with the double aspect could not deprive the defendant of his right to have the cause tried in the county of his residence; and furthermore that for the reasons set forth in the opinion the result would be the same even though the complaint be regarded as stating two causes of action upon one of which the defendant was entitled to a change of venue, and not upon the other. It will be seen, therefore, that in each of the foregoing cases the factual situation was entirely different from the one here presented, and that the language there used has no application to a case involving the status of a substituted defendant.

[6, 7] Finally, in support of the order appealed from, respondent cites and quotes from the cases of Smith v. Smith, 88 Cal.

572, 26 P. 356, and Brown v. Happy Valley Fruit Growers, Inc., 206 Cal. 515, 274 P. 977, to the effect that the general spirit and policy of said section 395 is to give a defendant the right of having all personal actions tried in the county of his residence, and that such right has always been safeguarded by a long line of judicial decisions. The soundness of that doctrine is, of course, not questioned; and beyond doubt it is applicable in cases such as the two cited, wherein a personal judgment was sought against a sole defendant who had been sued in a county other than the one in which he resided. Here it is conceded that the action was properly brought in the county in which the sole defendant resided at the time of the commencement of the action; therefore, by virtue of the express provisions of said section 395, such is the proper county for the trial thereof, subject, of course, to the power of the court to transfer the same as provided in title 4, part 2 of said code.

It follows that since no legal ground has been shown upon which the order appealed from may be sustained, it must be reversed; and it is so ordered.

We concur: PETERS, P. J.; WARD, J.



42 Cal.App.2d 701

SEBERN v. CITY OF RIVERSIDE.

Civ. 2489.

District Court of Appeal, Fourth District, California.

Jan. 30, 1941.

1. **Municipal corporations** ⇐819(1)

Evidence, including photographs, supported finding that metal flange of a drainpipe which protruded about half an inch through the pavement within a crosswalk constituted a "dangerous condition" which was hazardous to pedestrians, so as to authorize pedestrian to recover against city for injuries sustained when she fell as result of catching heel of her shoe on the flange.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Condition".

2. **Municipal corporations** ⇐819(6)

Evidence that metal flange of a drainpipe had protruded about half an inch through pavement within a crosswalk for a number of years, and that condition disclosed a conspicuously dangerous situation, justified finding that municipality had such "constructive notice" of defect as would permit pedestrian to recover for injuries sustained therefrom.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

3. **Municipal corporations** ⇐819(6)

Evidence that the protruding of a metal flange of a drainpipe about a half an inch through the pavement within a crosswalk was the result of defective design or construction established that municipality had such actual notice of defect as would permit pedestrian to recover for injuries sustained therefrom.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Eleanor M. Sebern against the City of Riverside for personal injuries sustained by plaintiff when she fell while walking across street at a crosswalk in defendant city. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Eugene Best, City Attorney, of Riverside, for appellant.

Thos. L. Clay, of Riverside, for respondent.

BARNARD, Presiding Justice.

In this action for personal injuries the plaintiff recovered a judgment for $482, and the defendant has appealed.

The accident happened at the intersection of Magnolia Avenue and Fairfax Avenue in the defendant city. Magnolia Avenue runs north and south and Fairfax Avenue east and west. On the occasion in question the respondent, while proceeding north on the easterly sidewalk of Magnolia Avenue, walked across Fairfax Avenue at the crosswalk and caught the heel of her shoe on the metal flange of a drainpipe which protruded through the pavement,

within the crosswalk and near the north curb of Fairfax Avenue. A fall resulted, which caused the injuries in question.

This drainpipe extended north and south across Fairfax Avenue along what may be called the easterly line of the crosswalk. The pipe was about thirteen inches in diameter and about one-third of it was within this crosswalk or within the extended easterly line of the concrete sidewalk paralleling Magnolia Avenue. The northerly end of the pipe was about a foot south of the northerly curb of Fairfax Avenue and the top of the pipe was about level with the curb, leaving a gutter between the two which was about eight inches deep. Most of the pipe was under the pavement but at its northerly end an edge or flange protruded about half an inch through the paving material. This, of course, was at the edge of the gutter.

[1] The appellant first contends that the court's finding to the effect that the end of this pipe constituted a dangerous condition which was hazardous to pedestrians is not supported by the evidence. In addition to the oral testimony as to the situation at this place and what occurred on this occasion, a plan prepared by the city engineer, showing the construction of this drainpipe in connection with the surrounding street, curb and sidewalk, was introduced in evidence, together with a number of photographs showing the conditions at that point. These photographs alone amply justify the inference that the north end of this drainpipe and its flange constituted an extremely dangerous hazard for pedestrians. Moreover, the pictures rather clearly indicate that while this danger was obvious from certain viewpoints it would be almost entirely concealed from the view of one approaching from the south, which is what the respondent was doing. Coming from that direction the general situation would be much less visible, and the thin layer of paving material on the north end of the pipe, being of the same color as the rest of the street, would naturally make the protruding flange less visible. The evidence supports the court's finding in this regard.

[2, 3] The only other point raised is that a finding to the effect that the appellant had knowledge of this dangerous condition is unsupported. There is evidence that this condition had existed for a number of years. The photographs in evidence disclose such a conspicuously dangerous situation that the court would be justified in finding that the city had constructive notice under the rules discussed in Nicholson v. Los Angeles, 5 Cal.2d 361, 54 P.2d 725. Moreover, the evidence justifies the inference that this dangerous condition was the result of defective design or construction, of which the city must be held to have had actual notice. Durante v. City of Oakland, 19 Cal.App.2d 543, 65 P.2d 1326; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



42 Cal.App.2d 629

In re EWING'S ESTATE.

BROWN v. FORD.

Civ. 12827.

District Court of Appeal, Second District, Division 2, California.

Jan. 27, 1941.

1. Guardian and ward ⇐58

In guardianship matters, it is not necessary in all cases to procure a court order before an expenditure may be made.

2. Guardian and ward ⇐58

If expenditures made by guardian were just and equitable they should be allowed, notwithstanding guardian failed to obtain an order from the court in advance.

3. Guardian and ward ⇐58

In passing upon expenditures of guardian shown in guardian's account, much discretion must be reposed in trial judge.

4. Insane persons ⇐65

Where court authorized guardian to expend $80 per month for support and maintenance of incompetent, and an additional $20 for a boy to act as incompetent's companion, and court later authorized guardian to expend $125 per month for room, board and care of the incompetent, court acted within its discretion in approving additional ex-

penditure of $1,108.04 made for personal needs of the incompetent such as clothing, laundry, auto rides, and barber expenses.

5. Insane persons ⇐42(2)

The burden of proof was on party excepting to guardian's account to establish that incompetent possessed jewelry which should have been included in inventory.

6. Insane persons ⇐42(2)

Where party excepting to a guardian's account did not present proof that incompetent possessed jewelry which should have been included in inventory, court properly made finding that it was not true that incompetent at time of appointment of guardian was possessed of considerable quantity of, or any, jewelry.

7. Guardian and ward ⇐154

Failure of guardian to present vouchers for some of items of expenditure in excess of $20 did not preclude approval of guardianship account. Probate Code, § 1534.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Proceedings in the matter of the estate of Alexander C. Ewing, an incompetent, wherein Nettie Ford was appointed guardian of the person and estate of Alexander C. Ewing. Howard C. Brown filed exceptions to the account filed by Nettie Ford, and from an order approving the account, Howard C. Brown appeals.

Affirmed.

Harmel L. Pratt, of Los Angeles, for appellant.

Ralph J. Brown, of Los Angeles, for respondent.

WOOD, Justice.

The respondent, Nettie Ford, was appointed guardian of the person and estate of Alexander C. Ewing, and letters of guardianship were issued to her on August 14, 1935. She filed her verified account current on December 30, 1938. Exceptions to the account were filed by appellant, and thereafter a hearing was held by the court and the account was approved except as hereinafter noted. The appeal is from the order approving the account.

Soon after the guardian was appointed, the court, at her request, made an order authorizing her to expend the sum of $80 per month for the support and maintenance of the incompetent and an additional sum of $20 per month for a boy to act as his companion. Later the court made an order authorizing the guardian to expend the sum of $125 per month for the room, board and care of the incompetent. In her account the guardian claimed credit for the sum of $1,159.39, in addition to the monthly allowance which had been allowed for room, board and care. This sum had been advanced by the guardian for the personal needs of the incompetent, such as clothing, laundry, auto rides and barber expenses. The court approved the additional expenditures except that they were reduced to the sum of $1,108.04. Appellant contends that the court erred in approving the expenditure of the last-mentioned sum, asserting that it should have been included in the allowance which the court had authorized by previous order. We are satisfied that the court acted within the bounds of its legal discretion in approving the additional expenditures.

[1-4] In guardianship matters it is not necessary in all cases to procure a court order before an expenditure may be made. If the expenditures by the guardian were just and equitable they should be allowed, notwithstanding the guardian failed to obtain an order from the court in advance. Estate of Clanton, 171 Cal. 381, 153 P. 459. In passing upon expenditures of guardians shown in their accounts much discretion must necessarily be reposed in the trial judge. We find nothing in the record to justify disturbing the action taken by the court.

[5, 6] The trial court found that "it is not true that said incompetent at the time of the appointment of said guardian was possessed of a considerable quantity of, or any, jewelry". In attacking this finding appellant asserts that it is not supported by the evidence. The burden of proof was upon appellant to establish that the incompetent possessed jewelry which should have been included in the inventory. Estate of Vance, 141 Cal. 624, 75 P. 323. Since appellant did not present such proof the court properly made the finding in question.

[7] Complaint is made that the guardian did not present vouchers for some of the items in excess of $20 in the account of the additional expenditures above referred to. The omission to present these vouchers does not call for the reversal of the order. The point in question was before the court

for consideration in Re Estate of Forthmann, 118 Cal.App. 332, 5 P.2d 472, 473, and it was there held that the presentation of vouchers was not necessary for the approval of a guardianship account. In that case the Code section involved was section 1789 of the Code of Civil Procedure, which provided that "all the proceedings by guardians concerning sales of property of their wards * * * accounting and settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter. * * *" The nearest counterpart to section 1789 of the Code of Civil Procedure is section 1534 of the Probate Code. It is to be noted that the words "accounting and settlement of accounts" were omitted when section 1534 of the Probate Code was adopted. We find no requirement for the presentation of vouchers by guardians in the provisions of the Probate Code or under the Code sections in force before its adoption.

The order is affirmed.

We concur: MOORE, P. J.; McCOMB, J.



42 Cal.App.2d 655

JANOFSKY et al. v. GARLAND.
Civ. 12514.

District Court of Appeal, Second District, Division 2, California.
Jan. 28, 1941.

Rehearing Denied Feb. 20, 1941.
Hearing Denied March 28, 1941.

1. Landlord and tenant ⇐164(3)

Landlord who voluntarily made repairs was within the general rule that a volunteer may not do in a negligent manner what he undertakes to do.

2. Landlord and tenant ⇐164(3)

A landlord is liable in damages if he fails to exercise reasonable care in making repairs, whether they be made by agreement or voluntarily.

3. Landlord and tenant ⇐164(3)

Landlord who negligently made voluntary repairs was liable to tenants for injuries resulting therefrom without proof that landlord thereby rendered a defective condition more dangerous.

4. Courts ⇐89

The rules announced in the Restatement of the Law do not have the force of statutory enactment nor do they supersede judicial decisions.

5. Landlord and tenant ⇐169(3)

Allegations that landlord replaced old plaster in ceiling with new, that he informed tenants that room was safe, that room looked safe to tenants who relied upon appearance and landlord's statement, but that work had been negligently done and that plaster subsequently fell upon tenants were sufficient to bring tenants within the rule that a landlord who makes repairs and gives premises a deceptive appearance of safety and leads tenant to use premises in a way which but for the repairs tenant would recognize to be dangerous, the landlord is liable for resulting injuries.

6. Landlord and tenant ⇐118(2), 164(3)

Landlord who negligently made repairs of premises let for an indefinite period could not avoid liability for injuries to tenants on ground that there was a monthly re-entry and re-letting, since the tenancy was a "continuing tenancy", and repairs made by landlord were made during such tenancy.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Tenancy".

7. Landlord and tenant ⇐169(3)

Complaint showing that landlord voluntarily replaced old plaster in ceiling with new, that he informed tenants that room was safe, that room looked safe to tenants who relied upon appearance and landlord's statement, but that work had been negligently done and that plaster subsequently fell upon and injured tenants was good as against contention that it failed to allege proximate cause and that allegations were not sufficiently certain.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by David Janofsky and another against William M. Garland, etc., to recover damages for injuries resulting from falling plaster. From a judgment for defendant, plaintiffs appeal.

Reversed with directions.

Mark F. Jones, by Sydney Tannen, both of Los Angeles, (Walter L. Engelhardt, and Edward I. Harris, both of Los Angeles, of counsel), for appellants.

Clyde C. Shoemaker, of Los Angeles, (William J. Currer, Jr., of Los Angeles, of counsel), for respondent.

WOOD, Justice.

Plaintiffs commenced this action to recover damages for injuries which they suffered when they were struck by plaster falling from a ceiling in their bedroom. The trial court sustained a demurrer to their third amended complaint without leave to amend and they have appealed from the judgment of dismissal.

It appears from the allegations of the complaint that plaintiffs on February 1, 1936, rented from defendant a part of a four-family flat building located at 946 North Western Avenue in Los Angeles at an agreed rental to be paid monthly. The agreement was oral and for an indefinite period. Thereafter plaintiffs occupied the premises continuously up to March 1, 1939. It further appears that during the occupancy of the premises by plaintiffs and within two years from the date of the commencement of the action on February 19, 1939, defendant inspected the ceiling in the bedroom of the premises rented to plaintiffs and found that the plaster of the ceiling was "cracked and bulged". Defendant removed the defective plaster, causing holes in the ceiling to be produced in several places, one of which was directly above the bed of plaintiffs. Defendants caused the defective holes to be repaired by replastering and "causing the said ceiling and room to appear safe for plaintiffs to sleep in and * * * informed plaintiffs that it was safe for plaintiffs to sleep in the said bedroom * * * plaintiffs looked at the said replastered portions of the ceiling and observed them to be safe, and relying thereon, as well as on the statement of defendant's agents and servants, that the said bedroom was safe to sleep in, as aforesaid, that plaintiffs thereafter continuously occupied the said room as a bedroom". It is further alleged that the replastering was done negligently and with a faulty mixture. While plaintiffs were asleep in their bed on February 1, 1939, a portion of the replastered part of the ceiling became loose and suddenly fell upon plaintiffs, causing the injuries for which damages are sought.

[1, 2] Although no duty rested upon defendant to make the repairs referred to in the complaint, yet, having volunteered to do so defendant was brought within the general rule that a volunteer may not do what he undertakes to do in a negligent manner. There appears to be some conflict in the authorities but the rule is established in California that a landlord is liable in damages if he fails to exercise reasonable care in making repairs whether they be made by agreement or voluntarily. In Nelson v. Myers, 94 Cal.App. 66, 270 P. 719, 723, it is said: "It is true that a landlord who voluntarily attempts to repair defective premises, whether he has contracted to do so or not, will be required by law to exercise reasonable care therein, and will become liable for injuries caused by his careless or unskillful workmanship." In Callahan v. Loughran, 102 Cal. 476, at page 481, 36 P. 835, at page 836, it is said that "when the landlord undertook to make the repairs, whether pursuant to a contract, or an obligation imposed by statute, or as a volunteer, he was in duty bound to use ordinary care in the conduct of the work".

[3] Defendant contends that plaintiffs may not recover unless it be established that defendant made a defective condition more dangerous. We find no ruling so holding in the California decisions. A similar contention was discussed by Mr. Justice Cardozo in Marks v. Nambil Realty Co., 245 N.Y. 256, 157 N.E. 129. In that case the landlord "made a bungling job" of repairing a defective stairway. The court held that there was no duty on the part of the landlord to make the repairs but also held: "The landlord, though a volunteer in making the repairs, is liable, none the less, for negligence in making them. * * * The distinction in such cases is the old one between nonfeasance and misfeasance." Concerning the argument that it must be shown that a defective condition was made more dangerous the court said: "We recall these familiar principles because they seem to have been overlooked in cases in the Appellate Division relied on by the defendant here. Marston v. Frisbie, 168 App. Div. 666, 154 N.Y.S. 367; Wynne v. Haight, 27 App.Div. 7, 50 N.Y.S. 187. There is a suggestion, if not a ruling, in these cases, that to make the landlord liable, the negligent repairs must have aggravated the defect, so that what was dangerous before became more dangerous than ever. We cannot yield assent to this restriction of the

field of duty. The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right. * * *" Defendant contends that this case was overruled by the later case of Kirshenbaum v. General Outdoor Adv. Co., 258 N.Y. 489, 180 N.E. 245, 84 A.L.R. 645, but we find nothing in the later case which is contrary to the doctrine of the earlier case. Indeed, a quotation from the earlier case is made with approval in the later case.

[4, 5] Defendant places reliance upon a rule set forth in Restatement of the Law, 2 Torts § 362, which is as follows: "A lessor of land who, by purporting to make repairs thereon while the land is in the possession of his lessee or by the negligent manner in which he has made such repairs has, as the lessee neither knows nor should know, made the land more dangerous for use, is subject to liability for bodily harm caused thereby to the lessee and others upon the land with the consent of the lessee or a sub-lessee." Immediately following this rule appears the following Comment: "The rule stated in this section applies if the negligent manner in which the repairs are made makes the land more dangerous for use, irrespective of whether the added danger is due to the fact that the physical condition of land is changed for the worse by the repairs or to the fact that the making of the repairs gives it a deceptive appearance of safety and so leads the tenant or others with his consent to use the land in a way which but for the repairs they would recognize to be dangerous." The rules announced in the Restatement of the Law do not have the force of statutory enactment nor do they supersede judicial decisions. Kolburn v. P. J. Walker Co., 38 Cal.App.2d 545, 101 P.2d 747. Where as here decisions of the highest tribunal of the state have enunciated the rule applicable to a given set of facts such rule should be followed by the courts of the state and not be disregarded in favor of a rule set forth in the Restatement. Moreover, even if the rule of the Restatement should be followed it does not bar recovery by plaintiffs in the present litigation. The statement is made in the rule that a lessor is liable if he does in fact make the premises more dangerous for use but the rule does not definitely provide that a volunteer landlord who negligently makes repairs is not liable. If we turn to the "Comment" in the Restatement which is above quoted we find that the rule stated in § 362 is applicable if the landlord makes repairs and the making of the repairs gives the premises a deceptive appearance of safety and so leads the tenant to use the premises in a way which but for the repairs he would recognize to be dangerous. Plaintiffs properly contend that the allegations of the complaint are sufficient to bring them within the rule as set forth in the Comment of the Restatement.

[6] Defendant cites the rule that a landlord is not liable for the defective condition of leased property unless there was a latent defect known to the landlord and not known to the tenant and from this basis argues that at the beginning of each month there was a renewal of the lease and a reentry by the tenant. The same argument was presented in Ward v. Hinkleman, 37 Wash. 375, 79 P. 956, 958, and the court there said that the "legal fiction that there is a re-entry and a reletting at the beginning of every month is too refined to meet our approval". We heartily agree with the conclusion reached by the Washington tribunal. The tenancy of plaintiffs was a continuing tenancy. They became tenants of the property long before the repairs on the ceiling were made and remained continuously until after the falling of the defective plaster which during the tenancy had been repaired by defendant.

[7] Other attacks made by defendant upon the complaint, such as the charge that plaintiffs failed to allege the proximate cause of their injuries and to make their allegations sufficiently certain, are not of sufficient importance to merit discussion.

The judgment is reversed and the superior court is directed to overrule the demurrer.

We concur: MOORE, P. J.; McCOMB, J.

GENUSER v. OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED.

Civ. 11556.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1941.

Hearing Denied March 28, 1941.

1. Reformation of Instruments ⇐36(3)

An amended complaint alleging that insured and insurer agreed to have automobile policy describe 1934 automobile rather than 1933 automobile, and that through insured's mistake, which was known to insurer, the policy issued described the 1933 automobile instead of the 1934 automobile, stated cause of action for reformation of policy. Civ.Code, § 3399.

2. Appeal and error ⇐863

On appeal from judgment for defendant after trial court sustained demurrer to amended complaint, District Court of Appeal was not concerned with any possible difficulties which might arise in the proof of allegations in amended complaint, or with possible difficulties which might arise in decision of incidental legal questions, but inquiry was confined to a consideration of whether amended complaint stated sufficient facts with sufficient certainty to entitle plaintiff to have the demurrer overruled and to have the cause proceed to trial.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Frank S. Genuser against the Ocean Accident & Guaranty Corporation, Limited, for reformation of a policy of insurance. From a judgment for the defendant after a demurrer to the amended complaint had been sustained, the plaintiff appeals.

Reversed, with instructions to overrule the demurrer.

Hibbard & Kleindienst and Jack H. Faucett, all of Los Angeles, for appellant.

George H. Moore and Hugh B. Rotchford, both of Los Angeles, for respondent.

Hearing denied; SPENCE, Justice pro tem., took no part in the consideration or decision of this matter.

SPENCE, Justice.

Plaintiff sued for reformation of a policy of insurance. The trial court sustained a demurrer to plaintiff's amended complaint and thereafter entered judgment in favor of defendant. Plaintiff appeals from said judgment.

On November 6, 1937, defendant issued a policy of automobile insurance to plaintiff describing the automobile therein as a 1933 Ford automobile coupe bearing motor number 18-447073. Plaintiff sought by this action to have said policy reformed upon the ground of mistake claiming that said automobile should have been described in the policy as a 1934 de luxe Ford coupe bearing motor number 18-075524.

Section 3399 of the civil code provides, "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention * * *."

Plaintiff alleged numerous facts purporting to show how the mistake occurred and further alleged as follows:

"That it was the intention of the plaintiff and defendant, the Ocean Accident and Guarantee Corporation, Limited, to insure the plaintiff from liability caused by accident, as aforesaid, arising out of the use, ownership and maintenance of an automobile owned by plaintiff and in which he had an insurable interest, to wit, a 1934 de luxe Ford coupe, motor number 18-075524, and not to insure the plaintiff from liability in connection with the use, ownership and maintenance of any automobile not owned or operated by him or in which or the use of which he had no insurable interest. That through the mistake of plaintiff, known to defendant, a policy of insurance was issued upon an automobile which the plaintiff did not own or was not operating or in which he had no insurable interest. That each of plaintiff and said defendant, the Ocean Accident and Guarantee Corporation, Limited, intended and agreed that the legal consequences of their acts should be the indemnification of plaintiff against loss and damage from bodily injury and injury to or destruction of property caused by accident in the amounts hereinabove specified, arising out of the ownership, maintenance or use of an automobile which plaintiff then owned, to wit, a de luxe Ford coupe automobile, year model 1934, engine number 18-705524."

[1, 2] The demurrer of defendant was both general and special and it was apparently directed largely at certain allegations of the complaint other than those above quoted. Said demurrer was directed particularly at those allegations of the complaint relating to the dealings of plaintiff with Widenham Company when ordering the insurance and at those allegations relating to the relationship of said Widenham Company to the parties. The first two headings of defendant's brief read "Widenham Company was not the agent of defendant" and "Widenham Company was the agent of appellant". The complaint alleged otherwise. The third heading in defendant's brief is directed to the point that the knowledge of a mere soliciting agent is not the knowledge of the insurance company. While there appears to be some dispute between the parties as to the exact nature of the agency, if any, and as to the question of whether the knowledge of the alleged agent was knowledge chargeable to defendant, we are nevertheless of the opinion that the allegations above quoted, if proved upon the trial, would be sufficient to warrant the granting of a decree reforming the policy and that said allegations were sufficient to withstand defendant's attack by general and special demurrer. These allegations cover the alleged intention and agreement of plaintiff and defendant to have the insurance policy describe the 1934 rather than the 1933 automobile and they further cover the issuance of the policy describing the 1933 automobile through an alleged mistake of plaintiff which was known to defendant. We are not now concerned with any possible difficulties which may arise in the proof of the quoted allegations or with the possible difficulties which may arise in the decision of incidental legal questions upon the trial of the cause. The inquiry here, in the light of the ground specified in defendant's demurrer, is confined to a consideration of whether the amended complaint stated sufficient facts with sufficient certainty to entitle plaintiff to have the demurrer overruled and to have the cause proceed to trial. Our reading of the amended complaint leads us to the conclusion that it does.

The judgment is reversed with directions to the trial court to overrule the demurrer.

We concur: NOURSE, P. J.; STURTEVANT, J.

42 Cal.App.2d 591

GENERAL PETROLEUM CORPORATION OF CALIFORNIA v. CITY OF LOS ANGELES et al.

Civ. 12779.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1941.

Hearing Denied March 24, 1941.

1. Pilots ⇐15

Care and skill required of pilots is the ordinary care and skill of an expert, such as is commonly possessed by other pilots in the profession.

2. Pilots ⇐16

Although a pilot is not liable for mere errors of judgment, he is liable for damages caused by failure to exercise the diligence which other pilots similarly situated would ordinarily have exercised.

3. Pilots ⇐16

A pilot would be liable for damages resulting from the handling of a vessel in a manner which nautical experience and good seamanship would condemn as unjustifiable at the time.

4. Wharves ⇐22

The fact that a moving vessel struck a stationary object, such as a wharf, would raise an inference of negligence on the part of those in charge of the vessel, upon whom would rest the burden of rebutting such inference.

5. Appeal and error ⇐996
Evidence ⇐597

Trial court may base its findings upon an inference or presumption, and such findings will not be disturbed on appeal unless such inference or presumption is wholly irreconcilable with the evidence as a whole.

6. Wharves ⇐22

In action for damages to wharf caused by alleged negligence of pilot in docking a ship, conflicting evidence as to strength of gust of wind at time of collision, as to distance of vessel from wharf as it proceeded toward dock, and as to whether two tugs should have been used in view of weather conditions was not inconsistent with inference of negligence arising from fact that moving ship collided with wharf, and was sufficient to support a finding of negligence on part of pilot in attempting to dock vessel, after being forced out of mid-channel

by outgoing ships rather than proceeding to turning basin and trying again under more favorable conditions.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the General Petroleum Corporation of California against the City of Los Angeles and others, for damages caused to plaintiff's wharves when struck by a ship piloted by an employee of defendant city. From a judgment for plaintiff, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Wm. Christensen, Deputy City Atty., all of Los Angeles, for appellants.

Martin J. Weil and J. M. Jessen, both of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff obtained a judgment against defendants as compensation for damage to its wharves caused by the Japanese Steamship Hakonesan Maru which was being brought to the wharves by defendant Oliegreen, a pilot in the employ of defendant city. It is charged that the pilot was negligent in docking the vessel. On a former appeal, taken by plaintiff from a judgment after a ruling that the complaint failed to state a cause of action against defendant city (22 Cal.App.2d 332, 70 P.2d 998, 72 P.2d 551), it was held that the city was engaged in a proprietary function at the time of the accident and is liable for the negligence of its agent, the pilot Oliegreen. After the remittitur went down the action was tried and the court found that the damage was caused by the negligence of the pilot. It is now contended on behalf of defendants that this finding is not supported by the evidence and that the damage was caused by an unavoidable accident brought about by a sudden gust of wind.

The vessel struck the wharves on the afternoon of May 21, 1932, between 5:30 and 6 o'clock. As the vessel entered the harbor the tugboat John Stuart was tied to her bow and the pilot prepared to take her to plaintiff's wharves. The witness Foley, chemist in plaintiff's employ, testified that he saw the Hakonesan Maru as she approached plaintiff's wharves and that her bow was angled into the wharves when she was only 20 feet away from it. The witness McKinney, a dockman, testified that as the vessel proceeded up the channel she was about 115 feet distant from the wharves. A number of witnesses testified that the weather had been windy and squally all the afternoon. The witness Foley and the witness Brown, a dockman, testified that they did not notice a gust of wind of any great intensity immediately before the accident. From the chart of the United States Weather Bureau it appeared that from 3 p. m. to 7 p. m. on the date in question the wind was blowing between 24 and 30 miles per hour and between 5 p. m. and 6 p. m. it varied between a low of 25 and a high of 32 miles per hour. The chief of the weather bureau testified that a wind blowing from 25 to 30 miles per hour at Los Angeles harbor would be "somewhat gusty" and that the gusts would vary "considerably" from the average velocity. Captain Gilbert, port captain for defendant city, in answer to the question, "How do you bring boats into the General Petroleum docks when it is blowing a good breeze," answered, "I employ two tugs, each with a tow line, one at the bow of the vessel the other at the stern. * * *"

The record discloses that Captain Stofen, an expert called by defendants, testified in part:

"The Court: Well, what I mean to say, with a ship like this Japanese ship; it was from 30 to 50 feet in places out of the water possibly; light; a lot of freeboard; how far off would you feel it was safe to be from the lee shore? A. Well, if I were coming in under those conditions, I would certainly want to stand off close to mid-channel, or about mid-channel.

"The Court: That would give you approximately 500 feet? A. Yes; that is, in approaching the dock."

The witness further testified:

"Q. Yes; that you saw at that point that ships were coming down the harbor, that were crowding you over closer than you wanted to be, would you still try to make a landing at the docks? A. If I felt that they were going to crowd me too close, no; I would increase the speed of my ship then and try and pass the dock; that is, if I could see that far ahead.

"Q. And then you would go up to the turning basin, would you? A. Yes.

"Q. And come out and try over again when you were not crowded? A. Presuming it did not make any difference which side the ship had to go to.

"Q. But if it did make any difference which side, you could go to the turning basin and then out into the outer harbor, and come up when things were less crowded? A. Yes, try it again."

The vessel was lightly laden and an unusually large part of it extended above the water. Captain Oliegreen testified that as he approached the neighborhood of plaintiff's wharves he met two steamships, the Point San Pablo and the Admiral Senn, which were coming out of the harbor on a mid-channel course and that he was compelled to bear over in order to pass them. He testified:

"Q. And if there is a cross-channel wind, isn't it sometimes a little more difficult to dock at those docks than at other docks? A. Yes, it is.

"Q. For that reason isn't it true that the usual practice of masters and pilots in coming up to the dock, is to stay a considerable distance off the docks, and then bring their ship to a standstill and allow her to drift over under the pressure of the wind? A. That just depends on the conditions, if you have a fresh wind, or something like that.

"Q. Well, if it is blowing as hard as 28 miles per hour, we will say. A. Oh, yes. * * *

"Q. Now, on this particular day, if you had not met the Point San Pablo and the Admiral Senn, do I understand that you would have stayed further off the dock? A. I would, yes.

"Q. About how far? A. Well, I would have stayed at least mid-channel until I got up to 239.

"Q. That is about four to five hundred feet off; is that correct? A. Yes, about 400 feet off.

"Q. Because that was the safest procedure to follow; is that right? A. Yes. * * *

"Q. If it had not been for the one or more ships approaching from the other direction, would you have kept farther out in the channel? A. I would have kept mid-channel. I was forced to the right.

"Q. Now, by 'farther out in the channel,' you were referring there to what you have now drawn as the dashed line on this Exhibit A? A. Yes, that is correct; that is all right.

"Q. And in your opinion at that time, that was the preferable course to follow, wasn't it? A. Yes, I guess so.

"Q. And when you saw that you could not follow that course, you still tried to make the landing, didn't you? A. Yes."

Captain Oliegreen further testified that as he approached the wharves a sudden gust of wind of a velocity of 40 to 50 miles per hour threw the vessel against the landing; that when the squall hit the ship he gave the order "full speed ahead" to try to get away from the wharves; that when the ship did not answer her helm he gave the order to "reverse at full speed" and drop the port anchor; that if he had gone forward past the wharves he would have landed the ship in a rock pile which might have caused damage of about $150,000. Several expert witnesses testified on behalf of defendants that Captain Oliegreen had acted properly at the time the squall struck the vessel.

[1-3] A pilot is required to use the ordinary care of an expert in his profession. He must exercise the degree of skill commonly possessed by others in the same employment and, although he is not liable for mere errors of judgment he is liable for damage caused by his failure to exercise the diligence which others similarly situated would ordinarily have exercised. The Dora Allison, D.C., 213 F. 645. Pilots are liable if they handle vessels in a manner which nautical experience and good seamanship would condemn as unjustifiable at the time. The Clarence L. Blackeslee, 2 Cir., 243 F. 365.

[4-6] When a moving vessel strikes a stationary object, such as a wharf, an inference of negligence arises and the burden is then upon the owners of the vessel to rebut the inference of negligence. 24 R.C.L. 1270; The Louisiana, 3 Wall. 164, 70 U.S. 164, 18 L.Ed. 85; The Marian, 9 Cir., 66 F.2d 354. The trial court may make findings based upon an inference or a presumption. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590. Such a finding will not be disturbed on appeal unless it appears from all the evidence that the inference, or presumption as the case may be, is wholly irreconcilable with the evidence. The record before us discloses that the

inference of negligence is consistent with the evidence and that the court's finding of negligence on the part of the pilot is sufficiently supported. It will be noted that there is a conflict in the testimony on the point of the strength of the gust of wind at the time the vessel struck the wharf. Three of the witnesses testified in effect that at that moment the wind was not of great violence. There is also a conflict in the testimony as to the distance between the Hakonesan Maru and the wharves as the vessel advanced. From the testimony of one expert it appears that in view of the weather conditions two tugboats should have been used instead of one. Even Captain Oliegreen himself testified that the preferable course would have been to "keep mid-channel" and that when he could not do so he "still tried to make the landing". The trial court could reasonably conclude from the evidence that good seamanship would have required the pilot to proceed to the turning basin and after making the turn to make another attempt to approach the wharves when the middle part of the channel was not occupied by outgoing vessels.

The judgment is affirmed.

We concur: MOORE, P.J.; McCOMB, J.



42 Cal.App.2d 618

WILLIAMS et al. v. VENNEMAN et al.

Civ. 11549.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1941.

1. Schools and school districts ⇐97(4)

In action to have school district bond election declared void, evidence sustained findings that plaintiff taxpayers were intimidated by force and violence and threats of additional violence from bringing to the polling place four qualified voters of district who would have voted against proposed bond issue, and that four additional votes against issue would have defeated proposed bond issue.

2. Elections ⇐197

Elections must be conducted fairly and without any material interference with freedom of election.

3. Elections ⇐233

If it clearly appears that the fairness, purity or freedom of an election has been materially interfered with by acts of violence, intimidation or armed interference, election should be set aside.

4. Elections ⇐233

Violence and intimidation must be shown to have been sufficient either to change result of election or it must be shown that by reason thereof the true result cannot be ascertained with certainty from the returns, in order to justify the setting aside of an election.

5. Schools and school districts ⇐97(4)

Findings that on day of school bond election plaintiffs were intimidated by force and violence and threats of additional violence from bringing to polling place four qualified voters of school district who would have voted against proposed bond issue, and that the additional votes against bond issue would have defeated proposed bond issue, sustained judgment declaring the election void.

6. Elections ⇐231, 232

The readiest way to stop fraud and corruption at elections is to see to it that the same is not rewarded by success.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by C. R. Williams and others, as residents and taxpayers of Topanga School District, against Mark A. Venneman and others, as members of the Board of Trustees of the Topanga School District, to have a certain bond election declared void. From a judgment for plaintiff, defendants appeal.

Affirmed.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for appellants.

C. H. Scharnikow, of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiffs, as residents and taxpayers of the Topanga School District, brought this

action against the defendants, as members of the board of trustees of said school district, seeking to have a certain bond election declared void. The trial court entered its findings and judgment in favor of plaintiffs, and from said judgment defendants appeal.

The trial court's findings of fact read in part as follows:

"That upon the day of the election referred to in said complaint the plaintiffs Oka Stewart and Odo B. Stade were struck and beaten at or near the polling place where the same was being held and conducted, and were thereby intimidated by force and violence, and by threats of additional violence, from bringing to the said polling place four qualified voters of said district who desired and intended to and who would have voted against said proposed bond issue; * * *

"That at said election a total of 197 votes were cast, and the proponents of said bond issue polled 132 votes; that except for said force and violence and intimidation so committed as aforesaid the opponents of said bond issue would have polled four additional votes, and would have polled sufficient votes to prevent a two-thirds majority in favor of said bond issue, and would have polled sufficient votes to change the result of said election and to defeat said proposed bond issue."

As conclusions of law from the foregoing facts, the trial court concluded that the election "was unfairly and irregularly held and conducted, and that said irregularity affected the substantial rights of the taxpayers of said Topanga School District, and of the electors voting at said election, and of the plaintiffs", and that plaintiffs were entitled to have said election declared void. Judgment was entered accordingly.

Defendants contend that the evidence was insufficient to support the findings of fact and that said findings were insufficient to support the judgment entered.

[1] We do not believe that defendants are seriously urging the claim that the evidence was insufficient to support the above-mentioned findings. The uncontradicted evidence showed a particularly flagrant case of the use of force and violence upon plaintiffs Stewart and Stade and that said plaintiffs were intimidated by said use of force and violence and by threats of the further use thereof from bringing to the polls four qualified voters who would have voted against said bond issue. It is a fair inference from the remarks made by the assailants of said plaintiffs that there previously had been another bond election which had failed; that there was considerable feeling on the part of some of the proponents toward the opponents of the bond issue at the time of the second election; and that there was a deliberate and premeditated plan on the part of at least three men to intimidate said plaintiffs from bringing to the polls voters who were opposed to the bond issue. Said three men voted early and remained in the vicinity of the polling place throughout practically the entire day. They struck plaintiff Stade on one occasion and they struck plaintiff Stewart on two occasions. They were described as "a riotous-looking crowd" and it was testified that "they looked like they were going to start a riot". On one occasion one of them said to plaintiff Stewart, "By God, you and Ray Williams and the rest of these —— —— —— had it your way last time, and we are here to see that you don't do it this time. You get the hell out of here." Plaintiff Stade was struck in the face with great force after he had gotten into his car and was told by his assailant to get out of his car and fight. Another of the men advised him not to get out, and stated, "You had better get out of here and stay out." While it is true that plaintiffs Stewart and Stade voted at the election and that neither was struck until after he had voted, it seems quite apparent that the purpose of the use of force and of threats upon them was to intimidate them from remaining near or returning to the vicinity of the polling place for any purpose.

Said plaintiffs Stade and Stewart had previously arranged to bring four elderly persons to the polls by automobile. These four persons were opponents of the bond issue and each of the four resided three miles or more from the polling place. They testified that they would have voted against the bond issue but were prevented from doing so by the failure of plaintiffs Stade and Stewart to call for them in the late afternoon as previously arranged. Said plantiffs testified that they did not bring said four persons to the polling place as arranged because of their fear for the safety of themselves and the safety of any voters that they might bring there. All of the foregoing testimony is uncontradicted and it is conceded that two additional

negative votes would have defeated the bond issue. It is therefore apparent that the foregoing findings of fact are amply supported by the evidence.

[2-4] The only debatable question is whether said findings are sufficient to support the judgment. Neither side has brought to our attention any authority directly in point. It is of course of the utmost importance under our form of government that elections should be conducted fairly and without any material interference with the freedom of such elections. The general acceptance of this view is evidenced by the fact that there are comparatively few authorities to be found dealing with the question of the effect of the use of violence and intimidation upon the validity of elections. In reviewing the authorities it is said in McCrary on Elections, 4th Edition, sec. 550, "If it clearly appears that the fairness, purity or freedom of an election has been materially interfered with by acts of violence, intimidation or armed interference, such election should be set aside. * * * The true rule is this: The violence or intimidation should be shown to have been sufficient either to change the result, or that by reason of it the true result cannot be ascertained with certainty from the returns." See, also, Paine on Elections, secs. 467–471; 18 Amer.Juris. 336; 20 Corp.Juris. 189 and cases cited.

[5, 6] We find no conflict of authority on the subject, but the only cases which have arisen appear to have involved instances where the violence or intimidation was directly applied to the qualified electors who failed to vote. In the present case the violence and intimidation was not directly applied to the four qualified electors who failed to vote, but the uncontradicted evidence showed that the violence and intimidation which was applied to plaintiffs was equally effective in accomplishing its intended purpose as though it had been directly applied to said four qualified electors who failed to vote. We are therefore of the view that it requires no unwarranted extension of the salutary principles laid down in said authorities to hold that the above-mentioned findings of the trial court were sufficient to support the judgment declaring said election void. There could be no freedom of elections if the tactics employed in the present case were permitted to succeed, and as was said in Hatfield v. Scaggs, 101 W.Va. 425, 133 S.E. 109, 114, a case involving intimidation, "We agree with the Michigan court that—'The readiest way to stop fraud and corruption at elections is to see to it that the same is not rewarded by success.'" Citing Attorney General v. Stillson, 108 Mich. 419, 423, 66 N.W. 388.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



42 Cal.App.2d 696

FRITSCHE v. McCUE.

Civ. 12238.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1941.

1. Judgment ⇐720

In action on a judgment based on a note, evidence as to matters set up in defense to prior action wherein judgment sued on was recovered, and as to alleged fraudulent conspiracy on plaintiff's part in concealing from court at prior trial facts which if revealed would allegedly have established defendant's defense was inadmissible, because prior judgment was "res judicata" as to such matters.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment ⇐906

Where party suing on note had no obligation to disclose facts which allegedly would have established a defense to suit, the concealment of such facts from court would not constitute "fraud", nor afford to judgment debtor a defense to action on the judgment recovered on the note.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Mary Alice Fritsche against Thomas F. McCue, wherein the defendant filed a cross-complaint. From an adverse judgment, defendant appeals.

Judgment affirmed.

See, also, 34 Cal.App.2d 46, 92 P.2d 928.

Thomas F. McCue, of Los Angeles, in pro. per.

G. P. Adams and Charles E. Beardsley, both of Los Angeles, for respondent.

DORAN, Justice.

The appeal herein involves a consideration of two actions; the first, an action by Mary A. Fritsche against Thomas F. McCue wherein plaintiff sued as executrix of the estate of her husband and in which action plaintiff recovered judgment. The second action is based upon the judgment obtained in the said first action, which judgment, it is alleged, was distributed to Mary A. Fritsche by administration. Thomas F. McCue is defendant in both actions.

The appeal herein is from a judgment for plaintiff in the second action.

The record reveals that the original action was on a promissory note executed by defendant in favor of A. E. Fritsche, whose estate Mary A. Fritsche was administering when the first action was filed and reduced to judgment.

In that first action defendant McCue defended on the grounds that there was no consideration for the note and that said note was delivered pursuant and according to an agreement between the maker and the payee which agreement was afterwards mutually rescinded; that the payee A. E. Fritsche had agreed to and intended to return said note to defendant but had died without having done so. At the trial of the first action the court found against defendant on all defenses and gave judgment for plaintiff. No appeal was taken and the judgment is final.

In the instant action, which, as above noted, is based on the first judgment, defendant seeks to defend on the same grounds set up in the answer to the first action. In addition and by cross-complaint defendant undertakes to set up an equitable defense in which, among other things, an effort to allege a fraudulent conspiracy appears. It is unnecessary to recite the details thereof, except to note that such purported conspiracy is based upon the alleged failure of plaintiff to reveal to defendant the fact that A. E. Fritsche had died and that plaintiff had concealed from the court at the first trial certain facts that, if revealed, would have established defendant's defenses.

At the trial of the present action, objections to any inquiry as to the matters above noted were sustained on the ground that the same were res adjudicata. The ruling is assailed as error, for it is contended by appellant that by reason thereof the so-called equitable defenses were foreclosed.

[1, 2] There is no merit to the contention. An examination of the so-called equitable defenses reveals them to be the same in substance as the defenses relied upon at the trial of the first action. With regard to the allegations setting forth respondent's failure to reveal certain facts at the first trial, it does not appear that any obligation so to do, moral or legal, existed. In the circumstances, no fraud results from such action.

There are no errors in the record and the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.



42 Cal.App.2d 660

SULLIVAN v. WARNER BROS. THEATRES, Inc. et al.

Civ. 12676.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1941.

Hearing Denied March 28, 1941.

1. Libel and slander ⇐112(1)

Evidence supported findings favorable to defendants in action for alleged libel based upon defendants' acts in posting a sign in codefendant's theater requesting codefendant's employees not to patronize plaintiff's place of business. Civ.Code, § 45.

2. Libel and slander ⇐15

To be "libelous per se" a writing on its face must fall within statutory definition of libel. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Libelous Per Se".

3. Libel and slander ⇐19

In determining whether alleged defamatory matter is "libelous per se", trial court must give language used the natural and popular construction of average reader, not the critical analysis of a mind trained in technicalities. Civ.Code, § 45.

4. Libel and slander ⇐16, 17, 18

A notice posted in defendant's theater requesting defendant's employees not to patronize plaintiff's place of business because plaintiff had shown himself disloyal to theater and did not merit employees' patronage and advising employees to discourage their friends from dealing with plaintiff was not "libelous per se", since plaintiff was not charged with anything that would expose him to hatred, contempt, ridicule or obloquy or which would cause him to be avoided, and language of sign did not tend to injure plaintiff in his occupation as operator of ice cream establishment. Civ.Code, § 45.

5. Libel and slander ⇐15

An action for libel could not be predicated upon defendant's act in requesting defendant's employees to refrain from patronizing plaintiff's store where notices published by defendant were not libelous per se, since an employer may by any legal means induce his employees not to patronize a particular establishment. Civ.Code, § 45.

6. Libel and slander ⇐6(1)

Language of notice published in defendant's theater requesting defendant's employees not to patronize plaintiff's place of business because plaintiff had shown himself "disloyal" to theater and neighborhood was not "libelous per se", for use of "disloyal", since "disloyal" was used as meaning uncooperative, and such a charge was not libelous, and case was within rule that one who is charged with doing that which he may legally and properly do is not liable. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Disloyal".

Appeal from Superior Court, Los Angeles County; C. Douglas Smith, Judge.

Action by James William Sullivan, etc., against Warner Bros. Theatres, Incorporated, and another, for alleged libel. From a judgment for defendants, plaintiff appeals.

Affirmed.

W. P. Butcher, of Santa Barbara, for appellant.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondents Warner Bros. Theatres, Inc.

Schauer, Ryon & McMahon and Robert W. McIntyre, all of Santa Barbara, for respondent Howard Ralston.

WOOD, Justice.

Plaintiff has appealed from a judgment in favor of defendants rendered in an action for libel.

[1] From the pleadings and the findings of the trial court, which are supported by the evidence, it appears that defendant Warner Bros. Theatres, Inc., was the owner of the Granada Theatre in the city of Santa Barbara and defendant Ralston was employed as manager of the theatre. Plaintiff owned a lunch and ice cream establishment located directly across the street from the theatre, which he operated under the fictitious name of Starr's Ice Cream Store. Plaintiff placed a poster in the window of his store, which advertised performances at the Fox Arlington Theatre, a rival of the Granada. When Ralston became acquainted with this fact he approached plaintiff and requested that he remove the poster from his window, stating that the advertisement would cause people in the vicinity to go out of the neighborhood for their amusement, thus injuring plaintiff's business as well as that of the Granada. Upon plaintiff's refusal to remove the poster Ralston caused the following notice directed to "all employees" to be posted in four places in the Granada Theatre: "You are requested not to patronize Starr's Ice Cream Co., across the street from the theatre, from this date until further notice. They have shown themselves disloyal to the house and the neighborhood in no uncertain fashion, and do not merit our patronage. It would be well to discourage your friends from dealing with this merchant also. Kindly cooperate. Howard Ralston, Mgr." The court found that such notices were posted in places accessible to the employees of the theatre only and not to the general public; that Ralston's intention was that such notices should be seen by his employees only and should be understood by them as a request not to patronize plaintiff's place of business because the display by plaintiff of advertising of a rival theatre was, in Ralston's opinion, injurious to the business of the

Granada Theatre; that Ralston's purpose in publishing such notice was to dissuade his employees and their friends from trading with plaintiff, thereby forcing plaintiff to remove the competitive advertising from his window. With the consent of plaintiff the allegations charging special damage were stricken from the complaint. The trial court concluded that the notice was not libelous per se and was not libelous under the circumstances shown by the evidence.

[2-5] Plaintiff's principal contention upon this appeal is that the court erred as a matter of law in concluding that the notice was not libelous per se. To be libelous per se it is necessary that the writing on its face fall within the definition of libel given in section 45 of the Civil Code. Rosenberg v. J. C. Penney Co., 30 Cal.App.2d 609, 86 P.2d 696. By section 45 libel is defined as "a false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation". In determining whether the alleged defamatory matter is libelous per se it is the duty of the court to give the language used the natural and popular construction of the average reader, not the critical analysis of a mind trained in technicalities. Western Broadcast Co. v. Times-Mirror Co., 14 Cal.App. 2d 120, 57 P.2d 977. Considering the notice in such light, it amounts to nothing more than a request to the employees of the theatre to boycott Starr's Ice Cream Company because "they have shown themselves disloyal to the house (theatre) and the neighborhood * * * and (therefore) do not merit our patronage * * *". Contrary to the contention of plaintiff, the language of the notice may not be construed as charging plaintiff with lack of merit. The phrase "and do not merit our patronage" is clearly a conclusion based upon the phrase which immediately precedes it. There is nothing illegal in requesting the employees to refrain from patronizing plaintiff's store, for an employer may by any legal means induce his employees not to patronize a particular establishment. Union Labor Hospital Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 112 P. 886, 33 L.R.A.,N.S., 1034; Katz v. Kapper, 7 Cal.App.2d 1, 44 P.2d 1060. The libel, if any, must therefore be found in the charge of disloyalty.

[6] Is the statement that "they have shown themselves disloyal to the house and the neighborhood" libelous per se? Construing such language in its natural and popular sense it fails to come within the meaning of section 45 of the Civil Code. The word "disloyal" is defined as "not loyal; not true to a sovereign or lawful superior, or to the government under which one lives; false where allegiance is due; faithless". Webster's New International Dictionary. Obviously the word was not used in the sense as above defined, for plaintiff owed no duty of allegiance, faithfulness or loyalty to the theatre or to any other establishment in the neighborhood. Placing ourselves in the position of the reader under the circumstances (Rosenberg v. J. C. Penney Co., supra), it is evident that the word "disloyal" was used as meaning uncooperative. Such a charge is not libelous. The case comes within the rule that one who is charged with doing that which he may legally and properly do is not liable. 16 Cal.Jur., p. 53; Stevens v. Snow, 191 Cal. 58, 214 P. 968; Mellen v. Times-Mirror Co., 167 Cal. 587, 140 P. 277, Ann.Cas.1915C, 766.

Manifestly the plaintiff was charged with nothing which would expose him to hatred, contempt, ridicule, or obloquy, or which would cause him to be shunned or avoided. Nor did it tend to injure him in his occupation, for it cast no reflection on his business ability, his honesty, his integrity, or the manner in which his business was conducted. 16 Cal.Jur. 45, and cases there cited.

The remaining contentions advanced by plaintiff are based upon the assumption that the language of the notice is libelous per se. In view of our conclusion that the language is not libelous per se it is unnecessary to discuss them.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

GOLDENBERG v. WILNER et al. *

Civ. 12707.

District Court of Appeal, Second Appellate District, Division 2, California.

Jan. 29, 1941.

Rehearing Denied Feb. 21, 1941.

Hearing Granted March 28, 1941.

1. Mortgages ⇐375

An action to recover a deficiency judgment founded upon a trust deed after sale of security is an action "founded" upon a deed of trust within contemplation of mortgage moratorium acts extending period within which an action may be brought on an obligation founded upon a deed of trust. Gen.Laws Supp.1935, Act 5104a, as amended by St.1937, p. 57; St.1937, p. 460; St.1939, p. 1045; Code Civ.Proc. § 337, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Founded".

2. Mortgages ⇐330

If the time for commencing of action for deficiency judgment founded upon a trust deed after sale of the security has not expired when moratorium acts extending period within which an action could be brought on such obligations were adopted, such action may be commenced within extended time stated in such acts. Gen.Laws Supp.1935, Act 5104a, as amended by St.1937, p. 57; St.1937, p. 460; St.1939, p. 1045; Code Civ.Proc. § 337, subd. 1.

3. Mortgages ⇐375

The moratorium acts extending period within which an action may be brought on an obligation founded on a written instrument secured by a trust deed extend the time provided in statute which prior to 1933 was four years after obligation founded upon a writing arose, within which to commence an action to recover a deficiency judgment, when sale of property given as security for payment of note upon which deficiency judgment is sought, was held prior to enactment of any moratorium legislation, which permitted trustor directly or indirectly to obtain a delay in sale of security which he had given. Gen.Laws Supp.1935, Act 5104a, as amended by St.1937, p. 57; St.1937, p. 460; St.1939, p. 1045; Code Civ.Proc. § 337, subd. 1.

4. Mortgages ⇐218

The mortgage moratorium acts extending period within which an action may be brought on an obligation founded on written instrument secured by trust deed extend to assignee of a note secured by deed of trust. Gen.Laws Supp.1935, Act 5104a, as amended by St.1937, p. 57; St.1937, p. 460; St.1939, p. 1045; Code Civ.Proc. § 337, subd. 1.

5. Mortgages ⇐330

The mortgage moratorium acts were available to the obligor on June 15, 1933, which was the date of sale under powers conferred by trust deed, since it was within power of legislature to extend the time within which an action might be filed without making it dependent upon a privilege extended to the obligor. Gen.Laws Supp.1935, Act 5104a, as amended by St.1937, p. 57; St.1937, p. 460; St.1939, p. 1045; Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Joe Goldenberg against Morris Wilner and others, to recover the balance due on a note for which a deed of trust with power of sale had been given as security, wherein defendants filed a demurrer. From an adverse order, the plaintiff appeals.

Reversed with directions.

Prentiss Moore, Morris C. Schrager, and John M. Dvorin, all of Los Angeles, for appellant.

Harriet Pugh, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of the defendants predicated upon the sustaining of their demurrer without leave to amend to plaintiff's complaint in an action to recover the balance due on a note for which a deed of trust with power of sale had been given as security following an exercise of the power of sale, plaintiff appeals.

The material allegations of the complaint filed January 25, 1940, are:

Defendants, September 18, 1928, executed and delivered to plaintiff's assignor a promissory note maturing two years after September 12, 1928. The note was secured by a deed of trust covering certain real property, which deed of trust conferred a power of sale in case of a default. The maturity date of the note was extended by plaintiff's assignor until March 12, 1932. Thereafter, a default occurring by reason of the nonpayment of principal after maturity of the note,

* Subsequent opinion 115 P.2d 820.

the beneficiary under the deed of trust delivered to the trustee a declaration of default and demanded a sale. The trustee, pursuant to the provisions of the deed of trust, sold the property described therein on June 15, 1933. The proceeds of the sale were applied to the note, leaving a deficiency, which is the basis of the present action.

Defendants demurred on the ground, among others, that the cause of action was barred by the provisions of section 337, subdivision 1 of the Code of Civil Procedure.

This is the sole question necessary for us to determine:

Did the Moratorium Act of 1935 (Act 5104a, Deering's 1935 Supplement to the Codes, Laws and Constitutional Amendments of the Constitution of the State of California, p. 1336), the 1937 Act (Chapter V, Statutes of 1937, p. 57), the 1937 Moratorium Act (Chapter 167, p. 460), and the 1939 Moratorium Act (Statutes of 1939, Chapter 86, p. 1045) extend the time provided in section 337, subdivision 1 of the Code of Civil Procedure, which prior to 1933 was four years after the obligation founded upon a writing arose, within which to commence an action to recover a deficiency judgment, when the sale of the property given as security for the payment of the promissory note, upon which the deficiency judgment is sought, was held prior to the enactment of any moratorium legislation, which permitted the trustor either directly or indirectly to obtain a delay in the sale of the security which he had given?

This question must be answered in the affirmative. Prior to 1933 section 337, subdivision 1 of the Code of Civil Procedure provided that a liability founded upon an instrument in writing must be commenced within four years after the obligation arose.

Section 19 of the 1935 Moratorium Act, supra, read as follows:

"19. Statutes of limitations. Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust or contract of purchase, or founded upon any guarantee of such obligation or any contract of suretyship therefor or any indorsement of such instrument, would expire by virtue by section 337 of the Code of Civil Procedure, or by virtue of the provisions of Chapter I, Statutes of Extra Session of 1934, or by virtue of the provisions of Chapter VII, Statutes of 1935, or any other provision of law, during the period commencing with the effective date of this act and ending on February 1, 1937, such time is hereby extended so as not to expire until the first day of July, 1937."

The first Moratorium Act of 1937, supra, amended section 19 of the 1935 act to extend the time within which an action could be commenced upon an obligation described in such section until October 1, 1937. The second Moratorium Act of 1937 amended section 19 of the 1935 and prior 1937 Moratorium Act to extend the time within which to bring an action upon an obligation described in such section until July 1, 1939, and the 1939 Moratorium Act, supra, by section 20 thereof extended the time within which to bring an action founded upon an obligation described in section 337 of the Code of Civil Procedure until the first day of October, 1941.

[1, 2] The law in California is established that (1) an action to recover a deficiency judgment founded upon a trust deed after sale of the security is an action "founded" upon a deed of trust and that such action is included among those described in the various Moratorium Acts, supra (Everts v. Newhouse, Inc., Ltd., 28 Cal.App.2d 407, 409, 82 P.2d 703); and (2) if the time for commencing of an action for a deficiency judgment has not expired when the Moratorium Acts, supra, were adopted, such action may be commenced within the extended time stated in such acts (Bakersfield, etc., Co. v. McAlpine, etc., Co., 26 Cal.App.2d 444, 450, 79 P.2d 410).

[3] Applying to the facts of the instant case the Moratorium provisions and the rules of law above stated, we find that section 19 of the 1935 Moratorium Act applied to actions such as the one here involved founded upon a deed of trust and that the time within which plaintiff might originally have commenced his action was March 12, 1936. This time was extended by the various Moratorium Acts, supra, to October 1, 1941. Hence, since the present action was commenced on January 25, 1940, it was not barred by the provisions of section 337, subdivision 1 of the Code of Civil Procedure.

[4, 5] There is no merit in defendants' contention that the act did not extend plaintiff's time, since he was the assignee

of the original obligation, which obligation was for a deficiency judgment on the promissory note, in view of the second rule of law stated above; nor is there any merit in defendants' contention that the Moratorium Acts were not available to the obligor June 15, 1933, the date of the sale under the powers conferred by the trust deed. It was within the power of the legislature to extend the time within which an action might be filed without making it dependent upon a privilege extended to the obligor (Bakersfield, etc., Co. v. McAlpine, etc., Co., supra, 26 Cal.App.2d page 446, 79 P.2d 410.)

For the foregoing reasons the order is reversed with directions to the trial court to overrule the demurrer and allow defendants a reasonable time within which to file an answer if they be so advised.

WOOD, J., concurred.

MOORE, P. J., deeming himself disqualified, does not participate in the consideration or decision of this case.



42 Cal.App.2d 637

COVIELLO v. MOCO FRUIT CO., Inc., et al.

Civ. 2569.

District Court of Appeal, Fourth District, California.

Jan. 27, 1941.

1. Appeal and error ⇐946

Where a trial court rules upon a motion, an appellate court can only pass upon the question as to whether trial court has abused its discretion.

2. Contracts ⇐212(2)

Where no time is specified for the doing of an act, it may be done within a reasonable time, and what is a "reasonable time" is dependent upon the surrounding circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

3. Appeal and error ⇐1008(3)

Where the construction given an instrument by trial court appears to be reasonable and consistent with intent of the parties making it, courts of appellate jurisdiction will not substitute another interpretation, even though it seems equally tenable.

4. Judgment ⇐898(4)

Where one of defendants obtained an ex parte order crediting amounts of two drafts upon a money judgment obtained by plaintiff in accordance with a written stipulation whereby drafts were delivered to plaintiff's attorney for collection, and stipulation contained a provision that drafts were to be collected for their amounts or in lieu thereof the full amounts of drafts must be credited against judgment, and also contained a provision for return of drafts if not collected within 10 days from date thereof, and a provision authorizing plaintiff to retain drafts provided they were credited at that time on the judgment, trial court did not abuse its discretion in setting aside the ex parte order, upon plaintiff's motion, after plaintiff had failed to collect the drafts.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Mike Coviello against the Moco Fruit Company, Incorporated, M. P. Mosesian and others, wherein plaintiff obtained a money judgment. The defendant Mosesian obtained an ex parte order crediting the amount of two drafts upon the money judgment in accordance with a written stipulation whereby the drafts were delivered to plaintiff's attorney for collection. The drafts were not collected, and the Superior Court upon plaintiff's motion set aside the ex parte order. From the order setting aside the prior ex parte order, the defendant Mosesian alone appeals.

Affirmed.

L. Kenneth Say and John Said, both of Fresno, for appellant.

A. P. Coviello, of Los Angeles, for respondent.

KLETTE, Justice pro tem.

A money judgment was obtained in this action by Mike Coviello, plaintiff and respondent, against defendant and appellant, M. P. Mosesian, and others. On January 5, 1940, the following written stipulation was entered into:

"It is hereby stipulated that A. P. Coviello, attorney for Mike Coviello, may take two drafts, Nos. 1057 and 1052, in the respective sums of $466.80 and $320.00, drawn against M. Antonellie on the California Bank, 16-161, for collection and the proceeds to be credited on account of the judgment against M. P. Mosesian in the case of Coviello v. P. M. (M. P.) Mosesian, et al., Superior Court, Tulare County No. 25754. Said drafts are to be collected for their amounts or in lieu thereof the full amounts of same will be credited against judgment. In the event said drafts are not collected within ten days from date hereof, they will be returned to M. P. Mosesian, 1301 Pacific Southwest Bldg., Fresno, or said drafts may be retained by A. P. Coviello provided they are credited at that time on the judgment as aforesaid. In the event that said drafts are collected no charges will be made for the collection of same."

The two drafts mentioned in the stipulation, not having been returned to appellant within ten days, he, on January 25, 1940, made an ex parte motion, to have the amount of these two drafts credited upon the judgment. This motion was granted by the court. Plaintiff and respondent thereupon made a motion, based upon affidavit, to set aside this order so made on January 25, 1940. The latter motion was heard on February 19, 1940, and granted. This appeal is taken by defendant Mosesian from that order.

[1] Where a trial court rules upon a motion, the Appellate Court can only pass upon the question as to whether it has abused its discretion. Wilder v. Wilder, 214 Cal. 783, 7 P.2d 1032; Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301.

The only question, therefore, before this court is whether the trial court did abuse its discretion in granting the motion setting aside its order of January 25, 1940.

The stipulation was apparently intended to cover four contingencies. First, the drafts were turned over "for collection and the proceeds to be credited on account of the judgment". Collection not having been made, the court is not now concerned with this clause. Second, "Said drafts are to be collected for their amounts or in lieu thereof the full amounts of same will be credited against judgment". This clause appears to be inconsistent with the third clause, which provides, "In the event said drafts are not collected within ten days from date thereof, they will be returned". Does the second clause mean that in any event, whether the drafts were collected or not, their amounts were to be credited on the judgment? If so, why were they not credited at the time the stipulation was made? And were they to be returned under the third clause, even though credited on the judgment? Or did the second clause mean that if they were collected by discounting them, the full amount of the drafts was to be credited on the judgment?

[2] It will be noted that the third clause does not state when the drafts were to be returned. The courts of California have repeatedly held that where no time is specified for the doing of an act, it may be done within a reasonable time. No citation of authorities is necessary on this point. What is a reasonable time is dependent upon the surrounding circumstances.

The fourth clause provides, "Or said drafts may be retained by A. P. Coviello provided they are credited at that time on the judgment as aforesaid". Do the words "at that time" relate to the end of the ten-day period, or do they relate to the time when respondent might decide to retain them?

In interpreting the stipulation, and in passing upon the motion, the court had these facts before it: That one of the drafts was dated one month, and the other, five weeks before the date of the stipulation, and the endorsement thereon showed that they had been presented to the bank for payment, before the stipulation was made, and that payment had not been made; that after respondent received them, he had tried to collect them, and failed; that the drawer of the drafts had claims of approximately $6,000 pending against him in the agricultural commissioner's office of the state of California; that respondent, on January 18, 1940, attempted, through another attorney, to return the drafts to appellant, but failed, because of the sickness of the attorney; that when the affidavit was filed, on February 3, 1940, which was the basis of the motion appealed from, the two drafts were attached thereto, with a stipulation that they be released to appellant.

[3] All of these matters contained in the stipulation, called for construction and interpretation by the lower court, and it is a well-established principle of law, that when the construction given an instrument by the trial court appears to be reasonable, and consistent with the intent of the parties

making it, courts of appellate jurisdiction will not substitute another interpretation, even though it seems equally tenable. Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193; Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245.

[4] The trial court being charged with the duty of construing this stipulation, and the construction given, appearing to this court to be reasonable, and consistent with the intent of the parties making it, we cannot say that the court abused its discretion in granting the motion appealed from. To have permitted this credit to stand would have meant a credit on the judgment for money never received. No one has been prejudiced or injured, the parties have been restored to their original positions, and substantial justice has been done.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



42 Cal.App.2d 685

MORRISON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6519.

District Court of Appeal, Third District, California.

Jan. 29, 1941.

1. Workmen's compensation ⇐549

"Silicosis", which is an "occupational disease", is a disease of the lungs due to silica dust.

See Words and Phrases, Permanent Edition, for all other definitions of "Occupational Disease" and "Silicosis".

2. Appeal and error ⇐1099(7)

A decision upon the sufficiency of evidence on a former appeal is the "law of case" and conclusive on subsequent appeal where the evidence disclosed by the record is substantially the same on both appeals, but, where evidence presented on second appeal is materially different from that previously passed upon, the decision on the first appeal is not conclusive.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of Case".

3. Workmen's compensation ⇐1953

Where, on former appeal, District Court of Appeal determined that evidence supported finding of Industrial Accident Commission on merits that miner died as result of silicosis and also that the commission was without jurisdiction to annul award on ground that claim was barred by statute of limitations, and where no materially different evidence was produced at second hearing, conclusions reached by District Court of Appeal on first appeal were the "law of case" both on the merits and statute of limitations. St.1937, p. 294 et seq., § 5400 et seq.

4. Workmen's compensation ⇐52

The workmen's compensation law is to be liberally construed in favor of the employee and not the employer. St.1937, p. 294 et seq., § 5400 et seq.

5. Workmen's compensation ⇐1953

Where, under the law of case, question of liability in workmen's compensation proceeding could not be further litigated, award to which petitioners were entitled under the law of the case could not be denied because petitioners refused to permit an autopsy. St.1937, p. 300, § 5707.

6. Workmen's compensation ⇐1953

Where it was contended that workmen's compensation claimants were not entitled to recover because they refused to permit an autopsy, but under law of case question of liability could not be further litigated, it was to be presumed that, on first hearing, the Industrial Accident Commission was aware of statutory presumption, arising from refusal to permit an autopsy, that death was not due to causes entitling claimants to an award, and that the commission decided that there was sufficient evidence to rebut such presumption. St.1937, p. 300, § 5707.

Petitioners seek to amend the award of the Industrial Accident Commission that they take nothing by reason of their claim for benefits based on the death of Murdoch D. Morrison.

Proceeding by Charlotte S. Morrison and others to amend an award of the Industrial Accident Commission that petitioners take nothing by reason of their

claim for benefits based on death of Murdoch D. Morrison.

Award annulled with directions to make another and further award for payment to petitioners of such benefits as are fixed by law.

Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for petitioners.

E. A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Donald Gallagher, Edmund Thomas, and Keith & Creede, all of San Francisco, for respondent State Compensation Fund.

TUTTLE, Justice.

This action has been pending either in the courts or before the Industrial Accident Commission for some five years. Three referees of the commission each heard a portion of the testimony. Petitioners now seek to annul the *second* award of the commission, which was to the effect that they take nothing by reason of their claim for benefits based on the death of Murdoch D. Morrison.

Petitioner Charlotte S. Morrison is the wife of, and the other three petitioners are the dependent minor children of Morrison. The latter was a miner who had, up to a year before he died, worked in the mine of respondent mining company, and was so employed for some seven years. His death was due to silicosis (miner's consumption), according to the first findings made by the commission and to the decision of this court which will hereafter be discussed. His widow, on May 22, 1936, filed a claim for benefits on behalf of herself and children. Respondent, State Compensation and Insurance Fund, refused to pay the benefits or any part thereof. A number of hearings were had, and numerous witnesses were examined on both sides. All the testimony bore upon the *merits* of the case which involved the cause of death. This necessarily involved the question as to *when* the injury occurred, in order to determine the issue of the statute of limitations. Petitioners contended that silicosis, contracted while working in the mine, led to the development of tuberculosis, from which, admittedly, death ensued. These respondents contended, and sought to prove, that while a certain amount of silicosis was present in the lungs of deceased, it was not the cause of death, and that the sole cause of death was tuberculosis, which did not arise from employment in respondent mine. They also contended that the claim was barred by the statute of limitations. Upon the denial of any relief to respondents, the latter filed a petition in this court seeking to annul the award. After a full consideration of all the evidence, we held that the finding of the commission on the merits, to the effect that Morrison died from an occupational disease which was incurred in the course of his employment, was based upon substantial evidence, and that we were bound thereby. Morrison v. Industrial Accident Commission, 29 Cal.App.2d 528-532, 85 P. 2d 186. As to the statute of limitations, we held that the commission was without jurisdiction to annul the award upon that ground.

[1] Silicosis is an occupational disease, and is thus briefly described in the case of Marsh v. Industrial Accident Commission, 217 Cal. 338, 340, 18 P.2d 933, 934, 86 A.L. R. 563: "From the evidence it appears that, by reason of conditions incident to their employment, the three men named became affected with an occupational disease, such as is frequently contracted by miners working in tunnels, and which is medically known as pneumonoconiosis silicosis, or more simply as pneumoconiosis silicosis, a term denoting a disease of the lungs due to silica dust, and sometimes called merely silicosis."

[2] It is contended by petitioners that the law of the case has been established by the opinion of this court in the prior review of the same case, mentioned above. We believe that such contention is sound, and that it should be upheld. In a very comprehensive note covering this question, found in 6 A. & E. Ann.Cas. page 793, the rule is thus stated: "While a decision upon the sufficiency of the evidence on a former appeal is the law of the case, it is the law of the case and conclusive upon a subsequent appeal only when the evidence disclosed by the record is substantially the same upon both appeals. When the evidence presented upon the second appeal is materially different from that previously passed upon, the decision upon the first appeal is not conclusive, the rule of the law of the case having no application. * * * But the evidence upon the second trial must have been substantially different and controlling, in its character. New evidence appearing in the record on the second appeal which does not change the

substantial features or merits of the controversy, will not alter the rule, so that, under such circumstances, the conclusion reached by the court upon the first appeal will be regarded as conclusive of the question. * * * If the additional evidence is merely cumulative, the doctrine of the law of the case is applicable."

In the case of Sheets v. Southern Pac. Co., 1 Cal.2d 408, 35 P.2d 121, there were two trials and two appeals. In the first opinion the Supreme Court held that the evidence in respect to contributory negligence justified a submission of that issue to the jury. On the second appeal, defendant again attempted to have the same question adjudicated. The court held that the decision on the first appeal was the law of the case, and the only question was whether the evidence at the second trial was substantially different from that presented in the first. Defendant there pointed out some differences, but the court held that they were not substantial in character, and that the question could not be raised a second time. We come to that same question here, and it is urged by petitioners that the evidence as disclosed by the record is substantially the same on both appeals. Respondents, in answer to this contention, throw no light whatever upon it. They make no attempt whatever to point out any difference between the two records. However, we have gone over both records, and are satisfied that the second is not substantially different from the first. The following witnesses testified at the second hearing: Bennett, Finn, Dr. Pierson, Dr. Hardie, Charlotte S. Morrison (one of the petitioners), Dr. Padgett, and Mrs. Griffin. The first five gave their testimony upon the first hearing. There is much cumulative testimony given by some of them at the second trial, but the essential facts and ultimate conclusions given by each are substantially the same in each instance. We come now to the two witnesses who testified at the last hearing only. Dr. Padgett merely identified an X-ray negative, a matter concerning which there was no dispute. Mrs. Griffin testified concerning the manner in which the hospital of Dr. Peers was conducted. Her testimony sheds no light upon the question involved, while neither of the last two witnesses was called at the first hearing, their testimony upon the second trial is so inconsequential in respect to the issues, that it can be entirely disregarded.

In answer to the foregoing, respondents contend that the original adjudication by the commission was not upon the *merits*, but applied solely to the statute of limitations. We are unable to come to that conclusion, and are of the opinion that all the questions here involved were finally and definitely determined by the findings made at the conclusion of the first trial, which read as follows: "The employee became disabled in August, 1934, from a condition which he was advised by a physician was the result of his occupation as a miner. His application was not filed until October 18, 1935, more than six months thereafter, and the claim is barred, therefore, by the provisions of Chapter 2, Part 4, Division 4, § 5400 et seq., of the Labor Code, St.1937, p. 294 et seq., formerly Section 11, of Chapter 586, page 841, of the Laws of 1917. The claim of the applicant herein filed May 22, 1936, is likewise barred by the foregoing provisions."

The question thus raised was considered and disposed of by this court in the former appeal. We there said; in 29 Cal.App.2d page 532, 85 P.2d page 189: "We are of the opinion there is substantial evidence that [Mr. Morrison] died as a result of silicosis, an occupational disease which was incurred in the course of his employment as a miner in The Original Sixteen to One Mine, and that, as a reasonable person, he possessed knowledge or information that he had a compensable disability on that account in February, 1935. *We are, therefore, bound by the findings of the Industrial Accident Commission in that regard.*" (Italics ours.)

[3] We there analyzed all the evidence in order to reach the conclusion mentioned. The entire record of the first trial indicates clearly that the commission considered the merits of the case on trial, instead of the sole issue of the statute of limitations. Numerous witnesses were examined, all upon the merits, and their testimony is spread over some three hundred and twenty-one pages of the transcript. It would seem that respondents then took the view that in order to decide the question of the statute of limitations, it was also necessary to adjudicate the merits of the claim. This was practically admitted by them when, in their answer on the first hearing, they set forth a summary of *all the evidence* to sustain their contention that the claim was not filed in time. All

of the foregoing facts should be considered in deciding the question of the extent of the first findings. In our opinion they should be construed to the effect that, while petitioners were entitled to compensation, their claim came too late. This would be entirely consistent. If petitioners had no valid claim, an adjudication of the question of the statute of limitations would be entirely unnecessary. It thus appears not only that the former decision of this court held that the merits of the case were tried and decided, but a reasonable construction of the prior findings, based upon the surrounding circumstances and the language used, indicates that respondent commission intended to, and did, decide the case on its merits. We are therefore of the opinion that no materially different evidence was produced at the second hearing, and that the conclusions reached by this court upon the first appeal are the law of the case upon both the merits and the statute of limitations.

Concluding, we might add that the evidence in favor of petitioners is of a very strong and convincing character. Dr. Hardie was a resident of the small town where the mine is situated, during the entire time that the deceased was working. He testified that in 1927, Morrison was a large man, in good health, weighing some two hundred pounds. Deceased worked in said mine practically the entire time, until he was compelled to cease. That was in 1935. Dr. Hardie was his personal physician during all of said time. He testified, in effect, that he saw the silicosis gradually developing until the man could no longer work. No doctor who testified for respondents ever saw or examined the deceased when he started work, nor examined him until he had ceased to work and was totally disabled. The chief witness for respondents, Dr. Pierson, *never saw the deceased*. The evidence bearing upon the presence of dust in the mine is conflicting. All doctors, however, agree that deceased had silicosis. The *conflict* is merely upon the question of the degree. There remains the undisputed fact that deceased was a well and strong man when he started to work in the mine; that he died of tuberculosis, and that there was evidence of some silicosis, which is commonly called "miner's consumption".

[4] If we are to construe the Workmen's Compensation law liberally, as we are enjoined by law to do, and as respondents frequently request us to do, this appears to be at least *one* situation where the rule should be invoked. The liberality should be extended to the employee, and not the employer.

[5, 6] It is finally contended that petitioners cannot recover because they refused to permit an autopsy. It is provided in section 5707 (19[e], St.1917, p. 849), of the Labor Code, St.1937, p. 300, that if an autopsy is refused, "it shall be a disputable presumption that the injury or death was not due to causes entitling the claimants to benefits under this act". We have pointed out that under the law of the case the question of liability cannot be further litigated. This applies equally to the question thus raised. It must be presumed that the commission was aware of the presumption on the first hearing, and that they decided that there was sufficient evidence to rebut it.

It follows that the award under attack here must be annulled, and it is so ordered. Respondent Commission is ordered to make another and further award for the payment to petitioners of such benefits as are fixed by law.

We concur: PULLEN, P. J.; THOMPSON, J.



42 Cal.App.2d Supp. 827

PEOPLE v. JOHNSON.
No. Cr. A 1702.

Appellate Department, Superior Court, Los Angeles County, California.

Jan. 30, 1941.

1. Master and servant ⇐69

Order of Industrial Welfare Commission relating to unclassified occupations was void because it showed on its face that the commission in making order disregarded the directions of the legislature by lumping together for consideration a miscellany of unspecified, unsegregated industries, whereas its statutory authority required it to hear and determine matters relating to each separate industry separately. St.1913, p. 633, §§ 3, 4, and page 634, §§ 5, 6, as amended by St. 1921, p. 379.

2. Master and servant ⇐69

Statute authorizing fixing by Industrial Welfare Commission of minimum wages for women and minors employed in industry intended that the wages to women and minors in all industries should be adequate to the specified purposes, but reposed no arbitrary discretion in the commission whose duty it is to see that all wages meet the statutory requirement. St.1913, p. 633, §§ 3, 4, and page 634, §§ 5, 6, as amended by St.1921, p. 379.

3. Master and servant ⇐69

Statute authorizing fixing by Industrial Welfare Commission of minimum wages for women and minors employed in industry, providing that notice of hearing by commission shall be given by advertisement in at least one newspaper published in 12 specified cities in the state, impliedly required that purpose of the hearing should be stated in the notice. St.1913, p. 634, § 6, as amended by St.1921, p. 379.

4. Master and servant ⇐69

Notice that purpose of hearing by welfare commission was to rescind, amend, or alter orders relating to "unclassified occupations" and that minimum wages paid to women and minors would be considered was too vague and uncertain to support any hearing or order, since "unclassified" merely means not classified and "classified" means grouped in classes, and the term "unclassified occupations" standing alone would have little, if any, significance as a means of giving notice. St.1913, p. 634, § 6, as amended by St.1921, p. 379.

See Words and Phrases, Permanent Edition, for all other definitions of "Classified", "Unclassified", and "Unclassified Occupations".

5. Constitutional law ⇐275(2)

Order made by Industrial Welfare Commission without an opportunity for the interested parties to be heard in the matter of fixing wages is invalid for want of "due process of law". St.1913, p. 634, § 6, as amended by St.1921, p. 379.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

6. Master and servant ⇐69

Provision of statute relating to fixing by Industrial Welfare Commission of minimum wages for women and minors employed in industry that notice be given of hearing is "mandatory". St.1913, p. 633, § 6, as amended by St.1921, p. 379.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

SCHAUER, J., dissenting.

Appeal from Municipal Court of Los Angeles; Leo Freund, Judge.

Sever A. Johnson was convicted on three counts of paying women employees a wage less than the minimum wage fixed by an order of the Industrial Welfare Commission, and he appeals.

Reversed, and cause remanded for a new trial.

Manuel Ruiz, Jr., of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and Wm. U. Handy, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

[1] Defendant was charged in three counts with paying to women employees a wage less than the minimum wage fixed by an order of the Industrial Welfare Commission, was found guilty on all three counts, sentenced and appeals from the judgments. The complaint in each case alleged that he was "an employer of women in an unclassified occupation in the food packing industry". In support of the charges the People introduced in evidence order No. 10A, made by the Industrial Welfare Commission on the 8th day of June, 1923, relating to "unclassified occupations". We hold this order void because it shows on its face that the commission, in making it, disregarded the directions of the legislature by lumping together for consideration and decision a miscellany of unspecified, unsegregated industries whereas its statutory authority required it to hear and determine matters relating to each separate industry separately.

The order just referred to was made under the provisions of an act authorizing the fixing of minimum wages for women and minors employed in industry. Stats. 1913, p. 632, as amended. No question is raised as to the validity of this act, and as it is substantially like that involved in West Coast Hotel Co. v. Parrish, 1936,

300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, it is undoubtedly valid. It has now been substantially embodied in sections 70–73 and 1171–1203 of the Labor Code enacted in 1937 (Stats.1937, pp. 185–329).

This statute, at the time the order above mentioned was made, provided for an Industrial Welfare Commission, imposed upon it a duty "to ascertain the wages paid, the hours and conditions of labor and employment in the various occupations, trades, and industries in which women and minors are employed in the State of California, and to make investigations into the comfort, health, safety and welfare of such women and minors", Section 3 as originally enacted, Stats.1913, p. 633, and directed that "If, after investigation, the commission is of the opinion that, in any occupation, trade, or industry, the wages paid to women and minors are inadequate to supply the cost of proper living, * * * the commission shall call a conference, hereinafter called 'wage board,' composed of an equal number of representatives of employers and employees in the occupation, trade, or industry in question", which board was to investigate the matter and make a report to the commission and whose proceedings and deliberations could be used as evidence in any proceedings before the commission. Section 5, as amended by Stats.1921, p. 379. At any hearing held by the commission, employers, employees and interested persons might appear and give testimony. Section 4 as originally enacted, Stats.1913, p. 633. The act also provided: "The commission shall have further power after a public hearing had upon its own motion or upon petition, to fix: 1. A minimum wage to be paid to women and minors engaged in any occupation, trade or industry in this state, which shall not be less than a wage adequate to supply to such women and minors the necessary cost of proper living and to maintain the health and welfare of such women and minors." Section 6, as amended by Stats.1921, p. 379. It also provided that the commission should give public notice by publication of the time, place and purpose of such hearing, and that after such hearing it might make an order "specifying the minimum wage for women or minors in the occupation in question", and directed the commission to mail "so far as practicable, to each employer in the occupation in question" a copy of the order so made. Section 6, as amended in 1921.

From all these provisions we conclude that by the statute the commission was required to consider and deal with each separate industry separately, and that a blanket order applicable to unspecified, unsegregated industries, linked together merely for the purposes of the order, was not authorized. The order must specify the minimum wage for "*the* occupation *in question*", and notice of it must be sent to each employer in "*the* occupation *in question*". Before making such order the commission must give notice of a hearing, the purpose of which hearing would be to fix a minimum wage "in any occupation, trade or industry". The wage board provided for in section 5 must contain representatives "in *the* occupation, trade or industry *in question*"; and without deciding that the appointment of such a board was a necessary prerequisite of an order fixing minimum wages we can see that at least the statute contemplated such board as a possibility in every case. Manifestly these provisions could not be complied with unless there were some particular occupation, etc. "in question", that is, under investigation, in each case. Of course, we do not mean to say that in making orders a separate document must be written for each industry. No doubt, after proper investigation and consideration separately of several industries the commission might write its orders in regard thereto in one document.

We do not intend by what we have just said to draw any hard and fast line setting limits on what might be regarded as a single industry or occupation and dealt with as such by the Industrial Welfare Commission. Undoubtedly that commission had a considerable discretion in that respect, and its acts in treating somewhat differing forms of business activity as in reality allied and constituting a single industry or occupation, or in segregating a general industry into smaller parts for separate consideration, must be upheld so long as a substantial and reasonable basis therefor appears; but it could not, under the law as written, yoke together for consideration industries belonging to entirely different genera. To illustrate by cases mentioned in argument, it would not be necessary for the commission, in dealing with the canning of fruit, to hold separate hearings for each kind of fruit that may

be canned; but bootblacking and taxi dancing are obviously unrelated occupations, not to be considered conjointly in one hearing by the commission. Yet the two last mentioned are undoubtedly, as the argument suggests, embraced within the terms of the order here in question.

[2] We see nothing in our interpretation of the statute which would render it invalid, and hence there is no occasion to invoke the rule for construing a statute so as to make it valid rather than invalid. It seems to be feared by plaintiff that upon our construction of the statute the commission could make arbitrary discriminations, imposing minimum wage and other regulations on some industries or occupations and omitting them from others, according to the dictates of whim or caprice. This contention does not take into consideration the above mentioned parts of the statute which laid upon the commission the duty "to ascertain the wages paid * * * in the various occupations, trades, and industries in which women and minors are employed", provided that whenever, after investigation, it was of the opinion that in any occupation, trade or industry the wages paid to women and minors were inadequate for the purposes specified, it should appoint a wage board, and empowered it to fix a minimum wage adequate for those purposes. Undoubtedly the purpose of the legislature here was that the wages paid to women and minors in all industries should be adequate to the specified purposes. That result was to be accomplished by means of the industrial welfare commission. If wages paid in any industry already met the standard thus prescribed, nothing was to be or needed to be done about it; if they did not it was the duty of the commission to bring such wages up to standard by a proper order. Here was no arbitrary discretion reposed in the commission; its duty was to see that all wages should meet the statutory requirement. See Associated Industries v. Industrial Welfare Comm., 1939, 185 Okl. 177, 90 P.2d 899, 906, where a like construction was put upon a substantially identical statute.

Order No. 10A, on which this prosecution is based, manifestly is not such an order as is authorized by the statute. By its terms it purports to fix the minimum wage for women and minors "in any unclassified occupation" and defines the term "unclassified occupations" to mean "all employment not classified under the mercantile, manufacturing, millinery, hotel and restaurant, laundry and dry cleaning, fruit and vegetable canning, fruit and vegetable packing, fish canning, and telephone and telegraph industries, office or professional occupations, domestic labor, or the harvesting, curing or drying of any variety of fruit or vegetables, and the cracking and sorting of nuts." No particular industry is here "in question", or is affected by this order. It is plainly intended to be a catch-all for all sorts of industries not among those described, no matter how diverse in character or location such industries might be, or what different matters might be deserving of consideration in fixing the minimum wage. It is no better in principle than would be an omnibus order covering all industries. The above mentioned requirements of the statute could not be complied with in connection with such an order, and it must be regarded as beyond the power of the commission.

[3, 4] In addition to the defects in Order No. 10A itself, it appears that the notice given of the hearing required before the order could be made was insufficient. Besides a certified copy of the order, the people introduced in evidence certified copies of the affidavits of publication of a notice of hearing. Section 6 of the statute, as amended in 1921, required that notice of such a hearing be given "by advertisement in at least one newspaper published in each of the cities of" (enumerating 12 cities in the state). While the statute did not expressly require this notice to state the purpose of the hearing, it must be construed to have that effect by implication. Section 6 required the commission to mail "a copy of said notice" to any employer filing "a written request for such notice of such hearing and the purpose thereof". This mailing would not satisfy the request unless the purpose were stated in the notice, and such statement would also be necessary to satisfy constitutional requirements discussed in a later part of this opinion. The affidavits mentioned show publication of a notice in newspapers corresponding in number and location to this requirement, but its contents were insufficient. It stated the purpose of the hearing thus: "for the purpose of rescinding, amending or altering Orders [here follows a list of several orders by number, year and industry, covered, including] * * * Number 10, amended

1920, Unclassified Occupations". Other parts of the notice indicated that as to each industry listed "minimum wages to be paid to women and minors" would be considered. No further description of "Unclassified Occupations" appeared, but the list of other occupations set forth included many—not all—of those excluded from that category by the definition contained in Order No. 10A and above quoted. This notice, in so far as it related to "unclassified occupations" was too vague and uncertain to support any hearing or order. No attempt was made in the notice, as there was in the order, to fortify that term by any definition. According to Webster's New International Dictionary, "unclassified" means merely "not classified", and "classified" means "grouped in classes". By these definitions the term "unclassified occupations", standing alone, would have little, if any, significance as a means of giving notice. It leaves unanswered the questions, "by what rule of classification?", "when?" and "by whom?", as well as others. Nor is it helped by its context, whose only possible suggestion would be that the occupations specifically listed in the notice were "classified" and all others were "unclassified". If any reader of the notice conceived that idea he speedily discovered himself in error when he read the order, for at least two occupations listed in the notice were covered by the order as "unclassified" and several occupations *not* listed in the notice could not be regarded as "unclassified" according to the definition found in the order.

[5, 6] Without an opportunity for the interested parties to be heard, in a matter of this kind, where the legislature has committed to a special tribunal the fixing of wages, the resulting order would be invalid for want of due process of law. Western Union Tel. Co. v. Industrial Comm., D.C.1938, 24 F.Supp. 370 and cases there cited; McGrew v. Industrial Comm., 1938, 96 Utah 203, 85 P.2d 608, 617. The provision for the hearing and for notice thereof, being a part of the statutory embodiment of due process, must be regarded as mandatory, for, even though some other form of hearing or some different notice might have been regarded as sufficient, the statute has not so declared, and compliance must be had with what has been, not merely what might have been, provided. See O. T. Johnson Corp. v. City of Los Angeles, 1926, 198 Cal. 308, 316, 317, 245 P. 164; Beck v. Ransome-Crummey Co., 1919, 42 Cal.App. 674, 679, 681, 184 P. 431; Overell v. Overell, 1937, 18 Cal.App.2d 499, 502, 64 P.2d 483; Bandini Estate Co. v. County of Los Angeles, 1938, 28 Cal.App.2d 224, 229, 230, 82 P.2d 185.

The judgments are reversed and the cause is remanded to the Municipal Court for a new trial.

BISHOP, Judge.

I concur. Order numbered 10A is the only one claimed by the People to govern this case. That this order was intended to be what the presiding judge in the majority opinion has characterized it as being, that is, a "catch-all", appears to me to be plain from the fact that in its definition of what the commission meant order 10A to cover it excluded, seriatim, eight industries for which special orders were made in 1923, a ninth industry which had been covered by an order made in 1920, and four other industries for which, it is reasonable to assume, the commission intended at the time it adopted order 10A to make special orders after proceeding in the manner prescribed by the statute. Deliberately, the Industrial Welfare Commission in 1923 followed the statute in a number of cases, but instead of completing their task in the manner authorized attempted to discharge their duty by a blanket order. If this blanket leaves the women of some industries in the cold it is a condition which may readily be remedied by the present commission following the present statute or by the enactment of a different statute; it is not to be remedied by our ignoring the requirements of the statute.

I dissent: SCHAUER, J.

In re TODD'S ESTATE.

Sac. 5315.

Supreme Court of California.

Feb. 3, 1941.

Rehearing Denied March 3, 1941.

1. Descent and distribution ⇐47(1)

The Legislature, in enacting Probate Code provision relating to rights of children and grandchildren of testator who does not mention them in his will, intended to change the pre-existing law and to provide that if surviving issue of testator's child, who predeceases testator, is not provided for by will, such issue shall succeed to a share of the estate by intestate succession the same as if no will had been made, regardless of whether the death of the testator's child occurs before or after execution of the will, and whether the issue of the child is born before or after execution of the will. Probate Code, § 90.

2. Statutes ⇐147

Generally, any essential change in phraseology of a statute indicates an intention on the part of the legislature to change the meaning of such provision rather than to interpret it.

3. Statutes ⇐181(2)

The language of a statute must be given a reasonable interpretation, and every statute as a whole must be so construed and must, when opportunity arises, be made compatible with common sense and dictates of justice. Civil Code, § 3542.

4. Constitutional law ⇐48
Statutes ⇐174, 181(2)

Courts have duty not to be ingenious to find ambiguities in statutes because of extraneous matters, but to interpret them in such a manner that they may be free from ambiguity and to give, if possible, a construction which not only renders them constitutional, but which is consistent with sound sense and wise policy, with a view to promoting justice. Civ.Code, § 3542.

5. Descent and distribution ⇐47(3)

Where testator's will devised testator's separate property in equal shares to his wife and his son, or the survivor of them, and no provision was made for grandson who was born after execution of will which did not disclose an intentional omission of grandson, and testator's son predeceased the testator whose wife survived him, the grandson was entitled to one-half of the testator's estate by intestate succession the same as if no will had been made. Probate Code, §§ 90, 221.

6. Descent and distribution ⇐47(2)

Where will devised testator's property in equal shares to his wife and son or the survivor of them, the testator intended to substitute his wife as sole legatee in event of death of his son, which precluded the surviving child of the son who predeceased testator from taking any portion of the estate under provision of Probate Code relating to death of a devisee during lifetime of testator. Probate Code, § 92.

7. Descent and distribution ⇐47(1)

If surviving child of testator's son, who was a legatee under testator's will but predeceased testator, could under terms of will have succeeded to share of estate devised to the son, pursuant to Probate Code provision relating to death of a devisee during testator's lifetime, the child would be barred from sharing in the testator's estate as a pretermitted heir under Probate Code provision relating to rights of children and grandchildren who are not mentioned in testator's will. Probate Code, §§ 90, 92.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of Rush B. Todd, deceased, the Bank of America National Trust & Savings Association, executor. From a decree of final distribution which distributed the entire estate of deceased to his surviving wife, Inez Todd, Ridgeway Addison Todd, a minor, appeals.

Reversed, with direction to enter a decree in accordance with opinion.

For prior opinion, see 99 P.2d 690.

Henry E. Monroe and Julia M. Easley, both of San Francisco, and Geary & Geary and C. J. Trauzer, of Santa Rosa, for appellant.

Grove J. Fink and Garton D. Keyston, both of San Francisco, for respondent.

CARTER, Justice.

This is an appeal from a decree of final distribution, which distributed the entire estate of Rush B. Todd, deceased, to his surviving wife, Inez Todd, one of respondents herein. The whole of said estate was decedent's separate property. The appellant is Ridgeway Addison Todd, a minor, the grandson of the decedent and being the son

of Addison Todd, the son of decedent. Addison Todd died prior to the death of decedent. The other respondent is the executor of the estate.

The facts are undisputed. The decedent made his will on February 17, 1925, in which it was provided in part: "Paragraph Third: I hereby declare that I am married, that my wife's name is Inez Todd, and that I have one child living, to-wit, a son, Addison Todd. Paragraph Fifth: I hereby give, devise and bequeath all of my estate, * * * equally, share and share alike, to my said wife, Inez Todd, and my said son, Addison Todd, or to the survivor of them." No mention of appellant, decedent's grandson, was made in the will, he was not provided for by settlement or advancement; and it does not appear from the will that the omission was intentional.

Appellant, grandson of decedent, was born May 7, 1931. Addison Todd, decedent's son, died on September 28, 1935, and left appellant surviving him as his sole issue. Decedent died on May 16, 1936. The decree of distribution distributed the decedent's entire estate to Inez Todd, his surviving wife.

Appellant urges as grounds for reversal of the decree that appellant should take one-half of the estate by virtue of section 90 of the Probate Code, and that even if he cannot prevail on that basis he is entitled to one-half the estate by reason of the death of his father, one of the legatees in the will, prior to decedent's death, pursuant to section 92 of the Probate Code.

It is clear that if appellant comes within the terms of section 90 of the Probate Code, he is entitled to disregard the will and receive the portion of the estate allowed to him under the laws of intestate succession, which in the instant case is one-half of decedent's property inasmuch as it was separate property and decedent's wife survived him. Prob.Code, secs. 90 and 221.

Prior to the adoption of section 90 of the Probate Code in 1931, the law concerning pretermitted heirs was embodied in sections 1306, 1307, 1308 and 1309 of the Civil Code. Section 1306 provided for inheritance by a child born after the will and provided in part: "Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's * * * property that he would have succeeded to if the testator had died intestate." Section 1308 related to the sources from which a pretermitted heir's share should come. This is now stated in section 91 of the Probate Code. Section 1309 provided that the pretermitted heir take no share if he had an equal share by advancement. This is now embraced in section 90 of the Probate Code. The portion of section 1307 which is here particularly pertinent read: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section [1306]. * * *" Section 1307 was first construed in In re Barter's Estate, 86 Cal. 441, 25 P. 15, and it was there held that the failure of the testator to provide for his grandchild did not make such grandchild a pretermitted heir, where the grandchild's mother was alive at the time the will was made but died prior to the death of the testator. The decision was properly based on the ground that section 1307 made pretermitted heirs of only those grandchildren who were the issue of a child of the testator dead at the time the will was made. With section 1307 remaining unchanged, the Barter case was considered favorably in Estate of Ross, 140 Cal. 282, 73 P. 976, and Estate of Matthews, 176 Cal. 576, 169 P. 233, although the exact question involved in the Barter case was not in issue in either of those cases.

[1-5] However, in 1931 sections 1306, 1307, 1308 and 1309 of the Civil Code were repealed and section 90 of the Probate Code was adopted and contains additional clauses radically changing those sections in certain respects. Section 90, the law controlling in the instant case, provides in part: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, *whether born before or after the making of the will or before or after the death of the testator,* * * * unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate." The italicized portions are the clauses which did not appear in sections 1306 or 1307 of the Civil

Code. We believe it is quite obvious that the legislature intended to change the law and the rule announced in the Barter case to provide that if the issue of a testator's child is not provided for by the will, such issue shall succeed to a share of the estate by intestate succession the same as if no will had been made regardless of whether the testator's child dies before or after the will is made, and whether the issue of the child is born before or after the making of the will, assuming, of course, the testator's child dies before the testator. To determine that no such change was accomplished as contended by respondents, and held by the trial court, would be to render ineffective and practically meaningless the words added by the adoption of section 90. To assume that the change accomplished was limited to grandchildren born after the will was executed but whose parent was dead when the will was made, would be a strained and unreasonable construction. At the best it would make the added words fit only extremely rare instances and would be manifestly unjust as it would confer a right as a pretermitted heir on the child of a testator's son but deny that right to a child of the testator's daughter. This limited application of the added words as interpreted in Estate of Childs, 21 Cal.App.2d 103, 68 P.2d 306, is relied upon by respondents in support of the holding of the trial court. This holding is contrary to the views above expressed. In Estate of Childs, supra, it is stated, at page 105 of 21 Cal. App.2d, at page 307 of 68 P.2d, that the only effect of the added words is: "These words might serve to give protection to a grandchild born after the execution of the will whose parent was dead at the time of its execution." Manifestly, such a child would have received protection even under section 1307 of the Civil Code. Therefore the added words would be meaningless. But assuming such protection did not exist prior to the adoption of section 90 and that the added words gave only such protection, then that protection could never be enjoyed by the issue of a daughter of the testator because if such issue were born after the death of the testator the daughter could not have predeceased the testator, whereas the issue of a testator's son would be protected, but even such issue to come within the protected class would be limited to those born not later than the normal period of gestation after a time just prior to the testator's death, assuming the son died just prior to such death. We cannot believe that the legislature intended to give such a limited effect or make such a discrimination by the added words which is patently unreasonable and unjust. To countenance such a construction would violate the well-settled rules of statutory construction. "Ordinarily, it would seem that any essential change in the phraseology of a statutory provision would indicate an intention on the part of the legislature to change the meaning of such provision rather than to interpret it." Young v. Three For One Oil Royalties, 1 Cal.2d 639, 646, 36 P.2d 1065, 1068. Section 3542 of the Civil Code provides: "Interpretation must be reasonable." It is said in 23 Cal. Jur. 722-3: "'Interpretation must be reasonable.' The code so provides. And it has been decided, not only that the language of a statute must be given a reasonable interpretation, but that every statute as a whole must be so construed, and thus, when opportunity arises, made compatible with common sense and the dictates of justice. In other words, it is the duty of courts not to be ingenious to find ambiguities in statutes because of extraneous matters, but to interpret them in such a manner that they may be free from ambiguity, and to give, if possible, a construction which not only renders them constitutional, but which is consistent with sound sense and wise policy, with a view to promoting justice."

For the foregoing reasons, that part of the decision in Estate of Childs, supra, apparently holding that the protection to pretermitted heirs does not extend to a grandchild where the testator's child did not die until after the execution of the will, is expressly disapproved.

Respondents contend that because section 1306 of the Civil Code did contain the words "Whenever a testator has a child born after the making of his will, either in his lifetime or after his death" the clauses above mentioned appearing in section 90 of the Probate Code were not in fact added. The obvious answer to that proposition is that whereas section 1306 was concerned solely with the protection of an after-born child, that is, a child born after a will is executed, section 90 of the Probate Code provides for not only after-born children, but also the protection of the issue of such children.

Appellant insists that if the above-mentioned proposition is determined adversely to him, he is nevertheless entitled to half

the estate under section 92 of the Probate Code, in his capacity as successor of his deceased father who was a legatee under the will. The will devises the estate to respondent, Inez Todd, and the decedent's son, or the survivor of them.

[6, 7] In our opinion it was the testator's intention to substitute respondent Inez Todd as sole legatee under his will in the event of the death of his son, Addison Todd. This would preclude appellant from taking any portion of the estate under section 92 of the Probate Code. However, if appellant could under the terms of the will have succeeded to the share of the estate devised or bequeathed to his father under the provisions of said section 92, he would be barred from sharing in the estate as a pretermitted heir under the provisions of section 90 of said code.

The decree of distribution is reversed with direction to the court below to enter a decree in accordance with the views herein expressed.

We concur: GIBSON, C. J.; SHENK, J.; PETERS, Justice pro tem.; WARD, Justice pro tem.

TRAYNOR, Justice (concurring).

I concur.

Decedent, Rush Todd, disposed of his estate by will as follows: "I hereby give, devise and bequeath all of my estate, * * * equally, share and share alike, to my said wife Inez Todd, and my said son, Addison Todd, or to the survivor of them." In 1931, more than six years after the making of this will, Ridgeway Todd, son of Addison Todd and grandson of the testator, was born. No provision was made for him in the will. Addison Todd died in 1935 leaving his father and his son surviving him. Rush Todd, the testator, died in 1936. The decree of distribution gave the entire estate to Inez Todd, his surviving wife. Ridgeway Todd has appealed from this decree of distribution contending that (1) by virtue of Probate Code section 90 he is a pretermitted heir and therefore entitled to one-half of the estate as his intestate share and (2) Probate Code section 92 entitles him to succeed to his father's share of the estate under the will.

Section 90 of the Probate Code provides: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate".

Section 92 of the Probate Code provides: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator".

Section 90 cannot be properly interpreted without taking into account the effect of section 92. In the ordinary situation where a testator is predeceased by his child who leaves a surviving child, the grandchild will succeed to his parent's share under the will by virtue of section 92. If the grandchild has received no express mention in the will may he also be regarded as a pretermitted heir under section 90 with the right to claim his intestate share of the estate in addition to that portion which he takes by virtue of section 92? The majority opinion states that he may not but gives no reason for reaching that conclusion.

A grandchild who will take his predeceased parent's share under a will by virtue of section 92 cannot be a pretermitted heir under section 90. When a testator provides for his child by will with no alternate disposition in the event that the child predeceases him, he has by law also provided for any issue of the child, since the issue will take in the place of the parent under section 92. The testator has not, therefore, omitted to provide for the issue of any deceased child within the meaning of section 90. He has provided for such issue by operation of law; if the testator's child predeceases him, the grandchild will succeed to his parent's share under section 92 and hence cannot be a pre-

termitted heir under section 90. Thus, suppose a testator provides among other bequests one of $10,000 for his son but makes no mention of a grandson. Suppose further that the son predeceases the testator and that the grandson's intestate share under section 90 would be $100,000. The grandson by virtue of section 92 will take only the $10,000 in place of his father, and not the $100,000 under section 90.

In the present case the question of whether or not the grandson, Richard Todd, is a pretermitted heir under section 90, turns upon the determination of whether or not he succeeds to his parent's share under section 92. The import of section 92 is that if a testator makes a testamentary disposition in favor of his child which fails by virtue of the child's predeceasing the testator, no substitute legatee having been named, the issue of such child will take in place of his parent. If, however, the testator has provided that the property should go to an alternate legatee in such a situation, then such alternate will take the property by virtue of the terms of the will and, there being no lapse of the legacy, the issue of the predeceased child will be able to claim nothing under section 92.

In the present case the testator provided that his estate should go to his wife and his son, or to the survivor. Upon the death of the son therefore the right to receive the entire estate passed to the wife under the terms of the will and the grandson, Ridgeway Todd, cannot claim an interest in the estate under section 92.

The problem remains as to whether he is a pretermitted heir under section 90. If the grandchild of a testator is to take as a pretermitted heir under section 90, the grandchild's parent must have predeceased the testator. It is respondent's contention, however, that the grandchild can only take as a pretermitted heir if his parent was dead at the time the will was made; that if the parent was alive at the time the will was made, the testator's duty was to provide only for his then living child, and that if such child subsequently predeceases the testator, a surviving grandchild is not a pretermitted heir within the meaning of section 90. In re Barter's Estate, 86 Cal. 441, 25 P. 15, construing Civil Code section 1307, now replaced by section 90, held that a grandchild was not rendered pretermitted by the testator's failure to provide for him when his parent was alive at the time the will was made even though the parent predeceased the testator. Section 1307 then provided: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate * * *." Following the repeal of sections 1306, 1307, 1308 and 1309 of the Civil Code in 1931, however, section 90 of the Probate Code was adopted and the following italicized clause was added: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, *whether born before or after the making of the will or before or after the death of the testator* * * * unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate." Despite its ambiguity, the most reasonable construction to be placed upon this added clause is that the legislature thereby intended to change the rule of the Barter case under former section 1307 and to provide that a grandchild could be pretermitted even though his parent, who subsequently predeceased the testator, was alive at the time of the making of the will. Unless the added clause is so construed it must either be disregarded entirely with respect to grandchildren or limited to situations where the testator's son has died before the making of the will but the son's wife has given birth to a child thereafter. Estate of Childs, 21 Cal.App.2d 103, 68 P.2d 306. Since such a grandchild would have been protected under the old section 1307, it is more reasonable to hold that in permitting the issue of a predeceased child, born before or after the making of the will, to be regarded as pretermitted, the legislature intended to include any child born at any time after the making of the will even though his parent was alive when the will was made. This view is reinforced by the reference in the clause to issue born before or after the death of the testator, which, with respect to grandchildren, would seem designed to cover the situation where a testator's son has predeceased the testator after the making of the will but the son's wife has given birth to a child after the testator's death. The only other possible interpretation with respect to grandchildren would limit the application of this part of the clause to the unusual situation in which the testator's son

dies, the testator makes his will, the testator dies, and the son's wife gives birth to a child, all in the order given, within a period of nine months.

In this light Ridgeway Todd must be considered a pretermitted heir under the provision of Probate Code, section 90, and he is therefore entitled to one-half of his grandfather's estate as his intestate share. Prob.Code, sec. 221.



17 Cal.2d 204

OLIVE PRORATION PROGRAM COMMITTEE FOR OLIVE PRORATION ZONE NO. 1 et al. v. AGRICULTURAL PRORATE COMMISSION et al.

L. A. 17286.

Supreme Court of California.

Jan. 31, 1941.

1. Judgment ⇐547

Ordinarily, doctrine of "res judicata" cannot be applied to the exercise by administrative bodies of power to make orders.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Officers ⇐110

Whether an administrative agency can reverse a particular determination depends on kind of power exercised in making the order and terms of statute under which the power was exercised.

3. Officers ⇐110

The determination of an administrative agency as to existence of a fact or status which is based upon a present or past group of facts cannot thereafter be altered or modified.

4. Judgment ⇐547

Where it is clear that Legislature intended that an administrative agency should exercise a continuing jurisdiction with power to modify or alter its orders to conform to changed conditions, doctrine of "res judicata" is not applicable.

5. Officers ⇐103

Courts usually will deny administrative agency the right to change its determination, in absence of a statutory provision so providing, since all administrative actions must be grounded in statutory authority.

6. Agriculture ⇐2

An order of Agricultural Prorate Commission denying petition to terminate program for the prorated marketing of olives was conclusive under Agricultural Proration Act, and commission had no authority to thereafter rescind its prior order denying petition and enter a new order granting it. St.1933, p. 1969, as amended; St.1935, p. 1540, § 23.

7. Agriculture ⇐2

Where Agricultural Prorate Commission called a hearing on a petition to terminate the program for the prorated marketing of olives and thereafter entered an order denying the petition, a redetermination by the commission without notice to parties, based on a field survey and report of Department of Finance submitted after entry of order did not meet statutory requirement of a "hearing". St.1933, p. 1969, as amended; St.1935, p. 1540, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearing".

8. Officers ⇐110

Only evidence which opposite party has an opportunity to refute at a hearing can be relied upon as a basis of a finding of an administrative agency.

9. Agriculture ⇐2

Act of Agricultural Prorate Commission, in considering field survey and report of Department of Finance received after a hearing on petition to terminate program for the prorated marketing of olives, was not justified on ground that counsel for certain of parties stipulated as to use of field survey and report, where it did not appear that counsel were authorized to bind all parties appearing at the hearing, and further that stipulation did not purport to authorize a later field survey and report. St.1933, p. 1969, as amended; St.1935, p. 1540, § 23.

10. Agriculture ⇐2

Where proceedings before Agricultural Prorate Commission to terminate program for the prorated marketing of olives was initiated by certain producers-owners under Agricultural Proration Act, action of commission in secretly receiving evidence consisting of a field survey and report of Department of Finance, after conclusion of

hearing on petition, could not be justified under provision of act authorizing commission to initiate an investigation on its own motion to determine whether facts warranting a proration program continued to exist. St.1933, p. 1969, as amended; St.1935, p. 1540, § 23.

11. Agriculture ⇐2

Under provision of Agricultural Proration Act authorizing producers and owners to file a petition with the Agricultural Prorate Commission for a termination of any proration program, only issue which commission could decide at a hearing on a petition was whether petition was signed by requisite number of producers and owners, and hence evidence offered for purpose of showing that there were no conditions justifying continuance of proration would not be relevant. St.1933, p. 1969, as amended; St.1935, p. 1540, § 23.

12. Agriculture ⇐2

An order of Agricultural Prorate Commission granting petition of owners and producers to terminate program for the prorated marketing of olives, which was based upon reports secretly received without knowledge of parties after conclusion of hearing on petition, contrary to provisions of Agricultural Proration Act, would not be sustained on ground that evidence upon which the order was based could be reviewed in the judicial proceeding authorized by the Act. St.1933, p. 1969, as amended; St.1935, pp. 1535, 1540, §§ 17, 23.

Original proceeding by Olive Proration Program Committee for Olive Proration Zone No. 1 and others, against the Agricultural Prorate Commission and others, for a writ of mandate directing respondent commission to annul orders purporting to terminate the olive proration program theretofore established.

Writ granted.

Hadsell, Sweet, Ingalls & Lamb and Dan Hadsell, all of San Francisco, for petitioners.

Earl Warren, Atty. Gen., W. R. Augustine and Lucas E. Kilkenny, Deputy Attys. Gen., for respondent Agricultural Prorate Commission.

L. A. MacNicol, of Merced, for respondents Harry Hughes and Jacob Isely.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondents A. R. Wakefield, Stacy Gange, E. A. Reeves and W. E. Stevenson.

EDMONDS, Justice.

In this original proceeding, the petitioner, Olive Proration Program Committee for Olive Proration Zone No. 1, seeks a peremptory writ of mandate directing the Agricultural Prorate Advisory Commission and William B. Parker, director of agriculture, as successors of the Agricultural Prorate Commission, Stats.1939, ch. 894 p. 2485; Deering's General Laws, 1937 ed., Vol. 1, Act 143a, to annul two orders made by the latter body. These orders, dated July 26 and August 7, 1939, respectively, purport to terminate the olive proration program theretofore established.

Olive Proration Zone No. 1, embracing the entire state, was created in 1936 under the Agricultural Proration Act, Stats.1933, Ch. 754, p. 1969, as amended; Deering's Gen. Laws, 1937 Ed., Vol. 1, Act 143a. A program for the prorated marketing of olives was established in 1937, and, as subsequently modified, has since been in effect unless it was concluded by the two orders which have been mentioned.

In 1939, approximately two years after the institution of the program, several persons filed with the respondent commission a petition authorized by section 23 of the act. This section, as then in effect, provided that an application for the termination of any proration program could be filed "by not less than 40 per cent of the producers and by the owners of 40 per cent of the producing factors of the industry within the zone in which the program is effective." When such a petition was filed, the commission was required to hold a hearing to determine whether it was signed by persons representing the specified percentage of producers and factors. If, upon such hearing, it was established that the petition was sufficiently signed, it was the duty of the commission to terminate the program.

After notice given, on March 16, 1939, the commission held a hearing upon this petition. Many persons appeared, several of whom, as witnesses or otherwise, voiced their support of or their objections to the marketing program then in effect. There was also considerable testimony to the effect that the signers of the petition were owners of groves or producers of olives to the extent indicated after their respective names. At the conclusion of the evidence,

the hearing was adjourned "subject to further call by the commission should it so decide."

No "further call" was ever made or other hearing had. Instead, and on June 27, 1939, more than three months after the conclusion of the hearing, the commission made and entered its findings and order denying the petition to terminate the program. It found that the petition was signed by less than 40 per cent of the olive producers and by less than 40 per cent of the owners of producing factors, and was insufficient in other respects to meet the requirements of the act. The findings recite in detail the grounds for the commission's conclusions and set forth methods employed in making its computations. In form they purport to be a complete and final determination concerning the sufficiency of the petition.

On July 27, 1939, and within the period prescribed in section 17 of the act, St.1935, p. 1535, for a judicial review of any order made by the commission, the respondents Hughes and Isely, two of the proponents of the petition to terminate the program, filed in the superior court of Tulare county a petition for writ of mandate to compel the commission to set aside this order and to terminate the program. This proceeding was dismissed when it was later ascertained that on the previous day the commission, by a three to two vote of its members, and without any further hearing or any request therefor, or notice to or consent of any of the interested parties made an order rescinding its prior order denying the petition to terminate and granted it "subject to a ruling by the attorney-general as to the legal power of the commission" so to do.

Following this order, the Attorney General advised the commission that it has the necessary power, under the circumstances shown in the present case, to vacate an order and to enter a new and different order. The commission then made the order of August 7, 1939, which in unqualified terms rescinded its order of June 27, 1939, denying the petition to terminate and granted it. This order was made without any notice to the parties, and was followed by a letter to them in which the commission stated: "This action is based in a large measure on an independent, impartial examination of the petition to terminate Olive Proration Zone No. 1 made by the division of budgets and accounts of the department of finance. We have authorized today this department to release this report to you and all other interested parties."

The petitioner then instituted the present proceeding, joining as respondents not only the commission but also the respondents Wakefield, Gange, Reeves and Stevenson who are proponents of the program, and the respondents Hughes and Isely who petitioned the commission for its termination. This court issued an alternative writ of mandate and thereafter made an order appointing the Honorable Maurice T. Dooling, Jr., as referee, to hear the issues and make findings thereon. After taking considerable evidence, the referee found and concluded, among other things, that the respondent commission had exceeded its authority when on August 7, 1939, it reversed its earlier action and terminated the program.

The first question for determination concerns the commission's jurisdiction to rescind and reverse its order of June 27, 1939, denying, as insufficient, the petition to terminate the program. This order, the referee found, was made "at a time when all evidence produced at the hearing of said petition to terminate said proration program was before said Agricultural Prorate Commission and at a time when said * * * commission was fully advised with regard to the law and the evidence relating to said petition; and that said findings and order purported to be and were complete, final and binding findings of the * * * commission with respect to said petition to terminate said proration program and purported to and did constitute a complete, final and binding order of said * * * commission denying said petition to terminate said proration program."

[1] Under legislation of recent years, administrative bodies are given authority to make orders which cover a wide field. Many of such orders determine facts which will put enactments into effect. Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 238 P. 703; Brock v. Superior Court, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127; Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; Hampton & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624. Others promulgate rules and incidental regulations which are necessary to implement and make effective the more general powers conferred. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175; United

States v. Grimand, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563. Ordinarily, the doctrine of res judicata may not appropriately be applied to the exercise of such power. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809; see, 49 Yale L.J. 1250, 1253; 52 Harv.L. Rev. 259.

[2-4] Where orders which relate to what may be rather broadly defined as individual rights are concerned, the question whether the administrative agency may reverse a particular determination depends upon the kind of power exercised in making the order and the terms of the statute under which the power was exercised. As to the first factor, almost without exception, courts have held that the determination of an administrative agency as to the existence of a fact or status which is based upon a present or past group of facts, may not thereafter be altered or modified. Muncy v. Hughes, 265 Ky. 588, 97 S.W.2d 546; Little v. Board of Adjustment, 195 N.C. 793, 143 S.E. 827; Lilienthal v. Wyandotte, 286 Mich. 604, 282 N.W. 837. As concisely stated by the New York Court of Appeals, "officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them." People ex rel. Chase v. Wemple, 144 N.Y. 478, 39 N.E. 397, 398. But if it is clear that the legislature intended that the agency should exercise a continuing jurisdiction with power to modify or alter its orders to conform to changing conditions, the doctrine of res judicata is not applicable. The determination depends upon the provisions of the particular statute.

[5, 6] The orders here challenged were made in a proceeding authorized by the Agricultural Proration Act, supra, as a means whereby persons in an industry may exercise the rights given to them, as a group, to control the proration of their products. The statute contains no provision in express terms giving the commission authority to change its considered determination, made after a full hearing, and the fact that any order made by it may be reviewed in a judicial proceeding to be commenced within 30 days after its effective date is some evidence of legislative intention to the contrary. And since all administrative action must be grounded in statutory authority, in the absence of a provision allowing a commission to change its determination, courts have usually denied the right so to do.

That principle was recently followed by this court in deciding that the decision of a civil service commission upon the status of an employee was final and conclusive. "It had no jurisdiction to retry the question and make a different finding at a later time. The charter gives no such grant of power, and it may not be implied." Continuing, the court said: "If the power were admitted, what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure." Heap v. City of Los Angeles, 6 Cal.2d 405, 407, 57 P.2d 1323, 1324.

[7, 8] These conclusions make it unnecessary to consider the contention that the last two orders of the commission are void because not made upon a hearing, as contemplated by the statute. However, as has been stated, the order of August 7th, according to the commission, was based, "in a large measure," on a field survey and report requested by the commission and made by the department of finance after the hearing of March 16, 1939. The parties were not apprised that this survey was being made or the result of it until after the last order of the commission was promulgated. As a result they were denied all right of cross-examination with respect thereto and also of an opportunity to make a counter showing in rebuttal. Under such circumstances, the statutory requirement of a hearing was not met. Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129; I. C. C. v. Louisville & N. R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431; see 52 Harv.L.Rev. 509, 12. Only evidence which the opposite party has an opportunity to refute at the hearing may be relied upon as the basis of a finding. United States v. Abilene & So. Ry. Co., 265 U.S. 274, 44 S. Ct. 565, 68 L.Ed. 1016.

The Attorney General defends the commission's use of the report of the department of finance upon the authority of Ray

v. Parker 15 Cal.2d 275, 101 P.2d 665, 683. In that decision, he insists, this court upheld an administrative order based upon hearsay evidence. But the evidence which is challenged in the present case was secretly received by the commission after it had determined the issues presented by the petition to terminate. In the Ray case, although the director of agriculture did not offer in evidence all of the documentary evidence he relied upon to support his order, "he did, in substance, place before each hearing the 'result' of his investigations and surveys, and the expert assistant * * * who had made the same was available and was in many instances subjected to examination by those present at the hearings."

[9] Also, the record does not support the contention that counsel for respondents Wakefield, Gange, Reeves and Stevenson stipulated at the hearing before the respondent commission on March 16, 1939, that such subsequent field survey and report might be made by the department and employed by the commission in determining the sufficiency of the petition to terminate. Aside from the fact that counsel for these respondents was neither authorized nor entitled to stipulate for and to bind all parties appearing at the hearing, it appears that, as the referee concluded, the stipulation covered merely a check of the sufficiency of the petition to terminate against the zone records. The stipulation did not purport to authorize a later field survey and report.

[10] Also, the investigation conducted by the department of finance was not one which may be said to have been made by the commission under the authority of section 23 of the Agricultural Proration Act, supra. That action allows the commission to "initiate an investigation on its own motion to determine whether or not the facts [warranting a proration program] * * * continue to exist." But the present proceeding to terminate proration, initiated by certain growers and producers, is an entirely different one from that contemplated by the quoted provision of section 23, and the action of the commission in secretly receiving and considering evidence after the conclusion of the hearing cannot be justified under it.

[11] After the referee filed his report, the respondents Hughes and Isely moved this court for leave to introduce additional evidence showing that there are now no conditions justifying the continuance of proration. They assert that because of the war abroad olives produced in the European and Mediterranean countries are not now reaching the United States, and California growers do not need the benefit of proration in order to receive maximum returns for their crops. But the only issue which the commission could decide in the proceeding before it was the sufficiency of the petition. If the petition was signed by the requisite number of producers and owners of producing factors, it was the duty of the commission, under the law as then in force, to terminate the program regardless of other facts. The evidence sought to be introduced by respondents Hughes and Isely would not be relevant to that issue even if it might be received at this late date.

[12] As another ground justifying its action, the commission asserts that its last order should be upheld because the evidence upon which it is based, although received after the conclusion of the hearing, may be reviewed in the judicial proceeding authorized by the act. To approve such a practice would mean that an administrative body could base a finding and order on information or reports secretly received without the knowledge of the parties, and successfully defend that action by answering that the remedy of the one aggrieved by the decision is to challenge the data or evidence in a later judicial proceeding. That is not the procedure provided for by the statute.

The motion to take additional evidence is denied. Let a writ of mandate issue requiring the respondent commission to annul its orders of July 26 and August 7, 1939.

We concur: TRAYNOR, J.; SHENK, J.; CARTER, J.; PETERS, J.; WARD, Justice pro tem.

GIBSON, C. J., deeming himself disqualified, does not participate in this decision.

17 Cal.2d 256

In re RICHARDS' ESTATE.

BENNALLACK v. RECTOR.

Sac. 5263.

Supreme Court of California.

Feb. 3, 1941.

1. Executors and administrators ⇐87

The statute providing that if decedent's debtor is unable to pay all his debts, court may authorize compromise, is inapplicable to proceeding for settlement of executor's account. Probate Code, §§ 578, 920 et seq.

2. Executors and administrators ⇐510(8)

After lapse of time for appeal from order or judgment, such as order settling executor's account, appeal from subsequent order refusing to set aside original order is unavailing. Probate Code, §§ 920 et seq., 1240.

3. Executors and administrators ⇐508(2)

The probate court being authorized by statute to settle executor's account free from any control by parties to proceeding for such settlement, such court's order of settlement is valid on its face and cannot be rendered void, even if stipulation therefor between attorneys for administrator of estate with will annexed and administrator of estate of widow of assignee of residuary interest in testator's estate was not binding on administrator of widow's estate for any reason, such as his attorney's lack of authority, since probate court is not bound to exercise such authority in accordance with parties' or their attorneys' stipulations or agreements. Probate Code, § 920 et seq.

4. Executors and administrators ⇐510(8)

Where no appeal from probate court's order granting executor's petition for permission to exchange certain realty of estate for other realty and additional cash sum was filed until nearly four years after date of order, appellant's objection thereto on ground that estate had not been distributed cannot be successfully urged on appeal from decree settling final accounts of deceased executor's successor.

Appeal from Superior Court, Nevada County; Raglan Tuttle and Arthur Coats, Judges pro tem.

In the matter of the estate of Philip Richards, deceased. From a decree settling the final and supplemental accounts of E. M. Rector, administrator with the will annexed of the estate, and ordering distribution thereof, Frank Bennallack, administrator of the estates of Mary Ann Bennallack and James Bennallack, deceased, appeals.

Affirmed.

Prior opinion, 103 P.2d 1033.

James Snell, of Grass Valley, for appellant.

W. E. Wright, and H. Ward Sheldon, both of Nevada City, for respondent.

Butler, Van Dyke & Harris, of Sacramento, amici curiae for respondent.

PER CURIAM.

This is an appeal from a "decree settling accounts and decree of distribution" in the matter of the estate of Philip Richards, deceased. The facts in this case are substantially as follows:

Philip Richards died in 1887, leaving a will in which William G. Richards, Francis Richards and James Bennallack were named as executors. The will, which was duly admitted to probate, designated certain legatees and provided that in the event of the death of any one or more of such legatees before receipt of the respective bequests, the amount or amounts thereof should be paid to the testator's brother, William S. Richards. The residue of the estate was left to the said brother, William S. Richards, and to another brother, Francis Richards (also known as Francis S. Richards), share and share alike.

Probate of the estate proceeded over a period of years and, on June 16, 1934, Wm. G. Richards, who since the death of the second coexecutor in 1900 had been the sole executor of the Philip Richards estate, rendered to the probate court an account which covered a period of twenty-two years, and which indicated a balance of cash on hand in the estate in the sum of $8,533.98. As against that amount, however, in the said account he requested that allowance be made to him for reasonable fees as executor. The amount shown as cash on hand included the sum of $3,000 which had been received as additional consideration in connection with certain real property which had been accepted in exchange for a parcel of real property that had belonged to Philip Richards' estate at the time of his death.

On August 21, 1934, Frank Bennallack, appellant herein, as administrator of the es-

tate of Mary Ann Bennallack, deceased, who was the widow and heir of James Bennallack (to whom Francis Richards' residuary interest in the estate of Philip Richards had been assigned), filed objections to the account filed by Wm. G. Richards and, among other things, alleged that no vouchers accompanied the said account; that, according to the books which had been kept by Wm. G. Richards, all amounts of money which had been received by him as executor were not included in the account so filed; and that many items of disbursement therein itemized were not properly chargeable against the estate.

On September 24, 1934, a hearing on the matter was had in open court, at which time it was ordered submitted. At said hearing it was stipulated that the matter of the claim of Wm. G. Richards for executor's fees would be considered at the hearing on his final account.

On November 26, 1934, Wm. G. Richards filed a supplemental and final account, wherein it appeared that the residue of the estate consisted of cash on hand in the sum of $8,767.40, together with the real property which had been acquired by the estate as a result of the exchange hereinbefore mentioned. The said final account was accompanied by a petition for distribution, and a hearing on that petition was set for December 7, 1934. On behalf of the estates he represented, Frank Bennallack filed exceptions to the said final account. However, two days after his final account was filed, Wm. G. Richards died, and his widow, Mary E. Richards,—to whom he had deeded all his interest in Philip's estate, including the residuary interest of Wm. S. Richards which theretofore had been assigned to him,—was appointed administratrix with the will annexed of the estate of Philip Richards. Shortly thereafter, and before qualifying as such administratrix, Mary E. Richards died. On April 5, 1935, E. M. Rector, respondent herein,—who is the husband of the daughter (and heir at law) of Wm. G. and Mary E. Richards,—was appointed to succeed Mary E. Richards as administrator with the will annexed of Philip's estate.

It perhaps at this point should be stated that for a period of forty-seven years preceding his death Wm. G. Richards had served as an executor of the will of Philip Richards, without having received therefor any fees as such executor,—and that during the last twenty-two years prior to his demise, as hereinbefore has been indicated, he had served as the sole executor thereof. The two accounts which were filed by Wm. G. Richards covered the said period of twenty-two years and contained several hundred items of receipt and disbursements, the dates, amounts and nature of which were clearly detailed. The items of receipt consisted principally of monthly rentals collected from tenants of the real property, and nearly all the items of disbursement represented payments of taxes and insurance, also for improvements and upkeep of the property. A considerable portion of the remaining disbursements represented expenses of litigation in which on each of many different occasions the estate had been engaged. The recapitulation set forth in the final account showed that during the preceding twenty-two years in which Wm. G. Richards was the sole executor he received for the estate the total sum of $18,447.42, and expended $9,680.02,—which left a balance on hand of $8,767.40. However, as hereinbefore has been stated, as against that balance the executor made a demand (which was supported by a complete statement of facts in relation thereto) for an allowance of fees in the following sums: $788.95 as statutory fees of the executor; $4,700 for extraordinary services performed by the executor during the preceding forty-seven years; and $1,000 for extraordinary services of the executor's attorneys. One of appellant's principal objections to the account and petition for final distribution which was filed by Wm. G. Richards was directed against the allowance of the amounts claimed therein as executor's fees.

From the record, it appears that, shortly after the death of Wm. G. Richards, it was ascertained that he did not, in fact, have on hand the entire amount of money with which, in his final account, he had charged himself as executor of the Philip Richards estate, i.e., the sum of $8,767.40. It also appears that all persons interested in the Philip Richards estate had knowledge of that fact—as well as the further fact that as against the amount shown in his final account as being on hand, Wm. G. Richards had asserted a claim for executor's fees in the sum of approximately $5,500.

Several hearings were had on the last account of Wm. G. Richards and finally, on February 5, 1936, the matter of the settlement thereof was taken up in court

chambers. At that hearing the attorneys for E. M. Rector as administrator of the respective estates of Philip Richards, deceased, Wm. G. Richards, deceased, and Mary E. Richards, deceased, entered into a written stipulation with the attorneys for Frank Bennallack as the administrator of the respective estates of Mary Ann Bennallack, deceased, and James Bennallack, deceased, whereby it was provided that the account dated June 15, 1934, and the final account dated November 22, 1934, as filed by Wm. G. Richards, be settled and allowed,—and a proposed order to that effect was prepared and attached to the stipulation. However, in view of the fact that the hearing was had in chambers there is no record of the discussion which took place among the several attorneys at or immediately preceding the time they entered into the said stipulation. But from the testimony which was given at subsequent hearings it appears that the question of the allowance of executor's fees was there discussed; that it was understood and agreed between the parties to the stipulation that the claim for the entire sum of money asserted by Wm. G. Richards as due him for executor's fees would be waived,—and that the amount of cash on hand which belonged to the Philip Richards estate was the sum of $3,002.76.

On February 7, 1936, the court signed the said order. It was therein recited that the amount of cash on hand in the estate of Philip Richards was the sum of $3,002.76, from which the court directed the payment of certain items of expense which had been settled and allowed; and by the terms of that order E. M. Rector, as administrator of Philip's estate, was charged with the amount of cash remaining on hand after those deductions had been made, i.e., the sum of $2,194.63. It also was provided therein that such order was to be "*a final adjudication* of the accounts presented and all moneys received and disbursed by the said Wm. G. Richards as Executor of the said Estate, and a final settlement of all cash money due said Estate from said Wm. G. Richards, * * *". (Emphasis added.) No appeal was taken from that order. However, a day or so after the stipulation was entered into, and after the order had been signed, appellant herein assertedly for the first time learned of the execution of the stipulation, and he thereupon discharged his then attorney for the asserted reason that the stipulation had been entered into on appellant's behalf without his knowledge or consent.

Thereafter, on February 14, 1936, E. M. Rector as administrator with the will annexed of the estate of Philip Richards filed his first and final account, which included a petition for distribution of all the estate remaining in his hands. On February 29, 1936, Frank Bennallack, individually, and as administrator of the estates he represented, filed objections to settling the accounts of administrator E. M. Rector, to the petition for distribution and to the closing of Philip Richards' estate. As a part of those objections he sought a nullification of the stipulation and order of February 7, 1936, settling the accounts of Wm. G. Richards, and requested that a complete hearing be had on both of the Richards accounts.

On January 4, 1937, a hearing was had on E. M. Rector's accounts, and from the record it appears that, in part, the court treated appellant's said objections as an application filed under the provisions of section 473 of the Code of Civil Procedure, to have set aside and declared void the said stipulation, together with the order which had been signed by the court on February 7, 1936. At that hearing the court stated that the application for relief under section 473 would be denied; and thereafter, and some time between January 4th and the end of that month, a minute order appeared on the records of the court, which in part was as follows: "It is ordered that relief under section 473 [Code Civ. Proc.] be denied. It is further ordered that judgment be that residue of the estate will be divided equally between the heirs and successors of William S. Richards and Francis Richards." Subsequently, administrator Rector filed supplemental accounts, and thereafter a hearing was had on September 3, 1937, with respect to those accounts. On September 16, 1937, the final and supplemental accounts of administrator Rector were settled, allowed and approved; and on September 20, 1937, a final decree of distribution was entered. By its judgment the court denied the relief asked for by administrator Bennallack as set forth in his several objections. The decree also contained a formal ruling by which appellant's request for nullification of the order of February 7, 1936, was denied. The present appeal was taken from that decree.

Although the appeal was taken from the decree settling the final account and granting the petition for final distribution filed by E. M. Rector, the real controversy on this appeal is grounded on the asserted invalidity of two separate orders which theretofore had been made by the probate court. The first of the orders which appellant sought to have annulled (which hereinafter will be more fully discussed) was made on November 6, 1933, during the administration of the estate by E. M. Rector's predecessor, Wm. G. Richards, which order authorized the exchange of real property heretofore mentioned. The second order was the one made on February 7, 1936, by which were settled the said two accounts filed by the executor Wm. G. Richards.

With regard to the second order,—against the validity of which appellant has directed most of his argument,—as hereinbefore has been stated, on February 29, 1936, at the time appellant filed his objections to settling the Rector accounts, he also sought an annulment of the said order of February 7, 1936 (based on the assertion that as to appellant the stipulation was invalid, for the reason that, allegedly, he had not authorized his then attorney to so stipulate); and at the same time he asked that a complete hearing be had on the two Wm. G. Richards accounts. In the latter connection appellant charged the executor with being indebted to the Philip Richards estate to the extent of large sums of money, and asked "That no allowance be made to said Wm. G. Richards for any item of expenditure alleged to have been made in said accounts in excess of $20.00 for which no voucher is produced or filed" or "for any item of expenditure alleged to have been made in said accounts for any item of $20.00 or less for which no voucher is produced, unless such item of expenditure shall be supported by the uncontradicted oath of the said Wm. G. Richards, positive to the fact of payment, specifying when, where, and to whom it was made; provided, however, that there shall not in any event be any allowance made for items of expenditure of $20.00 or less, where no vouchers are produced, for any sum in excess of $500.00". With respect to the absence of vouchers, it may be stated that at the hearing of Wm. G. Richards' first account testimony was adduced showing that during the management of the estate as sole executor he had kept a "time book" in which he had entered all receipts and disbursements as the respective transactions had taken place, and that the items of receipt and disbursement set forth in said account were copied from that book, which was produced at the hearing and introduced in evidence. Furthermore, Wm. G. Richards testified in support of his account that the amounts of all payments set forth therein had actually been made by him on the dates, to the persons, and for the purposes stated in the account. No testimony to the contrary was produced.

Appellant does not claim that the order settling said accounts was made or entered as the result of mistake, inadvertence, surprise or excusable neglect. Sec. 473, Code Civ.Proc. Nor does he intimate that any fraud was practiced by any one in connection with the making of the stipulation therein referred to, or with the obtaining of said order. Moreover, he concedes that upon its face the order is valid. However, appellant contends that the order should be declared void for the following reasons: (1) that the final proceedings which resulted in the making of the order of settlement took place in court chambers; (2) that the items of expenditure set forth in said account which exceeded $20 in amount were not supported by vouchers; (3) that said order is based on a void stipulation in that the stipulation in question was in effect a "compromise" of a claim against "a debtor of the decedent" as those terms are used in section 578 of the Probate Code, and that no petition was filed nor court order obtained for such "compromise", as required by that section; and (4) that in any event appellant was not bound by said stipulation —which was ineffectual for any purpose, for the reason that appellant's attorney entered into the stipulation without being authorized so to do.

[1] It would appear that if those contentions were to be upheld the effect would be to nullify the order of February 7, 1936, to reopen for examination the accounts of the executor Wm. G. Richards which had covered his administration of the Philip Richards estate over a period of some twenty-two years, and to declare as a matter of law that a probate court is without jurisdiction to settle an account of an executor or administrator for less than the amount of the balance set forth in the account unless a court order for "compromise" is previously petitioned for and granted, pursuant to the proceedings provided for in section 578 of the Probate Code. Respondent, however, contends that the requirements of section 578 were never

intended to apply to proceedings involving the settlement of an account of an executor. The latter contention must be sustained. By the provisions of article III, chapter XV, division III, of the Probate Code there is outlined the complete procedure to be followed in the matter of settlement of accounts of an executor or administrator, and no reference is therein made to the provisions of section 578 of that code. Moreover, from a consideration of the language of the said section it would appear to be impracticable to apply the provisions thereof to the settlement of an executor's account. In part, the section provides as follows: "If a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approval of the court, may give him a discharge, upon such terms as may appear to the court to be for the best interest of the estate. A compromise may also be authorized by the court when it appears to be just and for the best interest of the estate."

It is clear that until the probate court has made and entered an order settling an executor's account, there can be no determination of the amount due the estate from the executor, and until the amount thereof has been so determined there could be no basis for a petition or an order for compromise. Section 578 provides for the procedure which may be invoked where a "debtor" of a decedent is unable to pay all his debts.

[2] Moreover, under section 1240 of the Probate Code, a right of appeal from the order objected to was afforded appellant, and he failed to exercise that right. When the time has elapsed within which an appeal may be taken from an order or judgment, an appeal is unavailing where, as here, it is taken from a subsequent order which refused to set aside the original order. Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105; Estate of Devincenzi, 119 Cal. 498, 51 P. 845; 2 Cal.Jur. p. 164. It is clear that appellant herein could have appealed from the order of February 7, 1936, and thereby have presented for review on appeal the questions with regard to the asserted irregularities which he now presents as his first three points, as hereinbefore mentioned.

However, appellant argues that—on an appeal from the order of February 7, 1936, —he could not have embodied in a bill of exceptions the facts relied on by him to prove that his attorney had entered into the stipulation without having been authorized by appellant so to do, for the reason that such issue did not arise and the evidence pertaining thereto was not adduced until after said order had been made and entered. In connection with the stipulation, appellant's principal complaint is that—with regard to the settlement of Wm. G. Richards' final account—his attorney had no authority to stipulate for any sum less than the sum of $8,767.40, the amount of cash which was indicated in said account as having been on hand. However, as hereinbefore has been indicated, in entering into the stipulation the court and the attorneys took into consideration the executor's demand for fees, and in that regard the record shows the following facts: At the time of the executor's appointment in 1887, the estate consisted of several pieces of real property and considerable personal property, including mining stock. Twenty-two cash legacies were created by the will, some seven bequests of personal property, together with five specific devises of real property, and the residue was bequeathed in equal shares to the decedent's brothers. Several of the legatees resided outside this country. By the terms of the will, the executors were authorized—without order of court—to pay the cash legacies, deliver the bequeathed personal property, convey the real property to the beneficiaries entitled thereto, and to rent, sell or otherwise dispose of the remaining real property which belonged to the estate. Following the death of the two coexecutors, Wm. G. Richards managed the entire estate. He performed innumerable services in that regard, such as securing tenants for the real property, collecting the monthly rentals therefrom, keeping the property in repair and improving the same. Furthermore, during the forty-seven years of its pendency in probate, the estate was engaged as a party litigant in eight separate legal actions and several distinct appeals to this court. At the time the executor filed his petition for final distribution he had paid all claims against the estate and had carried out all the terms of the will with respect to payment of the cash legacies, delivery of the bequests, and conveyance of the several pieces of real property. In addition thereto he had sold or exchanged various other pieces of the real property belonging to the estate, so that the residue of the estate consisted only of money and one parcel of real property, which by the provisions of the final decree of distribution—from which

this appeal was taken—was apportioned in equal shares to the estates of Mary Elizabeth Richards, the deceased wife of the said executor, and James Bennallack, deceased, the father of appellant. Up to the time of the filing of his final account, no allowance for executor's fees had been made to Wm. G. Richards, and he thereupon asked for an allowance of approximately $100 a year for the extraordinary services thus rendered by him during the preceding forty-seven years. Therefore, it would seem that if the question of the reasonableness of such demand were a matter that could be properly reviewed on this appeal, this court would not be warranted in ruling that the amount claimed for executor's fees was disproportionate to the value of the services that he had rendered.

[3] However, aside from other considerations, the validity of the final order of settlement of the Wm. G. Richards accounts cannot be made to depend on the question whether appellant was bound by the stipulation, for the reason that by virtue of the Code sections embodied in article III, chapter XV, division III, of the Probate Code the authority to settle the accounts of an executor or administrator is vested in the probate court, free from any control by the parties. And although the court may exercise such authority in accordance with stipulations or agreements of the parties or their attorneys, it is not bound to do so. Therefore, even assuming that the stipulation which was entered into by the attorneys in the present case was for any reason not binding on appellant, the court's order of settlement, being valid on its face, could not in any event be rendered void. Church v. Church, Cal.App., 105 P.2d 643; Security-First Nat. Bank of Los Angeles v. Superior Court, 1 Cal.2d 749, 37 P.2d 69.

[4] The other order which appellant attacks on this appeal was made on November 6, 1933. In that order the probate court granted the petition of Wm. G. Richards as executor of the estate of Philip Richards, by which he sought to effect the exchange of a certain parcel of real property belonging to the Philip Richards estate for another piece of property, plus the sum of $3,000 in cash. Appellant filed a protest against such proposed exchange, on the ground that the estate had not been distributed. However, the said petition was granted on the ground that the exchange of the respective properties was for the best interests of the estate. The order recited that notice of hearing had been duly given and that evidence both oral and documentary had been introduced. The court had jurisdiction to entertain the petition as presented, and there is no showing that the order was void on its face. No appeal from such order was filed until September 27, 1937. The order had become final long prior to the last-mentioned date, and the present attack comes too late to be of any avail to appellant.

It therefore follows that appellant's present objections to the two orders herein attacked may not be successfully urged on this appeal which was taken from the decree settling the final accounts of Wm. G. Richards' successor. To entertain those objections at this time would be to put the stamp of approval on an action which amounts to no more than a collateral attack on the said two orders.

From the foregoing it follows that the decree settling accounts and ordering distribution should be, and it hereby is, affirmed.



17 Cal.2d 197

SIVERTSEN v. CITY OF MENLO PARK et al.

S. F. 15974.

Supreme Court of California.

Jan. 31, 1941.

1. Licenses ⇐7(6)

A city may discriminate, in regard to license fees, between businesses of the same character located within and those located without the boundaries of the city.

2. Constitutional law ⇐211

Discriminatory legislation adopted by a city denies "equal protection of the laws" if it is arbitrary, unreasonable and passed for sole purpose of creating a protective tariff for benefit of business located in the particular city. U.S.C.A.Const. Amend. 14; Const. Cal. art. 1, §§ 13, 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Laws".

3. Licenses ⇐7(3)

An ordinance imposing license tax and classifying businesses according as they have

or have not regularly established places of business is not ipso facto unreasonable.

4. Municipal corporations ⇐122(2)

Every intendment must be indulged by the Supreme Court in favor of the validity of an ordinance imposing a license fee and all doubts must be resolved in a way to uphold the lawmaking power.

5. Constitutional law ⇐230(2)
Licenses ⇐7(6)

An ordinance imposing an annual license fee of $10 on painting contractors having a fixed place of business within the city and increasing the fee 100 per cent. for such persons without fixed place of business in the city does not deny "equal protection of the laws" to a nonresident painting contractor, as an unreasonable or arbitrary discrimination or an attempt to destroy out-of-town business. U.S.C.A.Const. Amend. 14; Const. Cal. art. 1, §§ 13, 21.

6. Licenses ⇐7(6)

No hard and fast rule or test can be established to determine the legality of a licensing ordinance which classifies potential applicants according to their residence or nonresidence in the city, but question is simply one of degree.

7. Appeal and error ⇐840(3)

An appellate court, in determining the constitutionality of a license fee ordinance, need not do more than inquire into the reasonableness of such legislation.

8. Licenses ⇐7(1)

The ultimate decisions of local legislative bodies which are familiar with local problems, as expressed by license fee ordinances, should not be easily disturbed.

9. Appeal and error ⇐840(3)

The Supreme Court when called upon to review a license fee ordinance which allegedly violates constitutional guaranties has duty only to guard against attempts on part of local authorities to create a tariff barrier in favor of local businesses, and if such is shown by gross disparities, extraordinarily large exactions, or by other surrounding circumstances, then, and only then, will such ordinance be declared unconstitutional. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, §§ 13, 21.

Appeal from Superior Court, San Mateo County; A. R. Cotton and Maxwell McNutt, Judges.

Action by Oscar E. Sivertsen against the City of Menlo Park and others to enjoin enforcement of an ordinance requiring that painting contractors pay an annual license fee. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Rodgers & Costello, of Palo Alto, for appellant.

James T. O'Keefe, Jr., of Redwood City, for respondents.

CURTIS, Justice.

This is an appeal from a judgment of dismissal after the sustaining of a demurrer to plaintiff's complaint, without leave to amend.

It is alleged in the complaint that plaintiff was a painting contractor, duly licensed by the state of California, with his principal place of business in the city of Palo Alto; that he had contracted to do certain painting in the city of Menlo Park; and that while performing such work he was threatened with arrest by defendant Carroll, as chief of police of Menlo Park, for nonpayment of a license fee as provided by city ordinance No. 76. The pertinent part of the ordinance referred to provides that painting contractors having a fixed place of business in the city of Menlo Park shall pay an annual license fee of $10, and further that "Where such person has no fixed place of business in said city such fee shall be increased by 100%." It is also provided that any person violating any of the provisions of the ordinance is guilty of a misdemeanor and subject to fine or imprisonment in the county jail and that each day of violation would be considered a separate offense.

The plaintiff, having no fixed place of business in Menlo Park, fell within the above-quoted provision and, not having paid the required fee, was liable under the penal provision.

The complaint further alleged that, as a result of threats of arrest or actual arrest under the ordinance, the plaintiff would suffer great loss and irreparable injury and asked that defendants be enjoined and restrained from enforcing that part of the ordinance referred to and that the said ordinance be declared unconstitutional as in violation of the Fourteenth Amendment of the Federal Constitution and sections 13 and 21 of article I of the Constitution of California in that it denied to the plaintiff equal protection of the laws, and granted privi-

leges to one class of citizens which are not accorded to all citizens similarly situated.

It cannot be denied that the ordinance discriminates against those painting contractors who have no fixed places of business within the city of Menlo Park. The question, therefore, is whether such discrimination violates the equal protection clause of the Federal Constitution and the privilege and immunities provision of the state Constitution.

[1-3] It is not denied by the appellant and it is well established by the authorities that there may be discrimination between businesses of the same character located within and those located without the boundaries of a municipality in regard to license fees. Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884; Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; Continental Baking Co. v. City of Escondido, 21 Cal.App.2d 388, 69 P.2d 181; E. A. Hoffman Candy Company v. City of Newport Beach, 120 Cal.App. 525, 8 P.2d 235; Singer Sewing Machine Co. v. Brickell, 233 U.S. 304, 34 S.Ct. 493, 58 L.Ed. 974; Campbell Baking Co. v. City of Maryville, D.C., 31 F.2d 466; Richmond Linen Co. v. Lynchburg, 160 Va. 644, 169 S.E. 554. However, it is equally well established that if discriminatory legislation is arbitrary, unreasonable and passed for the sole purpose of creating a protective tariff for the benefit of business located in the particular municipality, it is unlawful and violative of the constitutional provisions above mentioned. Bueneman v. City of Santa Barbara, supra; Ex parte Frank, 52 Cal. 606, 28 Am.Rep. 642; In re Hines, 33 Cal.App. 45, 164 P. 339; In re Hart, 36 Cal.App. 627, 172 P. 610; In re Riley, 39 Cal.App. 58, 177 P. 854; In re Robinson, 68 Cal.App. 744, 230 P. 175; Campbell Baking Co. v. City of Maryville, supra. These principles are well stated in the case of Continental Baking Co. v. City of Escondido, supra [21 Cal.App.2d 388, 69 P.2d 183], wherein the following appears: "* * * the rule in this state must now be taken to be settled that for the purpose of fixing and imposing license taxes merchants having fixed places of business within a city and other merchants may be separately classified and license taxes in different amounts may be laid upon those in the two classifications, so long as a tax is actually imposed upon both classes, and provided that the tax on one class is not so disproportionately heavy as to demonstrate that the classification is 'a mere subterfuge for legislation directed against a particular group of taxpayers.'" The rule and the test to be applied are also well stated in the case of Campbell Baking Co. v. City of Maryville, supra [31 F.2d 468], in the following language: "A city, having the power to impose license taxes on, for example, bakers, undoubtedly may classify them, if the classification has some reasonable basis. To put those having a regularly established place of business in one class, and those having no such regularly established place of business in another, is not ipso facto an unreasonable classification. [Citing case.] Such a classification, even with substantial differences in taxes, is not unconstitutional. Where, however, it appears from gross disparities, from extraordinarily large exactions (as compared with others), and from all the facts, that the real intent and purpose is, not to raise revenue, but to destroy the business of nonresidents, in the interests of resident dealers and business men, when that appears, then nonresidents are denied that equal protection of the laws which the Constitution guarantees to all."

[4, 5] Applying the above rules to the ordinance here under consideration and keeping in mind the well-established principle that in considering the validity of such an ordinance, we must indulge every intendment in favor of its validity and that all doubts must be resolved in a way to uphold the law-making power (Ex parte Haskell, supra), we are of the opinion that the ordinance does not run counter to any of the constitutional inhibitions. It cannot be said that the requirement of a 100 per cent increase in the license fee for a painting contractor who has no fixed place of business in Menlo Park is an unreasonable or arbitrary discrimination or is an attempt to destroy out of town business. The annual license fee paid by local contractors is $10. A 100 per cent increase of that sum, or $20, required from out of town contractors surely is not such an exorbitant sum, the payment of which would drive such contractors out of business or prevent them from seeking business within the city.

[6] There can be no hard and fast rule or test set down which will determine the legality or illegality of an ordinance such as the one before us. The question is simply one of degree. A brief reference to some of the cases holding ordinances

unconstitutional because of illegal discrimination will illustrate that, as a matter of degree, the instant ordinance cannot be classified with that group. The ordinance declared unconstitutional in the early case of Ex parte Frank, supra, required a merchant whose goods were located within the city to pay a quarterly license fee of $100, whereas a merchant whose goods were located without the city was required to pay a quarterly license fee of $2,000, or twenty times as great. In Re Hines, supra, the ordinance fixed a flat fee of $12 per annum for the operation of local laundries and a $130 fee for every wagon used for pickup or delivery by an outside laundry, or at least eleven times as great. The statute invalidated in In re Robinson, supra, imposed a license fee of $200 per quarter upon a solicitor if he drew his supplies and filled his orders from a business house located outside the city but if located within, then no license fee was required.

Appellant strongly relies on the case of Bueneman v. City of Santa Barbara, supra. Reference to the ordinance there involved shows clearly why it was placed in that class of ordinances previously declared to be unconstitutional. The ordinance there provided that laundry or dry cleaning businesses whose establishments were located outside the city were to pay an annual license fee of $200 for soliciting or delivering within the city. No tax was imposed upon a person conducting a similar business whose establishment was located within the city. An ordinance completely exempting local businesses and impressing a $200 fee on outside businesses is far different from the ordinance here under consideration, which provides for a $10 fee from local contractors and a $20 fee from outside contractors.

The disparity here is not even so great as that in the ordinance reviewed in the case of Continental Baking Co. v. City of Escondido, supra, which was determined to be not arbitrary or unreasonable. The ordinance there required a $50 annual license fee from every person, firm or corporation owning, operating and conducting a bakery within the city and a $150 license fee and $25 semi-annually for every vehicle over one used in the business, from all operating from without the city. The appellant attempts to distinguish this case on the ground that the statute expressly stated that the local businesses, to pay only the lower fee, were to be on the tax rolls of the city and that no such requirement is made in the instant ordinance. This cannot be said to be a distinction because all property within a city, with certain exceptions not relevant here, is taxable and any such provision may be considered mere surplusage. It is true that the court referred to the provision but such reference was made only as further evidence in support of its conclusion that the taxing authorities were not using the increased license fee as a subterfuge for oppression, but only as an attempt to balance the tax burden.

Appellant further relies on a statement in the case of E. A. Hoffman Candy Co. v. City of Newport Beach, supra, to the effect that a municipality is without any power to classify persons engaged in precisely the same business or placing a license fee on some and not others, or a charge not operating uniformly upon all engaged in precisely the same business. If, by such statement, the court there meant that no discrimination under any circumstances was permissible, then we cannot agree with such statement. However, a review and analysis of the facts and conclusions of that case clearly show that the court did not intend to lay down any such principle. The ordinance there made three different classifications, viz., (1) local merchants paying a flat license fee of $10 for operation of business; (2) out of town merchants who delivered by motor vehicles within the city paying a $10 license fee on every vehicle; and (3) out of town merchants who delivered by common carrier apparently paying no license fee. The court concluded that such ordinance was valid, even though there clearly was classification. Therefore, it cannot be said that the court in its opinion established or approved of a rule of no discrimination. Furthermore, the court there cites as authority for the statement made the line of cases beginning with Ex parte Frank, supra, which cases, as we have already pointed out, declared the ordinances involved unconstitutional because they were unreasonable.

[7-9] It being well established that there may be discrimination or classification in this type of legislation, it is not incumbent upon an appellate court, in determining the constitutionality of a license fee ordinance, to do more than inquire into the reasonableness of such legislation. Each locality has its own individual tax problems and there can never be an absolute

equality of taxation. Because of the familiarity of the local legislative bodies with such local problems, their ultimate decisions as expressed by the taxing ordinances should not be easily disturbed. It is the duty of this court only to guard against attempts on the part of such local authorities to create a tariff barrier in favor of local businesses. If such attempt is shown by gross disparities, extraordinarily large exactions, or from other surrounding circumstances then, and only then, will such an ordinance be declared unconstitutional. We do not find such elements present in the ordinance here being considered. We are therefore of the opinion that the ordinance does not violate the Fourteenth Amendment of the Federal Constitution or sections 13 and 21 of the State Constitution.

The action of the trial court in dismissing the action after sustaining the demurrer to the complaint, without leave to amend, was, in our opinion, proper.

The judgment is affirmed.

We concur: HOUSER, J.; TRAYNOR, J.



17 Cal.2d 314

GANTNER & MATTERN CO. v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Sac. 5406.

Supreme Court of California.

Feb. 7, 1941.

1. Mandamus ⇐4(5)

Under provision of the Unemployment Insurance Act that any party to a decision by a referee may appeal to employment commission from such decision, and commission may, on its own motion, affirm, modify, or set aside any decision of referee on basis of evidence previously submitted or direct taking of additional evidence, party aggrieved by a decision of referee must first exhaust his statutory remedies of appeal before he can maintain mandamus to prevent employment commission from paying unemployment benefits to employees who left their work because of strike and picket line. St.1939, pp. 8, 3013, §§ 56, 72.

2. Mandamus ⇐4(5)

An employer dissatisfied with the decision of a referee of the employment commission recommending that benefits be paid to employees who left their work because of strike and picket line could not maintain mandamus to prevent payment of unemployment benefits to such employees without first exhausting the statutory remedy of appeal from referee's decision on ground that employment commission by a long line of decisions had made plain its views as to law applicable to the situation and that it would have been idle act to have asked for a review by commission. St.1939, pp. 8, 3013, §§ 56, 72.

SHENK and WARD, JJ., dissenting.

Proceeding by the Gantner & Mattern Company against the California Employment Commission and others for a writ of mandate to prevent respondent commission from paying any unemployment benefits to striking employees, members of the Knitgoods Workers' Union, to recover back all benefits already paid to them, and to enforce provisions of the Unemployment Insurance Act, St.1939, pp. 8, 3013, §§ 56, 72.

Writ of mandate denied.

Prior opinion, 101 P.2d 173.

See, also, 35 Cal.App.2d, 742, 96 P.2d 802.

Gladstein, Grossman & Margolis and Milton Marks, all of San Francisco, for petitioner.

Brobeck, Phleger & Harrison, of San Francisco, amici curiae for petitioner Waterfront Employers Ass'n of San Francisco.

Earl Warren, Atty. Gen., and John J. Dailey, Deputy Atty. Gen., for respondents.

PER CURIAM.

This case was ordered transferred to this court on our own motion, after decision by the District Court of Appeal, Third Appellate District, 101 P.2d 173, in order that it might be considered together with the case of Abelleira v. District Court of Appeal, S.F. 16357, then pending before us. Our decision in the Abelleira case, supra, this day filed, 109 P.2d 942, reaches the same conclusion as did the District Court of Appeal in the instant case. Accordingly, we hereby adopt its opinion, with minor changes, as the opinion of this court. It reads as follows:

"Petitioner herein is a corporation engaged as a manufacturer and wholesaler of knit goods. Among its many employees were janitors, who were members of the Building Service Employees' International Union, Local No. 87; some 150 others were engaged as employees in the manufacturing, packing and shipping of knit goods and were members of Knitgoods Workers' Union, Local No. 191, International Ladies' Garment Workers' Union; still other employees, according to their particular craft or occupation, were members of Office Employees' Union, Local No. 21320, Machinists' Lodge No. 68, Warehousemen's Union, Local No. 860, and Building Service Employees' International Union, Local No. 87.

"On October 10, 1939, petitioner discharged a janitor then in its employment, who was a member of the Building Service Employees' International Union heretofore referred to. Thereafter the union demanded of petitioner that it re-employ and reinstate the janitor, which demand was, by petitioner, refused. On October 16, 1939, the Building Service Employees' Union declared a strike against said petitioner, and established a picket line at the factory of the Gantner & Mattern Company, in which picket line the several unions, except the Knitgoods Workers, joined and participated.

"Upon the declaration of the strike and the establishment of the picket line the members of the Knitgoods Workers' Union left their work at the establishment of petitioner and refused and still refuse to return to their work at the plant of petitioner.

"Thereafter these employees, members of the Knitgoods Union, made application to the respondent commission for the payment to them of unemployment benefits, and pursuant to an order of respondent commission, petitioner filed a list of its employees, members of the Knitgoods Union who were in its employment at the time the strike was declared, and who had left their work because of the strike and picket line. Subsequent to the filing of such list of employees, respondent commission, through its adjustment unit, ordered and directed the payment of unemployment benefits to the employees of petitioner, members of the Knitgoods Workers' Union. Thereafter, and within the time fixed by the Unemployment Insurance Act, Stats. 1935, chap. 352, p. 1226, petitioner filed with respondent commission an appeal in writing from the decision of the adjustment unit of the respondent commission, setting forth that the jobs of said employees were then and there at all times open to said employees, and that these employees had left their work because of a strike and the maintenance of a picket line and were disqualified to receive benefits under the provisions of the act, and particularly section 56 thereof, St.1939, p. 8.

"Upon the filing of this appeal with respondent commission, it was referred to a referee who, after a hearing, recommended that unemployment benefits be paid to said employees, members of Knitgoods Workers' Union, Local No. 191.

"To prevent such payments, petitioner, by this writ of mandate, seeks to prevent respondents from paying any unemployment benefits to the members of the Knitgoods Workers' Union, to recover back all benefits already paid to them, and to enforce the provisions of the Unemployment Insurance Act.

"The main point urged in this proceeding is that petitioner has failed, without justifiable excuse, to exhaust its statutory remedies, and for that reason this court should refuse to issue its writ of mandate.

[1] "Section 72 of the Unemployment Act as amended in 1939, St.1939, p. 3013, provides that any party to a decision by a referee may appeal to the commission from such decision, and the commission may, on its own motion, affirm, modify or set aside any decision of the referee on the basis of the evidence previously submitted in such case or direct the taking of additional evidence.

"We are of the opinion that where a procedure is provided, as here, that a party must first exhaust his statutory remedies before this court can intervene.

"San Joaquin, etc., Company v. County of Stanislaus et al., 155 Cal. 21, 99 P. 365, holds that a water company engaged in the business of furnishing water for irrigation cannot maintain an action to have declared void orders of the board of supervisors establishing the maximum rates for water, and to enjoin the enforcement of such rates, on the ground that the same were unfair and unreasonable, if the company had made no attempt within a year to secure a readjustment of the rates by petition to the supervisors.

"In re Kehr, 190 Cal. 401, 212 P. 913, in which a writ of mandate to compel a superior court to hear a petition for distribution, where money had been paid to the state treasurer under the provisions of section 1737 of the Code of Civil Procedure, was denied on the ground that the remedy of petitioner was first by proceedings found in section 1272a of the Code of Civil Procedure.

"Teeter v. Los Angeles, 209 Cal. 685, 290 P. 11. Here a property owner attempted to enjoin a city from carrying out the terms of a contract to improve certain streets. He failed, however, to first file his protest before the city council, as required by the Street Improvement Act of 1911, and a writ was denied.

"Collier v. Astor, 9 Cal.2d 202, 70 P.2d 171. 'Any action involving a controversy arising under the Private Employment Agency Act [Stats.1913, p. 515] brought in the superior court, without first referring the controversy to, and securing the determination of, the labor commissioner, is prematurely brought, and cannot be maintained.' (Syllabus.)

[2] "It is here argued by petitioner that by a long line of decisions the commission has made plain its views as to the law applicable to a situation similar to the one now before us, and that it would have been an idle act to have asked for a review by the commission. But be that as it may, we cannot presume that the commission, having adopted a particular rule or policy in like cases in the past, would necessarily have applied the same rule in the case at bar. The exhaustion of remedial procedure as laid down by the statute is required unless the petitioner can positively state that the commission has declared what its ruling will be in the particular case, and that, petitioner is unable to do.

"For that reason, and upon that ground, the writ of mandate is denied."

SHENK, Justice.

I dissent.

This proceeding in mandamus was decided on the merits by the District Court of Appeal, is here pursuant to an order of transfer, and is now decided by this court likewise on the merits. The principal question, as I see it, is whether the statutory remedy of appeal to the commission after decision by the referee is an adequate remedy on behalf of petitioner in the light of the admitted facts and the proper construction of the statute. That the administrative remedy afforded by statute must be an adequate remedy is not disputed.

The rule of exhaustion of remedies does not require blind enforcement. It is an outgrowth of the rule that a petitioner may not invoke the extraordinary redress of the courts if he has another adequate legal remedy, exemplified in the rules governing the issuance of the writ of mandamus (Sec. 1086, Code of Civ.Proc.) and the writ of review (Sec. 1067, Code of Civ.Proc.). The basis of the rule excluding the petitioner from the redress sought is that his legal remedy is adequate. In contemplating the question of adequacy, realities as well as theories must be considered. This is the point at which I depart from the opinion of the majority.

In the petition for the writ of mandamus it is alleged that the commission has adopted a rule binding upon all the officers, referees, and employees of the commission charged with the administration of the act and the payment of benefits thereunder. The alleged rule is to the effect that notwithstanding the provisions of section 56 (a) of the act, the commission will order and direct that unemployment benefits "be paid to employees belonging to one union who leave their work by reason of a trade dispute actually in existence at the establishment at which they are employed, where such trade dispute is evidenced by a strike and picket line declared, established and maintained by another union representing employees in the same establishment, and where the employees seeking benefits under the act have left their work and refused to return thereto, although their employment is available to them, by reason of sympathy with the striking and picketing union and with the union objectives of the trade dispute evidenced thereby". It is also alleged that "Said rule has been kept in force and effect since June 29, 1939, and has been complied with by all officers, employees, deputies and referees, and said Commission and its officers, employes, deputies and referees have publicly and officially declared that said rule will be enforced in all cases submitted to them, or any of them, notwithstanding the express provisions of the Act, and particularly section 56 thereof."

The commission denied that on or about June 29, 1939, or at any other time it had

"adopted" such a rule, but admitted that, through its adjustment unit, it had directed the payment of benefits to the members of Knitgoods Workers' Union Local No. 191, who refused to cross the picket line established by another union in the same establishment, but denied that the direction was pursuant to any rule "adopted" by the commission. The denial is captious in the light of the admission in the answer and the language of the opinion and decision of the referee in this very matter, a copy of which is attached to and made a part of the return to the alternative writ. The opinion so adopted contains the following statement: "Opinion: The principle is settled by a long line of Commission decisions that the refusal of members of a union which is not engaged in any labor dispute with an employer to cross a picket line established by another union representing a different class of workers which is engaged in a trade dispute with an employer, is not sufficient to invoke the disqualification provided by Section 56(a) of the Unemployment Insurance Act." The opinion then cites twelve commission cases to that effect and follows with this positive announcement: "These decisions are binding upon the Referee in this case." It should here be noted that in the Bodinson case the commission adhered to the same rule.

In the face of these admissions and allegations, it is certain that the commission would affirm the referee's order. To admit and allege that it had uniformly ruled in favor of the allowance of benefits under the facts here disclosed is tantamount to an admission that the commission had adopted a rule on the subject. As stated by the referee, the rule was binding on him. He, therefore, had no discretion in the matter and must decide in accordance with what the commission had announced it would hold on any appeal from the referee's decision. To conclude that an appeal under these circumstances would be an adequate remedy on behalf of petitioner, and that relief should be denied on that ground, would be to ignore the substance of the controversy.

Of course, the Bodinson case had not been decided by this court at the time the respondents filed their answer and return. As the matter then stood, the petition was, in my opinion, entitled to the relief sought. However, in the light of our decision in the Bodinson case, Bodinson Mfg. Co. v. California Employment Comm., 109 P.2d 935, the commission has no discretion or alternative except to set aside the referee's order and deny payments which this court has decided would be illegal, if made.

Inasmuch as the official duty of the commission is thus so clearly indicated, the peremptory writ should in my opinion be granted.

I concur: WARD, J., pro tem.



17 Cal.2d 321

BODINSON MFG. CO. v. CALIFORNIA EMPLOYMENT COMMISSION, et al.

Sac. 5407.

Supreme Court of California.

Feb. 7, 1941.

Rehearing Denied March 7, 1941.

1. Constitutional law ⇐70(3)

It is not the province of the Supreme Court, in construing the Unemployment Insurance Act, to consider arguments of social policy, but such matters are for the Legislature. St.1935, p. 1226, as amended.

2. Constitutional law ⇐70(3)

The Supreme Court has no authority to question the wisdom of the scheme set up by the Unemployment Insurance Act, and cannot deliberate upon the social desirability of making benefit payments to groups which are excluded by the statute. St.1935, p. 1226, as amended.

3. Master and servant ⇐78

The fact that the Unemployment Insurance Act does not provide its own procedure for testing whether a particular decision of the Employment Commission awarding benefits is authorized, and that only express provision in the act for court review is one authorizing employer to sue to recover contributions paid under protest, does not establish that courts are without power to review a decision of the commission awarding unemployment benefits in violation of the statute. St. 1935, p. 1226, as amended; St.1939, p. 2058, § 45.10.

4. Master and servant ⇐78

An administrative agency, such as the Employment Commission, charged with carrying out a particular statute must adopt

some preliminary construction of the statute as a basis on which to proceed.

5. Statutes ⇐219

The administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous.

6. Statutes ⇐219

A tentative administrative interpretation of a statute which an administrative agency is charged to enforce makes no pretense at finality, and it is duty of Supreme Court, when a question of law is properly presented, to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction.

7. Constitutional law ⇐67

The ultimate interpretation of a statute is an exercise of the "judicial power". Code Civ.Proc. § 2102.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Power".

8. Constitutional law ⇐67

The "judicial power" is conferred on the courts by the Constitution, and in the absence of a constitutional provision, cannot be exercised by any other body. Const. art. 6, § 1.

9. Constitutional law ⇐80(2)
Master and servant ⇐11

If the Unemployment Insurance Act were construed to vest final authority in the Employment Commission to pass on questions of law, it would be unconstitutional as a delegation of "judicial power". St.1935, p. 1226, as amended; Const. art. 6, § 1.

10. Constitutional law ⇐48

Any construction of a statute which renders it unconstitutional is to be avoided if possible.

11. Constitutional law ⇐67

Despite procedural omissions in statutes creating administrative agencies, such as the Unemployment Insurance Act which creates the Employment Commission, the Supreme Court must continue to exercise its constitutional authority to render final decisions on questions of law properly raised in connection with the acts of such agencies. St.1935, p. 1226, as amended; Const. art. 6, § 1.

12. Master and servant ⇐78

Under the proper construction of the Unemployment Insurance Act, an employee who is prevented from working, through no act of his own, is entitled to unemployment compensation. St.1935, p. 1226, as amended; St.1939, p. 8, § 56.

13. Master and servant ⇐78

Where strike was called by welders' union, machinists in the same plant who did not go on strike, but who refused to pass through picket line which striking welders had established around the plant, left work because of a "trade dispute", within statute providing that individual is not eligible for unemployment benefits if he leaves his work because of a "trade dispute", the choice causing them to refrain from working not being involuntary. St.1939, p. 8, § 56.

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Dispute".

14. Master and servant ⇐78

Under statute providing that an individual is not eligible for unemployment benefits if he leaves his work because of a "trade dispute", the disqualification depends on the fact of voluntary action and not on the motives which lead to it. St.1939, p. 8, § 56.

15. Mandamus ⇐71

"Mandamus" has traditionally been merely a proceeding to compel the performance of ministerial duties and has not been widely used as a method for reviewing the decisions of administrative agencies.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandamus".

16. Mandamus ⇐3(1), 63

In California, "mandamus" is the remedial writ used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided. Code Civ.Proc. §§ 1084–1097.

17. Mandamus ⇐1

A writ of "mandamus" is used, not only to compel administrative action which is refused in violation of law, but also to annul or restrain administrative action already taken in violation of law. Code Civ.Proc. §§ 1084–1097.

18. Mandamus ⇐70

The writ of "mandamus" may be used, not only to compel the performance of a ministerial act, but also, in a proper case, for the purpose of reviewing the final acts and decisions of statewide administrative agencies which do not exercise judicial power. Code Civ.Proc. §§ 1084–1097.

19. Mandamus ⇐73(1)

Mandamus was the proper proceeding for employer to bring to compel the Employment Commission to set aside a decision awarding unemployment compensation to employees who were members of a union which was not on strike against employer but who refused to pass through picket lines established by other striking employees, where employer alleged that such award violated law. St.1935, p. 1226, as amended; St.1939, p. 8, § 56; Code Civ.Proc. §§ 1084–1097.

20. Master and servant ⇐78

A person permitted by statute to participate as an "interested party" in administrative hearings and to take appeals at the administrative level has sufficient interest in the result to test the legality of the final decision before a court of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested Party".

21. Mandamus ⇐23(1)

An employer whose reserve account might be affected by payment of unemployment benefits to persons formerly in his employ, and who participated in proceedings before Employment Commission involving rights to unemployment compensation of certain employees who left work because of refusal to walk through a picket line established by another union of which they were not members, was a "party beneficially interested", and, therefore, a "proper party" to maintain mandamus proceedings to set aside Commission's decision awarding unemployment compensation to such employees. St.1935, p. 1226, as amended; St.1939, pp. 8, 3010, §§ 56, 67; Code Civ.Proc. §§ 1084–1097.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Beneficially Interested".

22. Officers ⇐103

It would be highly improper for Supreme Court to substitute its opinion for that of an administrative agency, such as Employment Commission, on matters properly intrusted to the agency to decide.

Mandamus proceeding by Bodinson Manufacturing Company against the California Employment Commission and others, to compel the respondent commission to set aside its decision awarding unemployment compensation to two of the corespondents and to compel it to deny such compensation to the other corespondent and to compel it to correct petitioner's merit rating. On motions to quash an alternative writ and separate demurrers on the ground that the petition fails to state a cause of action.

Demurrers overruled and motions to quash alternative writ denied with directions.

Prior opinion, 101 P.2d 165.

Rehearing denied; CARTER, J., dissenting.

J. M. Mannon, Jr., Edwin S. Pillsbury, George O. Bahrs, and McCutchen, Olney, Mannon & Greene, all of San Francisco, for petitioner.

Horton & Horton and Joseph K. Horton, all of Los Angeles, and Brobeck, Phleger & Harrison, of San Francisco, amici curiæ for petitioner Waterfront Employers Ass'n of San Francisco.

Maurice P. McCaffrey, of San Francisco, Glenn V. Walls, of Sacramento, Earl Warren, Atty. Gen., and John J. Dailey, Deputy Atty. Gen., for respondents.

Robert W. Kenny and Morris E. Cohn, both of Los Angeles, for corespondents.

Milton Marks, of San Francisco, amicus curiæ for respondent.

GIBSON, Chief Justice.

Petitioner sought a writ of mandamus in the District Court of Appeal, Third District, to compel the respondent Commission to set aside its decision awarding unemployment compensation to two of the corespondents, to compel it to deny such compensation to the other corespondents, and to compel it to correct petitioner's merit rating under the Unemployment Insurance Act, Stats.1935, p. 1226, chap. 352, as amended, Deering's Gen.Laws, 1939 Supp., Act 8780d. The writ issued as prayed. 101 P.2d 165. Thereafter a petition by respondents and corespondents for hearing in this court was granted.

There is no conflict as to the material facts. The California Employment Commission is charged by law with the administration of the Unemployment Insurance Act. The petitioner, Bodinson Manufacturing Company, is an employer subject to the terms of the act, and both the company and its employees have contributed as required by law to the fund from which benefit payments are made from time to time to unemployed workers pursuant to the provisions of the statute. The five named corespondents are machinists who, for some

time prior to May 24, 1939, had been employed by petitioner at its plant in San Francisco.

On the morning of May 24, 1939, a strike was called by certain of the petitioner's employees who were members of the Welders' Union, Local 1330. The corespondent machinists were not members of the Welders' Union, Local 1330, and did not go on strike against petitioner, but from May 24, 1939, to July 10, 1939, corespondents were unemployed solely because they refused to pass through the picket line which the striking welders had established around petitioner's plant. Corespondents applied for unemployment benefit payments and an initial determination was made under section 67 of the act, St.1939, p. 3010, denying their application. Two of the employees, Cailteaux and Harvey, appealed as permitted by section 67, and the decision was reversed as to them by the referee. The petitioner, Bodinson Manufacturing Company, thereupon appealed to the full Commission, see sec. 72, St.1939, p. 3013, which rendered its decision holding that the two employees were entitled to unemployment compensation under the act, and further indicated that it would award benefits to all others similarly situated. Having exhausted its remedies under the act (see Abelleira v. District Court of Appeal, 109 P.2d 942, this day decided), petitioner sought this writ of mandate on the theory that the Commission's order was in violation of the provisions of the Unemployment Insurance Act.

Petitioner contends that the statute, properly interpreted, makes corespondents ineligible to receive benefit payments. The applicable provision is section 56, St.1939, p. 8, reading as follows: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: (a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed." The respondent Commission and the corespondent machinists contend that this clause was intended to disqualify only those workers who voluntarily leave their work because of a trade dispute, and that corespondents did not leave their work voluntarily. They further assert that the petitioner is not a proper party to raise the question by this proceeding in mandamus.

The main issue is one of statutory interpretation. It is necessary to determine the meaning of the legislative declaration that a workman is disqualified if he left his work because of a trade dispute. The fundamental rights of organized labor are not involved in this controversy. No one has challenged the right of labor to strike or to maintain picket lines for the purposes sanctioned by law. Cf. McKay v. Retail Automobile Salesmen's Local Union No. 1067, Cal.Sup., 106 P.2d 373; E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38-44, Cal.Sup., 106 P.2d 1; C. S. Smith Metropolitan Market Co., Ltd., v. Lyons, Cal.Sup., 106 P.2d 414; Shafer v. Registered Pharmacists Union, Local 1172, Cal.Sup., 106 P. 2d 403; Lund v. Auto Mechanics' Union No. 1414, Cal.Sup., 106 P.2d 408.

[1, 2] It is not the province of this court to consider the arguments of social policy which have been urged upon it by each side; these are matters which must be, and no doubt were, addressed to the legislature. We have no authority to question the wisdom or unwisdom of the scheme set up by the statute, and we cannot deliberate upon the social desirability of making benefit payments to groups which are excluded by the statute. The conditions under which benefits are to be paid have been provided by the legislature. Thus, the sole question is whether the five employees in the present case meet the conditions which the statute prescribes.

[3] The statute does not provide its own procedure for testing whether a particular decision of the Commission awarding benefits is consistent with the authority delegated to the Commission under the act. The only express provision for court review is made by section 45.10, St.1939, p. 2058, which permits an employer to contest the legality of the contribution sought to be enforced against him by paying it under protest and then suing to recover the amount so paid. It does not follow from this, however, that the courts are without power to review a decision awarding unemployment benefits when it is alleged that the Commission has violated the plain provisions of the statute under which it functions.

[4-11] The question presented is one of law. We are not concerned here with the degree of finality which the legislature may have intended to confer upon the Commission's determinations of fact. The failure

of the legislative body to provide a specific means of judicial review might well be held to indicate an intention that the Commission's decisions were to be final in so far as the legislature could make them final. Respondents would have us deduce from this, however, that the legislature intended decisions awarding benefits to be final, not only as to findings of fact, but also on matters of statutory interpretation and other questions of law. We recognize, of course, that an administrative agency charged with carrying out a particular statute must adopt some preliminary construction of the statute as a basis upon which to proceed. It is likewise true that the administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous. People v. Southern Pacific Co., 209 Cal. 578, 594, 595, 290 P. 25; Riley v. Thompson, 193 Cal. 773, 778, 227 P. 772; Colonial Mut. C. Ins. Co., Ltd., v. Mitchell, 140 Cal.App. 651, 657, 36 P.2d 127; 23 Cal.Jur. 776. See, also, United States v. Philbrick, 120 U.S. 52, 59, 7 S. Ct. 413, 30 L.Ed. 559; McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 51 S.Ct. 510, 75 L.Ed. 1183; 40 Harv.L.Rev. 469. But such a tentative administrative interpretation makes no pretense at finality and it is the duty of this court, when a question of law is properly presented, to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction. Riley v. Forbes, 193 Cal. 740, 745, 227 P. 768; Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86; 23 Cal. Jur. 776; see Federal Trade Comm. v. Gratz, 253 U.S. 421, 427, 40 S.Ct. 572, 64 L.Ed. 993; United States v. Dickson, 40 U.S. 141, 15 Pet. 141, 161, 162, 10 L.Ed. 689; Houghton v. Payne, 194 U.S. 88, 99, 100, 24 S.Ct. 590, 48 L.Ed. 888; Koshland v. Helvering, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756; Iselin v. United States, 270 U.S. 245, 46 S.Ct. 248, 70 L.Ed. 566; 59 C.J. 1028; 29 Mich.L.Rev. 840, 844; Landis, Administrative Process [1938], pp. 150-152; Blachly & Oatman, Administrative Legislation & Adjudication [1934], p. 184. The ultimate interpretation of a statute is an exercise of the judicial power. Code Civ.Proc., sec. 2102; Sierra County v. Nevada County, 155 Cal. 1, 14, 99 P. 371; Signal Hill v. Los Angeles County, 196 Cal. 161, 236 P. 304; 23 Cal.Jur. 719. Also, Federal Trade Comm. v. Gratz, supra; Dismuke v. United States, 297 U.S. 167, 172, 173, 56 S.Ct. 400, 80 L.Ed. 561; 59 C.J. 944, sec. 564. The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body. Calif.Const., Art. VI, sec. 1; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 413, 156 P. 491, Ann.Cas.1917 E, 390; Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; cf. Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 571, 55 P.2d 495; Globe Cotton Oil Mills v. Zellerbach, 200 Cal. 276, 277, 252 P. 1038; 5 Cal.Jur. 683. Thus, if it were held that the statute was intended to vest final authority in the California Employment Commission to pass upon questions of law, the act would clearly be unconstitutional. Any such construction is to be avoided, if possible. People v. Southern Pacific Co., supra, 209 Cal. at page 594, 290 P. 25; County of Los Angeles v. Legg, 5 Cal.2d 349, 353, 55 P.2d 206; County of Los Angeles v. Riley, 6 Cal.2d 625, 629, 59 P.2d 139, 106 A.L.R. 903; 6 Cal.Jur. 615. Furthermore, the finality of decision which is contended for by corespondents in this case where the particular decision happens to be favorable to them might, in a future case, operate to prevent a workman whose just claim was denied by the Commission from applying to the courts for redress. Thus, despite procedural omissions in statutes creating administrative agencies, this court must, under well-settled principles, continue to exercise its constitutional authority to render final decisions on questions of law which are properly raised in connection with the acts of such agencies.

We are therefore required, for the first time, to construe the disqualification clause of the Unemployment Insurance Act which makes a workman ineligible for benefits if he has "left his work because of a trade dispute". It is a question upon which no authority exists in this state. Respondents contend that the language of the California statute, which says "left his work", implies that the laborer is disqualified for unemployment benefits only if he leaves his work voluntarily. See Fierst & Spector, "Unemployment Compensation in Labor Disputes", [1940] 49 Yale L.J. 461, 462. Reasoning from this premise, respondents contend that the corespondent machinists in this case did not leave their work voluntarily, but were prevented from going there by reason of the picket line of the striking welders. It is argued that if they did not leave voluntarily, the disqualification clause does not

apply, and that benefits should be paid to them.

[12, 13] The weakness of this argument is not in the underlying premise upon which respondents rely, but in its application to the present case based upon the assumption that the employees who refused to pass the picket line did not act of their own volition. It is true that under the proper construction of the statute an employee who is prevented from working through no act of his own is entitled to compensation as, for example, where he is barred by force from the premises where he has been working. But that is not the situation here. If the picket line was maintained within the limits permitted by law, as this one presumably was, no physical compulsion was exerted to prevent corespondents from working. They were unemployed solely because, in accordance with their union principles, they did not choose to work in a plant where certain of their fellow employees were on strike. Their own consciences and faith in their union principles dictated their action. This choice is one which members of organized labor are frequently called upon to make, and in the eyes of the law this kind of choice has never been deemed involuntary. This very point was considered by us in a recent case dealing with the right of labor unions to picket, wherein the employer sought an injunction on the ground that the picket line operated as an unlawful compulsion upon other union men. We said "* * * it is obviously untrue that when truck drivers employed by other firms refuse to go through the picket line, they do so involuntarily. Such refusal is undoubtedly based upon the freely adopted rules of the local union to which they belong." C. S. Smith Metropolitan Market Co., Ltd., v. Lyons, Cal.Sup., 106 P.2d 414, 418.

[14] In brief, disqualification under the act depends upon the fact of voluntary action, and not the motives which led to it. The legislature did not seek to interfere with union principles or practices. The act merely sets up certain conditions as a prerequisite to the right to receive compensation, and declares that in certain situations the worker shall be ineligible to receive compensation. Fairly interpreted, it was intended to disqualify those workers who voluntarily leave their work because of a trade dispute. Corespondents in this proceeding in fact "left their work because of a trade dispute" and are consequently ineligible to receive benefit payments. It follows that the Commission's decision was erroneous as a matter of law and should be annulled.

Respondents have raised two further issues of a procedural nature. It is contended that the right to receive benefits cannot properly be raised by this proceeding in mandamus, and, in any event, that the employer is not a proper person to challenge a decision awarding benefits under the act. In our opinion neither contention is sound.

[15-19] The writ of mandamus is provided for in the Code of Civil Procedure, sections 1084–1097. It may be sought by a "party beneficially interested", sec. 1086, against "any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins". Sec. 1085. Historically the writ has been used for far narrower purposes than those for which it is used in this state today. Mandamus has traditionally been merely a proceeding to compel the performance of ministerial duties and has not been widely used as a method for reviewing the decisions of administrative agencies. United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 51 S.Ct. 502, 75 L.Ed. 1148; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 23 S.Ct. 698, 47 L. Ed. 1074; Cousens, "Legal Doubt or Determination as a Ground for Refusing Mandamus" [1936], 24 Georgetown L.Jour. 269, 272; U. of Pa.L.Rev. [1930], 407. In jurisdictions where other means exist for reviewing the acts and decisions of administrative bodies, either by specific statutory procedure or by writ of certiorari, there has been no necessity for enlarging the writ of mandamus beyond its conventional sphere. In this state, however, the law is now established that mandamus is the remedial writ which will be used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided. Drummey v. State Board, 13 Cal.2d 75, 82, 87 P.2d 848; McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; Whitten v. State Board, 8 Cal.2d 444, 447, 65 P.2d 1296, 115 A.L.R. 1; cf. 16 Cal.Jur. 765, 823; 27 Cal.L.Rev. [1939], 738. Our late decisions have recognized that the use of mandamus to review acts of administrative agencies is a departure from the traditional purpose of the writ, and that many historical theories concerning mandamus (as, for example, the technicalities of the rule that discretion in the inferior officer will

bar the issuance of the writ) will not always be applicable where the writ is used to review the acts of administrative bodies. Drummey v. State Board of Funeral Directors, supra, 13 Cal.2d page 84, 87 P.2d 848; McDonough v. Goodcell, supra, 13 Cal.2d page 752, 91 P.2d 1035, 123 A.L.R. 1205. Thus, the writ has been used not only to compel administrative action which was refused in violation of law (Wahl v. Waters, 11 Cal.2d 81, 77 P.2d 1072; Anglo California National Bank v. Leland, 9 Cal. 2d 347, 70 P.2d 937; Peters v. Sacramento City Employees' Retirement System, 27 Cal. App.2d 10, 80 P.2d 179; Hartsock v. Merritt, 94 Cal.App. 431, 271 P. 381), but also to annul or restrain administrative action already taken which is in violation of law. Drummey v. State Board, supra; Clancy v. Stockburger, 10 Cal.2d 651, 76 P.2d 678; Rodgers v. Board of Pub. Works, 208 Cal. 291, 281 P. 64; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582; Lotts v. Board of Park Com'rs, 13 Cal.App.2d 625, 57 P.2d 215. The writ of mandamus may therefore be used in this state, not only to compel the performance of a ministerial act, but also in a proper case for the purpose of reviewing the final acts and decisions of statewide administrative agencies which do not exercise judicial power. That being so, mandamus was the proper proceeding to bring in the present instance.

[20, 21] It is finally contended that the employer is not a proper party to challenge the decision of the Commission awarding benefits under the act. In providing for mandamus proceedings the Code of Civil Procedure, section 1086, requires only that the petitioner be a party "beneficially interested". The act provides in section 67, St.1939, p. 3010, that "any employer whose reserve account may be affected by the payment of benefits to any individual formerly in his employ may become an interested party to any proceeding under this article * * *". It is conceded that the petitioner took the required steps to become an interested party under the statute in the present case and, indeed, was the moving party in appealing to the full Commission from the decision awarding benefits to the corespondents. We are aware of no authority which holds that a person permitted by statute to participate as an interested party in the administrative hearings and to take appeals at the administrative level is, nevertheless, without a sufficient interest in the result to test the legality of the final decision before a court of law. Indeed, it seems to us that elemental principles of justice require that parties to the administrative proceeding be permitted to retain their status as such throughout the final judicial review by a court of law, for the fundamental issues in litigation remain essentially the same. Cf. L. Singer & Sons v. Union Pac. R. Co., 61 S.Ct. 254, 85 L.Ed. 198, Frankfurter, J., concurring at page 259, of 61 S.Ct., 85 L.Ed. 204. Furthermore, it seems apparent that the employer whose reserve account is affected is the only person having sufficient incentive to challenge a decision awarding benefits. Action by this employer provides the only procedural guarantee that the Commission can be held by legal process to comply with the requirements of the statute under which it operates.

Respondents suggest that the rules governing a taxpayer's suit to restrain a governmental agency from spending public money should by analogy control the result here. Cases are cited to the effect that a member of the public, whose only interest in the particular administrative act is that of a general taxpayer, should not in the absence of statute be permitted to interfere with the processes of government by bringing a court proceeding against the agency. See Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078. The situations are not analogous. A more accurate parallel is furnished by the various administrative agencies created in this state and elsewhere with limited powers for the purpose of dealing with particular phases of the relationship between employers and employees. Hearings before such agencies are treated as adversary proceedings in which interested parties on each side of the question are permitted to appear. This is the procedure adopted in workmen's compensation acts and labor relation statutes, and we do not think the legislature intended to depart from it in creating the California Employment Commission. The adversary parties to these proceedings are entitled to such appeals as are permitted under the statute, and further, are entitled to appear in court to test the Commission's final decision, thus insuring compliance with the requirements of the law. Our conclusion is, therefore, that the petitioner was a proper party to test the legality of the Commission's decision awarding unemployment benefits by this proceeding in mandamus.

[22] It would of course be highly improper for this court to substitute its opinion for that of an administrative agency on matters which were properly entrusted to the agency to decide. In the present case, however, accepting the facts exactly as found by the Commission, it is clear that there was no statutory authority for the award of benefits to corespondents, and the peremptory writ of mandate should issue to annul the award.

The demurrers are overruled and the motions to quash the alternative writ are denied. The Commission is directed to disallow benefits to the corespondents, Haydock, Almeida and Martinez and to credit to petitioner's account all benefits heretofore paid to the other corespondents and to disregard the claims of corespondents in determining the petitioner's merit rating under the Unemployment Insurance Act.

We concur: EDMONDS, J.; TRAYNOR, J.; PETERS, J. pro tem.

SHENK, Justice, and WARD, Justice pro tem. (concurring).

We concur in the judgment on the ground that on the undisputed facts and the interpretation placed upon the statute the petitioner is entitled to the relief sought and granted.



17 Cal.2d 280

ABELLEIRA et al. v. DISTRICT COURT OF APPEAL, THIRD DISTRICT et al.

S. F. 16357.

Supreme Court of California.

Feb. 7, 1941.

1. Master and servant ⇐78

Until Employment Commission determines facts upon which right to unemployment benefits depends, it is improper for a reviewing court to consider claims for benefits on their merits. Gen.Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 67–72.

2. Prohibition ⇐11

"Prohibition" never issues to restrain a lower tribunal from committing more error by deciding a question properly before it, since, if lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision subject only to appellate review and not to restraint by prohibition.

See Words and Phrases, Permanent Edition, for all other definitions of "Prohibition".

3. Prohibition ⇐10(1)

"Prohibition" is not confined in its operation to restraining trial courts from acting in original proceedings, but the writ lies also to prevent a lower appellate court from reviewing on appeal a matter over which it has no jurisdiction.

4. Prohibition ⇐10(1)

As respects right to issue prohibition for "lack of jurisdiction", quoted phrase in its most fundamental and strict sense means an entire absence of power to hear or determine the case and absence of authority over the subject matter or the parties, but in its ordinary sense for purpose of determining right to review by certiorari restraint by prohibition or dismissal of an action, a much broader meaning is recognized and may be applied to a case where, though court has jurisdiction over subject matter and parties in fundamental sense, it has no "jurisdiction" or power to act except in particular manner or to give certain kinds of relief or to act without occurrence of certain procedural prerequisites.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction" and "Lack of Jurisdiction".

5. Prohibition ⇐10(1)

The concept of "jurisdiction" as respects issuance of prohibition for lack thereof embraces a large number of ideas of similar character, some fundamental to nature of any judicial system, some derived from requirement of due process, some determined by constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional.

6. Certiorari ⇐28(2)
Prohibition ⇐10(1)

Generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by courts and followed under doctrine of stare decisis, are in

"excess of jurisdiction" in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess of Jurisdiction".

7. Constitutional law ⇐275(2)
Master and servant ⇐11

The Unemployment Insurance Act, which contains a complete administrative procedure with provisions for one original determination and two appeals, fulfills every requisite of "due process of law." Gen. Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 67–72.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

8. Mandamus ⇐3(8)
Prohibition ⇐10(2)

The District Court of Appeal had no jurisdiction to issue writ of mandate to Employment Commission restraining payment of unemployment benefits, and hence prohibition would issue from Supreme Court to restrain District Court of Appeal from enforcement of writ of mandate where employers had not exhausted the remedies provided by Unemployment Insurance Act, employers not having appealed to Employment Commission. Gen.Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 67–72.

9. Action ⇐10

The doctrine of "exhaustion of administrative remedies" is that, where an administrative remedy is provided by statute, relief must be sought from administrative body and such remedy exhausted before courts will act.

See Words and Phrases, Permanent Edition, for all other definitions of "Exhaustion of Administrative Remedies".

10. Courts ⇐90(1)

The doctrine of "exhaustion of administrative remedies" is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under doctrine of stare decisis and binding upon all courts.

11. Master and servant ⇐78

The exhaustion of administrative remedies provided by Unemployment Insurance Act is a jurisdictional prerequisite to resort to courts. Gen.Laws 1937, Act 8780d; Gen. Laws Supp.1939, Act 8780d, §§ 67–72.

12. Mandamus ⇐3(8)

The filing of appeal with Employment Commission by employers did not comply with rule of "exhaustion of administrative remedies" so as to authorize District Court of Appeal to issue writ of mandate to commission to restrain payment of unemployment benefits, where appeal was filed after mandate and stay order had issued and appeal was merely a formal step, not intended to have any substantial effect, and commission was then under restraint of court's order and unable to act upon merits of the case. Gen.Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 67–72.

13. Mandamus ⇐3(8)

Employers who failed to exhaust administrative remedies under Unemployment Insurance Act were not entitled to writ of mandate to restrain Employment Commission from paying unemployment benefits on ground that employers would suffer "irreparable injury" because employers would ultimately be required to pay contributions at an increased rate, where employers' contention was purely speculative, it did not appear that contributions would be increased by the payments, and under act payments were required to be made regardless of any appeal. Gen.Laws 1937, Act 8780d, § 40; Gen.Laws Supp.1939, Act 8780d, §§ 1, 2, 39, 41, 45.10, 67.

See Words and Phrases, Permanent Edition, for all other definitions of "Irreparable Injury".

14. Master and servant ⇐78

The provision of Unemployment Insurance Act that, if referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal thereafter taken, was designed to carry out policy of act of alleviating evils of unemployment, as part of a national plan of social security in which federal and state legislation is coupled; very essence of act being its provision for prompt payment of benefits to those unemployed. Gen.Laws 1937, Act 8780d; Gen.Laws Supp.1939, Act 8780d, §§ 1, 2, 67.

15. Mandamus ⇐3(8)

Employers who failed to exhaust administrative remedies under Unemployment Insurance Act were not entitled to writ of mandate to restrain Employment Commission from paying unemployment benefits on theory that term "appeal" within statutory provision that, if referee affirms initial determination allowing benefits, such benefits shall be paid regardless of any appeal there-

after taken, referred only to appeal to commission, and did not purport to prohibit stay pending review by court, where there was no review proceeding properly pending in a court, since District Court of Appeal which issued mandate had no jurisdiction to take over the proceeding. Gen.Laws Supp.1939, Act 8780d, § 67.

See Words and Phrases, Permanent Edition, for all other definitions of "Appeal".

16. Mandamus ⇐3(8)

Employers who failed to exhaust administrative remedies provided by Unemployment Insurance Act in failing to appeal to Employment Commission were not entitled to writ of mandate restraining payment of unemployment benefits on ground that appeal would be futile in that commission had already decided cases on similar facts against employers' position, since to countenance such view would break down the rule requiring exhaustion of administrative remedies before seeking protection of court. Gen.Laws 1937, Act 8780d; Gen.Laws Supp. 1939, Act 8780d, §§ 67–72.

17. Prohibition ⇐10(1)

As respects right to prohibition, a tribunal generally has jurisdiction to determine its own jurisdiction, but once a tribunal, judicial or administrative, has made such determination of issue and has acted to assume jurisdiction of the cause, the rule no longer has any meaning, since jurisdiction to determine has been fully exercised by determination in favor of jurisdiction over cause and the question is no longer of jurisdiction to determine but of jurisdiction to act, and jurisdiction to act is always a subject of inquiry by a higher court.

18. Prohibition ⇐18

The writ of prohibition is not refused nor held in abeyance because lower tribunal may ultimately realize the error of its assumption of jurisdiction, but the writ is granted at the time act in excess of jurisdiction occurs.

SHENK and WARD, JJ., dissenting.

In Bank.

Petition for writ of prohibition by Frank Abelleira and others against the District Court of Appeal of the State of California, Third Appellate District, the Honorable John F. Pullen and others, Justices thereof, to restrain the respondents from enforcing a writ of mandate and temporary restraining order issued against the California Employment Commission.

Writ issued.

Prior opinion, 102 P.2d 329.

Gladstein, Grossman & Margolis and George Olshausen, all of San Francisco, for petitioners.

Robert W. Kenny, of Los Angeles, amici curiae for petitioner California State Federation of Labor.

Maurice P. McCaffrey, of San Francisco, and Glenn V. Walls, of Sacramento, for California Employment Commission.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., and Brobeck, Phleger & Harrison, Gregory A. Harrison, and Richard H. Ernst, all of San Francisco, for respondents.

Webster V. Clark and Rogers & Clark, all of San Francisco, amici curiae for respondent Associated Farmers of California, Inc.

Milton Marks, of San Francisco, for Gantner & Mattern Co.

J. M. Mannon, Jr., Edwin S. Pillsbury, George O. Bahrs, and McCutchen, Olney, Mannon & Greene, all of San Francisco, for Bodinson Mfg. Co.

GIBSON, Chief Justice.

Upon rehearing of this case, we adopt our prior opinion with certain minor modifications, as follows:

"This is a petition for a writ of prohibition, to restrain the respondent District Court of Appeal from taking any steps toward the enforcement of a writ of mandate and temporary restraining order heretofore issued by that court and directed against the California Employment Commission. For convenience, the term "petitioners" will be used to refer to those who seek the writ of prohibition in the present proceeding; the term "respondent" will refer to the District Court of Appeal; and the term "employers" will be used to refer to those employers who sought and obtained the writ of mandate and restraining order from the District Court of Appeal, as well as to other employers represented by counsel participating in the argument as amici curiae.

"Petitioners are individual longshoremen ordinarily employed in the harbor of San Francisco and numbering about five thousand persons. As such workmen they are subject to the provisions of the California

Unemployment Insurance Act. Stats.1935, Chap. 352, p. 1226, as amended; Deering's General Laws 1937, Act 8780d; Deering's 1939 Supplement, p. 1697. Under the act a percentage of their earnings is deducted and paid into the unemployment fund, and this money, together with contributions from employers, is used to pay benefits to unemployed workers. The act is administered by a board known as the California Employment Commission, with powers usual to such commissions, including authority to adopt rules and regulations. Sec. 90, St. 1939, p. 3006. The procedure established by the act as it read at the time of this controversy is as follows: Application is made by an unemployed workman and notice thereof is sent to the employer. An initial determination is made by the adjustment unit, which is the lower tribunal. Notice of this determination and its reasons is sent to the applicant and the employers. If payment is ordered, any employer whose reserve account is affected by the payment may intervene and appeal, and payment will be stayed pending said appeal. Sec. 67. A referee is appointed by the commission to hear the appeal, which is conducted in the manner usual to such commission hearings, full opportunity being accorded to produce evidence and examine witnesses. Secs. 67–71. St.1939, pp. 3010–3013. The referee makes written findings and a decision which, unless further appeal is taken, becomes final; but appeal lies to the commission. Secs. 67, 68, 72. This appeal is heard on the record and on any additional evidence produced; oral or written argument may be permitted; and the commission thereafter makes its findings of fact and decision. The commission may also transfer to itself proceedings on any claim pending before the referee, thus affording in some cases an opportunity to expedite a decision by the commission itself. Sec. 72. Section 67 contains a provision reading as follows: 'If a referee affirms an initial determination allowing benefits, *such benefits shall be paid regardless of any appeal* which may thereafter be taken, but if such determination is finally reversed no employer's account shall be charged with benefits so paid as to each such determination so reversed.' The importance of this provision will hereinafter appear.

"During October and November, 1939, widespread unemployment occurred among petitioners. On or about November 10, 1939, they registered for work and made claim for unemployment benefits in accordance with the requirements of the statute. An initial determination was made by the adjustment unit that they were entitled to the benefits, and the employers, intervening, appealed from this determination. A hearing was had before a referee; considerable evidence was introduced and argument heard, following which, written briefs were filed. On December 15, 1939, the referee made his decision affirming the initial determination.

"On December 16, 1939, the employers applied to the District Court of Appeal, Third Appellate District, for a writ of mandate and other incidental relief, in a proceeding entitled 'Matson Navigation Company v. California Employment Commission.' The employers objected to payment of the benefits on the ground that petitioners left work 'because of a trade dispute', which, under section 56 of the act, St.1939, p. 8, disqualifies employees from receiving unemployment benefits. In their application for mandate the employers also alleged that they intend to and will appeal to the commission; that they have not further exhausted their remedies before the commission because the proposed payment of benefits would violate the act; that in prior decisions the commission has indicated its position against the employers on the issue raised and would decide against them; and that the unemployment fund would be seriously damaged by the allegedly unlawful payments contemplated in this case.

"The District Court of Appeal issued an alternative writ of mandate and a temporary restraining order directed to the commission to withhold payment of unemployment benefits. The writ states that 'any such payments which may be made * * * are in violation of the provisions of the Unemployment Insurance Act', and orders the commission to refuse to pay as long as the asserted trade dispute is in progress, or to appear and show cause before the court why it has not done so. The restraining order was issued to enforce compliance with the mandate pending a final hearing on the alternative writ. The writ and restraining order having been issued ex parte, petitioners on December 18, 1939, made a motion to dissolve. The motion was argued, but the court submitted it without making any decision thereon at that time.

"Subsequently, on December 22, 1939, the employers filed an appeal from the de-

cision of the referee to the commission itself which appeal is now pending.

"On or about December 26, 1939, petitioners applied to this court for a writ of prohibition. On January 5, 1940, we issued an alternative writ. The matter was heard and is here on briefs of counsel, together with a number of additional briefs of amici curiae representing the commission, other employers and parties interested generally in the issues of the case.

"The theory upon which the District Court of Appeal acted in issuing the writ of mandate clearly appears from the petition, the writ, and the briefs of counsel. The court, in ordering the commission to cease paying benefits, was undoubtedly of the belief that the commission was acting beyond its statutory powers, and consequently was without jurisdiction to make the payments in question. This is expressly asserted by certain amici curiae appearing for the employers.

"The theory upon which the writ of prohibition was sought is that the District Court of Appeal had no jurisdiction to issue the writ of mandate prior to completion of the administrative proceedings, and that petitioners had no plain, speedy or adequate remedy otherwise. See Code Civ.Proc. sec. 1103, and authorities discussed infra.

[1] "It must be understood at the outset that the merits of the controversy between the original parties, involving the interpretation of the 'labor dispute' proviso in the Unemployment Insurance Act are not before us. The important question is not *what* should be the decision on that point, but rather *how* the decision should be made. In the normal course the commission would make it, and thereafter judicial review, if appropriate, might be sought by either employers or employees. See Bodinson Mfg. Co. v. California Employment Commission, Cal.Sup., 109 P.2d 935, this day decided. The employers, in departing from this normal procedure, and asking for a judicial review before completion of the administrative proceeding, rely upon assumptions of fact not supported by any record in this court. They seek to justify their action by charging that the determination in favor of petitioners is in violation of the law. But there has not, as yet, been any such final determination by the commission. That body has power to review the evidence previously presented before the referee, and also to take new evidence and make new findings, approving or disapproving those of the referee. It has not yet determined the facts upon which the right to benefits depends, and until it does so, it is improper for a reviewing court to consider the claims on their merits. The issue actually before us does not concern the rights of petitioners or their employers, nor the scope of the Unemployment Insurance Act. These matters were properly before the court and were decided in the Bodinson Mfg. Co. case, supra. The question here is whether boards and commissions, charged with the administration of a statute, may carry on their administrative proceedings to completion before being subjected to judicial review. The importance of that issue can hardly be over-estimated, since a curtailment of administrative jurisdiction usually means an enlargement of the duties of the courts in a field in which the courts traditionally are reluctant to enter.

"1. *'Lack of jurisdiction' as a basis for writ of prohibition.*

"The first inquiry in this case must, of course, be as to the nature and meaning of 'jurisdiction'; and here three possible sources of confusion must be eliminated.

"First is the argument of the employers that the District Court of Appeal has general original jurisdiction to issue writs of mandate. This is not disputed, nor is the power of the court to review a final decision of the commission in issue. Whether the commission's decision as to the payment of benefits is subject to any judicial review, or whether it can be reviewed by mandate, are questions beyond the scope of this proceeding. They are considered and decided in the Bodinson Mfg. Co. case, supra. The writ herein was issued before any final decision of the commission was rendered, and the question before us now is whether the court could properly interfere with the uncompleted administrative proceeding.

[2] "Second is the nature of a writ of prohibition, which never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it. If the lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision, subject only to appellate review and not to restraint by prohibition. Hence, in examining the authorities, we must conclude that in those

situations in which a writ of prohibition was issued, the particular action restrained was one beyond the jurisdiction of the court to take.

[3] "Third is the question whether this court has power to restrain or otherwise control the action of the District Court of Appeal. There can no longer be any doubt on this point. The writ of prohibition is not confined in its operation to restraining trial courts from acting in original proceedings; it lies also to prevent a lower appellate court from reviewing on appeal a matter over which it has no jurisdiction. Shriver v. Superior Court, 48 Cal.App. 576, 582, 192 P. 124; Commonwealth v. Yungblut, 159 Ky. 87, 166 S.W. 808; 50 C.J. 668, sec. 25. This court has in fact issued prohibition directed against the District Court of Appeal in two comparatively recent cases. Fay v. District Court of Appeal, 200 Cal. 522, 254 P. 896; People v. District Court of Appeal, 193 Cal. 19, 222 P. 353; see, also, Stout v. Farwell, 111 Cal. App. 31, 32, 295 P. 47.

"We now proceed to a consideration of the meaning of the term 'jurisdiction' in its relation to the granting of a writ of prohibition. The term, used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition. At best it is possible to give the principal illustrations of the situations in which it may be applied, and then to consider whether the present case falls within one of the classifications.

[4] "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. See generally, 14 Am.Jur. 363, sec. 160. Familiar to all lawyers are such examples as these: A state court has no jurisdiction to determine title to land located outside its territorial borders, for the subject matter is entirely beyond its authority or power. See Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074. A court has no jurisdiction to adjudicate upon the marital status of persons when neither is domiciled within the state. See Restatement, Conflict of Laws, sec. 111; Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069. A court has no jurisdiction to render a personal judgment against one not personally served with process within its territorial borders, under the rule of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. See Doherty & Co. v. Goodman, 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097, discussing modern exceptions to the rule. A court has no jurisdiction to hear or determine a case where the type of proceeding or the amount in controversy is beyond the jurisdiction defined for that particular court by statute or constitutional provision. See Cambra v. Justice's Court, 4 Cal.2d 445, 49 P.2d 1121. Other examples of lack of jurisdiction in this fundamental sense will readily occur.

"But in its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations. For the purpose of determining the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. Thus, a probate court, with jurisdiction of an estate, and therefore over the appointment of an administrator, nevertheless acts in excess of jurisdiction if it fails to follow the statutory provisions governing such appointment. Texas Co. v. Bank of America, 5 Cal.2d 35, 39, 53 P.2d 127. The Superior Court may have jurisdiction over a cause of action and the parties to a suit for libel, but in the case of non-residents, a bond for costs is required by statute, and unless such bond is filed, it is without jurisdiction to proceed, and will be restrained by writ of prohibition. Shell Oil Company v. Superior Court, 2 Cal.App.2d 348, 37 P.2d 1078; see, also, Carter v. Superior Court, 176 Cal. 752, 757, 169 P. 667. A court with jurisdiction over a cause may hear and determine it and give judgment, but it cannot award costs in a situation not provided by statute. Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546. The Superior Court may have jurisdiction over a particular cause, but a disqualified judge may not sit and hear it if objection to his qualifications is raised, and prohibition will lie to prevent him from trying it. Hall v. Superior Court, 198 Cal. 373, 387, 245 P. 814. Where an injunction is sought against enforcement of a public statute, the court, despite its general equitable powers, has no jurisdiction to issue it. Loftis v. Superior Court, 25 Cal. App.2d 346, 352, 77 P.2d 491; Reclamation District v. Superior Court, 171 Cal.

672, 154 P. 845. A court may have jurisdiction to grant a new trial after motion based upon proper statutory grounds, but has no jurisdiction to make the order unless the moving party has given his notice of intention within the prescribed statutory time. See Peters v. Anderson, 113 Cal.App. 158, 298 P. 76. The court has power under section 473 of the Code of Civil Procedure to set aside its judgment or order on motion where it was entered against a party through inadvertence, excusable neglect, or mistake; but that power is wholly lost at the end of the six months' period prescribed by statute. Estate of Hunter, 99 Cal.App. 191, 196, 278 P. 485. An appellate court may have power to hear and determine a particular case on appeal, but is without jurisdiction to do so unless the procedural step of notice of appeal within the prescribed statutory time is taken. Aregood v. Traeger, 94 Cal.App. 227, 270 P. 1002. And if the notice is given before judgment is actually rendered, the premature appeal will be dismissed (Aspegren & Co. v. Sherwood, Swan & Co., 199 Cal. 532, 250 P. 400), or a lower appellate court may be prevented from hearing it by writ of prohibition. Shriver v. Superior Court, 48 Cal.App. 576, 582, 192 P. 124. After reversal of a judgment with directions to the lower court, it has jurisdiction to enter judgment, but is limited by the directions of the appellate court and is without jurisdiction to permit amended pleadings to raise new issues; hence prohibition will lie to prevent it from retrying the case. Lial v. Superior Court, 133 Cal.App. 31, 23 P.2d 795. The same is true where the superior court, in an appeal from a justice's court on questions of law alone, attempts to try the cause de novo. Sour v. Superior Court, 1 Cal.2d 542, 36 P.2d 373.

"On a number of occasions the courts of this state have recognized the conflicting senses in which the term 'jurisdiction' is used, and have emphasized the point that in applications for prohibition or certiorari, the broader meaning is involved. In our own recent decision, Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, 112, we said: '* * * some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess.' In Spreckels S. Co. v. Industrial Accident Commission, 186 Cal. 256, 260, 199 P. 8, 9, where the commission made an award larger than the statute authorized and certiorari was sought, the court said: 'The difficulty arises from the different shades of meaning which the word "jurisdiction" has. As sometimes used, it means simply authority over the subject-matter or question presented. In this sense the Commission undoubtedly had jurisdiction in this case, and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed.' See also, Weintraub v. Superior Court, 91 Cal.App. 763, 769, 267 P. 733; State ex rel. Sullivan v. Reynolds, 209 Mo. 161, 107 S.W. 487, 491, 15 L.R.A., N.S., 963, 123 Am.St.Rep. 468, 14 Ann. Cas. 198, reviewing authorities on prohibition and quoting from Appo v. People, 20 N.Y. 531: '* * * The writ lies to prevent the exercise of any unauthorized power, in a cause or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire cause is without its jurisdiction.'

[5, 6] "The foregoing observations while by no means a complete description of the term, nevertheless, serve as a warning against a too restricted meaning. The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari. And, as a practical

matter, accuracy in definition is neither common nor necessary. Though confusion and uncertainty in statement are frequent, there is a surprising uniformity in the application of the doctrine by the courts, so that sound principles may be deduced from the established law by marshalling the cases and their holdings in this field.

[7, 8] "2. *The requirement of exhaustion of administrative remedies.*

"Lack of jurisdiction in the District Court of Appeal to issue its writ of mandate is clearly established when the foregoing principles are considered in connection with a settled doctrine of administrative law. The Unemployment Insurance Act, summarized above, contains a complete administrative procedure, with provision for one original determination and two appeals, fulfilling every requisite of due process of law. Until that administrative procedure has been invoked and completed, there is nothing that the District Court of Appeal or any other court may review; it cannot interfere in the intermediate stages of the proceeding. The employers have no standing to ask for judicial relief because they have not yet exhausted the remedies given them by the statute. They still have their appeal to the commission, which appeal has not yet been decided adversely to them, and prior to the prosecution of this appeal they have no right to demand an extraordinary writ from a court.

[9] "This is the doctrine of 'exhaustion of administrative remedies.' In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. The authorities to this effect are so numerous that only the more important ones need be cited here as illustrations. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (National Labor Relations Board); Prentis v. Atlantic Coast Line, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 [rate orders]; Porter v. Investors' Syndicate, 286 U.S. 461, 468, 52 S.Ct. 617, 76 L.Ed. 1226 [investment commissioners and permit of investment company]; United States v. Sing Tuck, 194 U.S. 161, 24 S.Ct. 621, 48 L.Ed. 917 [immigration and the powers of the Secretary of Labor]; Gorham Manufacturing Company v. State Tax Commission, 266 U.S. 265, 45 S.Ct. 80, 69 L.Ed. 279 [tax board]; Red River Broadcasting Co. v. Federal Communications Commission, 69 App.D.C. 1, 98 F.2d 282, 284; Western Powder Mfg. Co. v. Interstate Coal Co. D.C., 5 F.Supp. 619, 621; Hegeman Farms Corporation v. Baldwin, 293 U.S. 163, 172, 55 S.Ct. 7, 79 L.Ed. 259 [liquor control board]; United States Navigation Co. v. Cunard S. S. Company, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed 408 [shipping board]; De Pauw University v. Brunk, D.C., 53 F.2d 647, 652; Palermo Land & Water Co. v. Railroad Commission, D.C., 227 F. 708; Hammerstrom v. Toy Nat. Bank, 8 Cir., 81 F.2d 628 [tax board]; American Bond, etc., Co. v. United States, 7 Cir., 52 F.2d 318; Monocacy Broadcasting Co. v. Prall, 67 App.D.C. 176, 90 F.2d 421; Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, 174, 47 S.Ct. 553, 71 L.Ed. 978; St. Clair Borough v. Tamaqua, etc., Ry. Co., 259 Pa. 462, 103 A. 287, 289, 5 A.L.R. 20; Corstvet v. Bank of Deerfield, 220 Wis. 209, 263 N.W. 687, 697; Earl Carroll Realty Corp. v. New York Edison Co., 141 Misc. 266, 252 N.Y.S. 538, 543; 48 Yale L.J. 981; 51 Harv.L.Rev. 1251; 35 Columb.L.Rev. 230; 12 N.Y.Univ.L.Q.Rev. 393; 28 Mich.L.Rev. 637; 28 Cal. L.Rev. 129, 151, 154, 162. The California cases have consistently applied this settled rule. See Teeter v. Los Angeles, 209 Cal. 685, 290 P. 11; Collier & Wallis v. Astor, 9 Cal.2d 202, 70 P.2d 171; San Joaquin, etc., Co. v. Stanislaus County, 155 Cal. 21, 27, 99 P. 365; Dawson v. Los Angeles County, Cal.Sup., 98 P.2d 495.

[10, 11] "The rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. We are here asked to sanction its violation, either on the ground that a valid exception to the rule is applicable, or that despite the uniformity with which the rule has been applied, it may be disregarded by lower tribunals without fear of prevention by the higher courts. This last point cannot be too strongly emphasized, for the rule will disappear unless this court is prepared to enforce it. To review such action of a lower court only on appeal or petition for hearing would permit interference with the administrative proceeding pending the appeal or hearing, with the effect of completely destroying the effectiveness of the administrative body. The writ of prohibition can alone operate surely and swiftly

enough to prevent this unfortunate result; and only if we recognize that the rule is jurisdictional will it be uniformly enforced. Bearing in mind the analysis of jurisdiction which has heretofore been made, and examining the authorities dealing with the rule, we are necessarily led to the conclusion that exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.

"In Myers v. Bethlehem Shipbuilding Corporation, supra, an application was made to the federal district court to enjoin the National Labor Relations Board from holding a hearing, but the employer applicant did not comply with the board's procedure. The United States Supreme Court annulled a preliminary injunction despite the employer's contention that the board had no authority over it because it was engaged in interstate commerce. The court declared that to uphold the employer's contention would be in effect to 'substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance'. [303 U.S. 41, 58 S.Ct. 463, 82 L.Ed. 638.] The Court then went on to say: 'The contention is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.' The opinion of the court exhaustively cites the controlling authorities, and a footnote points out that 'the rule is one of judicial administration—not merely a rule governing the exercise of discretion.'

"In United States v. Sing Tuck, supra, petitioner alleged that he was a citizen seeking to return to the United States. An immigration inspector decided against his claim of citizenship, and he failed to follow the statutory provision for appeal to the Secretary of Labor, seeking instead a writ of habeas corpus. The court denied relief, declaring (page 167 of 194 U.S., 24 S.Ct. page 622, 48 L.Ed. 917) that the act 'points out a mode of procedure which must be followed before there can be a resort to the courts'. The opinion then states that even though it be contended that the administrative officers are acting without jurisdiction, 'it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way.'

"In Gorham Manufacturing Company v. State Tax Commission, supra, it was held that a suit against the New York Tax Commission to enjoin collection of a tax alleged to be invalid and levied under an unconstitutional statute was properly *dismissed* for failure of plaintiff to avail itself of the administrative remedy provided by the statute for revision and correction of the tax. The court said (page 269 of 266 U.S., 45 S.Ct. page 81, 69 L.Ed. 279): 'A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax, cannot thereafter be heard by a judicial tribunal to assert its invalidity.'

"In Red River Broadcasting Company v. Federal Communications Commission, supra, a broadcasting company appealed to the courts from a decision of the commission granting a permit for the construction of another station. The appeal was *dismissed* on the ground that appellant had failed to exhaust its administrative remedies and hence could not invoke the jurisdiction of the courts. The opinion, citing numerous cases, states (69 App.D.C. 1, 98 F.2d page 284): 'It is a well-settled rule of judicial administration that no one is entitled to judicial relief until he has exhausted all prescribed, applicable, administrative remedies. Generally, the rule is stated as being conclusive of the rights of one who prematurely seeks judicial review, without intimation or suggestion that any judicial discretion is involved in its application.'

"In Porter v. Investors Syndicate, supra, [286 U.S. 461, 52 S.Ct. 620, 76 L.Ed. 1226], it was said that 'the legislative process remains incomplete' until the administrative remedy is exhausted.

"In Western Powder Manufacturing Company v. Interstate Coal Company, supra [5 F.Supp. 621], the court declared that it 'has no jurisdiction of such controversies until the administrative remedies have been exhausted'.

"This court recently gave the rule its full force in Collier & Wallis v. Astor, supra. In that case the Private Employment Agency law required that certain controversies be submitted to the labor commissioner subject to later appeal to the superior court. Plaintiff sued on a con-

tract coming within the scope of the statute, and defendant objected that no determination by the commissioner had been made prior to commencement of the action. We sustained the objection, saying (page 206 of 9 Cal.2d, 70 P.2d page 174): 'The provision of section 19 of the Private Employment Agency Law providing for a reference to the labor commissioner of controversies arising under said act for hearing and determination by such official being a valid legislative enactment, any action brought in the Superior Court without first making said reference and securing said determination is prematurely brought and cannot be maintained.'

[12] "The mere filing of the appeal with the commission, after the mandate and stay order had issued, was not a fulfillment of the requirements of the rule. It was purely a formal step, not intended to have any substantial effect, for the commission was then under the restraint of the court's order, and unable to act upon the merits of the case. The courts have considered this type of evasion and have held that the rule of exhaustion of remedies is not complied with by the mere filing of an appeal; the remedies are not exhausted until the appeal is fully prosecuted. Consequently the filing of the appeal with the commission is no more a compliance with the rule than the participation in the original hearing before the Adjustment Unit, or the first appeal before the referee. See Southland Industries v. Federal Communications Commission, 69 App.D.C. 82, 99 F.2d 117; Chicago, etc., R. R. Co. v. Basham, 249 U. S. 164, 167, 39 S.Ct. 213, 63 L.Ed. 534. Thus, in Southland Industries v. Federal Communications Commission, supra, where the petitioner applied to the court while his petition for rehearing before the commission was pending and undecided, the court said [99 F.2d 120]: 'Upon the filing of its appeal in this court—its petition for rehearing being then undisposed of—appellant occupied the anomalous position of asking the Commission for administrative relief, and at the same time asking the court for judicial relief from the anticipated decision of the Commission. See Vincent v. Vincent, 3 Mackey 320, 322, 14 D.C. 320, 322; Chicago Great Western R. Co. v. Basham, 249 U.S. 164, 167, 39 S.Ct. 213, 63 L.Ed. 534; Doyle v. District of Columbia, 45 App.D.C. 90; Burnet v. Lexington Ice & Coal Co., 4 Cir., 62 F.2d 906. "Two courts cannot have jurisdiction in the same case at the same time." Lasier v. Lasier, 47 App.D.C. 80, 83. See Andrews v. Virginian Ry. Co., 248 U.S. 272, 39 S.Ct. 101, 63 L.Ed. 236. As appellant elected to petition for a rehearing, the Commission retained jurisdiction; and as it failed to act on the petition its decision has never become a final one from which an appeal could be taken. See Voorhees v. John T. Noye Mfg. Co., 151 U.S. 135, 14 S.Ct. 295, 38 L.Ed. 101; Kingman & Co. v. Western Mfg. Co., 170 U.S. 675, 18 S.Ct. 786, 42 L.Ed. 1192; Northern Pacific R. Co. v. Holmes, 155 U.S. 137, 138, 15 S.Ct. 28, 39 L.Ed. 99; Harrison v. Magoon, 205 U.S. 501, 27 S.Ct. 577, 51 L.Ed. 900. Consequently, this court is without jurisdiction.'

[13, 14] "3. *The employer's assertion of irreparable injury.*

"The employers seek to avoid the operation of the rule, however, by the contention that they would suffer irreparable injury if the administrative hearing were permitted to proceed and its orders made effective without judicial interference at this time. The cases they cite are those dealing with rate orders of regulatory commissions, where the administrative body imposes a confiscatory rate on a public utility. Continued operation of the business at the rate imposed pending the appeal may in some instances be so unprofitable as to amount to a destruction of the business, and therefore a taking of property without due process of law. The courts in these cases issue injunctions to stay the enforcement of the new rate until a final determination of its validity, in order to protect the constitutional rights of the petitioning utilities. In brief, these decisions establish the right to equitable relief to protect the property rights of a petitioner from irreparable injury immediately threatened by a void administrative act. The soundness of this proposition cannot be questioned, but it has no relevancy here.

"What injury do the employers show? They say that they will suffer in the event unauthorized payments are made to unemployed workers, because their accounts will be charged with such payments, and their reserve under section 39 of the act will be thereby decreased, with the ultimate result that they may in 1941 pay contributions at an increased rate. In examining this contention, we must remember just what the employers are trying to do. They are attempting to prevent payment

of public funds in which they have no direct interest, by a body specially charged with the duty of making such payment. We held, in the Bodinson Mfg. Co. case, supra, that they are aggrieved parties entitled to demand judicial review. But the question here is not whether they are aggrieved to the extent necessary to gain standing on appeal or review. The question is whether the payment of benefits at this time constitutes such an immediate and irreparable injury as to warrant the drastic step of interfering with an uncompleted administrative proceeding, in defiance of an established rule of jurisdiction. To this question there are several decisive answers.

"In the first place, their whole contention is purely speculative. The maximum contribution which they can be required to pay under the statute is 2.07 per cent. This cannot be increased, and the extent of their possible injury would therefore be the loss of a hoped for lower rate under the so-called merit rating provision of the statute. This provision enables employers with a favorable employment experience to obtain a slightly lower rate of contribution, when their account on the commission books shows an excess of contributions over benefits paid. See secs. 39, 40, 41, St.1935, p. 1233, St.1939, p. 2147. But the narrow range in which the contribution rate fluctuates can be affected by a variety of circumstances and by numerous instances of unemployment. It cannot be determined at the present time whether this particular order of payment would, in the light of all the occurrences of the past year and any other period involved, actually result in a changed rate. See 88 Univ.Pa.L.Rev. 137, 142.

"Second, it is provided in section 67 of the act that in the event that any payments of benefits are found to be erroneous the particular employer's account shall not be charged with them. This being so, it is not clear how his contributions can be increased by the payments, since the factor determining the rate is made inapplicable in such event.

"The third answer is more fundamental; the mandate contravenes the express provision of section 67 that 'if a referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken * * *.' This is one of the most significant statements in the act. In substance it provides that when the initial determination has been reviewed and approved by the intermediate appellate authority (the referee), no further delay in *payment* shall be permitted even though the issues may be still further considered in a subsequent appeal. It was designed to carry out the policy declared in section 1, St.1939, p. 1968, of alleviating the evils of unemployment, as part of a national plan of social security in which federal and state legislation is coupled. Sec. 2. The very essence of the act is its provision for the prompt payment of benefits to those unemployed. See 88 Univ.Pa.L.Rev. 137, 139. Any substantial delay would defeat this purpose and would bring back the very evil sought to be avoided. The legislature recognizing the importance on the one hand of avoiding improvident payments without due consideration of the right thereto, and the danger on the other hand of withholding the payments for long periods through the slow processes of appeal to the commission and perhaps eventually to the courts, took a middle course. It provided for a preliminary appeal or review of the first determination where payments were ordered. This appeal, ordinarily decided in a short period of time, carries with it a stay. But when this second decision has also been made in favor of the applicants, the benefits begin, with protection, as already noted, for the employer in the event of later reversal.

"The proceeding instituted by the employers ignores this statutory objective, and attempts to do precisely what the statute forbids. Their position is that the challenge in a court of law of any of the numerous factual and legal determinations which the referee must make in any decision to pay benefits is sufficient cause for the statute to cease operating. They believe that to continue payments where the propriety thereof has not yet been settled by the courts is an invasion of their legal rights. But in truth there is nothing unusual in the provision, which is in force in some thirty-six of the states. The legislature has concluded on the basis of normal experience that the large majority of the administrative orders will be proper, and that to permit these justifiable and necessary payments to be postponed for long periods would defeat the objectives of the act. The courts have upheld similar provisions in workmen's compensation acts, where the statutes required payments of compensation after stay orders of limited duration, despite the pendency of proceedings on appeal or re-

view. In Employers' Mutual Insurance Company v. Industrial Commission, 65 Colo. 283, 176 P. 314, an employer's insurance company sought to enjoin enforcement of a commission award until the court could pass upon the legal questions. This was denied, and on appeal the court said (page 316 of 176 P.): '* * * the judgment of the Commission in favor of a claimant is prima facie evidence of his right to recover. Procedure under the act is summary in character in order to furnish immediate aid to injured employees, and a careful reading of the statute as a whole leads to the conclusion that it was the intention of the legislature that payment of these weekly allowances should not be stayed. Indeed, to hold that such payments can be enjoined pending judicial review would in effect practically nullify one of the prime objects and purposes of the law.' And in Bannister v. Shepherd, 191 S.C. 165, 4 S.E.2d 7, 12, the South Carolina Industrial Commission made an award of compensation, from which the insurance carrier gave notice of appeal to the Supreme Court, meanwhile refusing to make the payments ordered. The statute provided that an appeal from an award of the commission should operate as a supersedeas for thirty days only, and thereafter the employer should be required to make payments until the issue was finally determined. The insurance carrier contended that if it were forced to pay and ultimately obtained a reversal, there would be no way to recover the payments erroneously made, and therefore the statute violated its constitutional rights. The court called attention to the rule that there is no right to supersedeas pending an appeal except where expressly authorized by statute; pointed out that the legislative purpose was to prevent the long delays incident to an appeal by an insurance carrier seeking to escape payment; and observed further that the Workmen's Compensation Act 'is a form of social legislation passed primarily for the benefit of the employee, and to prevent the burden of injured employees becoming charges upon society'. The opinion finally concludes: 'The Legislature has in clear and convincing language provided that an appeal shall only act as a supersedeas for a period of thirty days, whether or not this was a wise decision * * * it is not the province of this court to say.'

"The foregoing cases demonstrate the weakness of the argument that because a commission may make an occasional error in ordering some payment out of a public or semipublic fund, the courts must have the power to stay any and all payments during the lengthy period of judicial review. The legislature has concluded that it is wiser to have a system of unemployment compensation operating with a possible small percentage of error, than to have a system not operating at all. The legislative power to make such provision is unquestioned; the statutory language cannot be misunderstood; and for the courts that is the end of the matter.

[15] "To these arguments the employers answer that the statute does not in terms apply to the present case. Their theory is that the term 'appeal' in section 67 must be given a restricted interpretation, to refer only to an appeal to the commission, and that it therefore does not purport to prohibit a stay pending a review by a court. Parenthetically it may be pointed out that the employers have already appealed to the commission, and while that appeal is pending the order to cease payments violates the statute. But this inconsistency need hardly be stressed, for the entire argument begs the question. The issue is *whether there is a review proceeding properly pending in a court.* As we have already shown, the District Court of Appeal has no jurisdiction to take over the proceeding, unless some valid exception to the rule of exhaustion of remedies could be established; and the employers, by way of proving such an exception, assume the very point in issue, namely, the pendency of a valid proceeding before the District Court of Appeal to review the merits of the administrative determination. It is impossible to explain away section 67 by such reasoning as this.

[16] "4. *The assertion that appeal would be futile.*

"One final argument of the employers to justify disregard of the administrative remedy may be noticed. They assert that the commission has already decided cases on similar facts against their present position, and therefore that an appeal in the instant case would be fruitless. This is, indeed, the slender thread upon which their entire case hangs. But again their position is unsound in principle and unsupported by the better authorities, for it was early perceived that to countenance this view would break down the rule of exhaustion of remedies. In substance the contention is that if they learn upon hearsay or by analogy that the administrative board may take a certain action, the board may be ignored and its ac

tion treated as already taken. We should all be very much surprised, no doubt, to find such an assertion made in the judicial field. One might attempt, for example, to bring an original suit in the Supreme Court on the theory that the local superior judge was possessed of a particular opinion opposed to the views of the plaintiff, but he would receive scant consideration. The whole argument rests upon an illogical and impractical basis, since it permits the party applying to the court to assert without any conclusive proof, and without any possibility of successful challenge, the outcome of an appeal which the administrative body has not even been permitted to decide. This argument, though successful in a few cases, has been rejected by the weight of authority. In Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159, 209, 49 S.Ct. 282, 289, 73 L.Ed. 652, the court said that orderly action could not be defeated 'by alleging an intent to deny the relief sought.' And in Red River Broadcasting Co. v. Federal Communications Commission, supra, the opinion states: 'Appellant seeks further to excuse its failure, affirmatively to seek administrative relief, by contending that, even if it had attempted to do so, its request would have been denied; consequently, that its attempt would have been a futile and useless gesture. We cannot assume that consequence. If under such circumstances relief had been sought and denied, then there would have been a basis for appeal. * * * It cannot be heard to complain in this court that there was danger of refusal when it made no effort to do so.' See, also, United States Nav. Co. v. Cunard S. S. Co., 284 U.S. 474, 488, 52 S. Ct. 247, 76 L.Ed. 408; United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 272, 51 S.Ct. 376, 75 L.Ed. 1025.

"It should be observed also that this argument is completely answered by those cases which apply the rule of exhaustion of remedies to rehearings. Since the board has already made a decision, if the argument of futility of further application were sound, then surely this is the instance in which it would be accepted. But it has been held that where the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made. See Palermo Land & Water Co. v. Railroad Commission, supra; Carlson v. Railroad Commission, 216 Cal. 653, 655, 15 P.2d 859; Red River Broadcasting Co. v. Federal Communications Commission, supra; McCardle v. Board of Commissioners, 195 Ind. 281, 144 N.E. 877, 878.

"5. *Jurisdiction to determine jurisdiction.*

"The final contention is advanced that though all of the above conclusions may be entirely correct, and that in consequence the District Court of Appeal has no jurisdiction to hear and determine the merits of the case, nevertheless it has power *to hear and determine the question of whether it has jurisdiction.* If by this statement it is meant that the court had jurisdiction to determine whether the employers had exhausted their remedies before the commission, the record itself is a conclusive answer. The employers have affirmatively alleged their failure to exhaust their remedies before the commission, and their entire argument is devoted to an attempt to excuse such failure. On this point there is no issue presented, but only an admitted fact. If, on the other hand, the statement means that the court had jurisdiction to determine whether it had jurisdiction of the merits of the cause, it is indeed a strange argument. Stated plainly, the proposition is that a court may temporarily interrupt any pending proceeding, administrative or judicial, and hold that proceeding in abeyance while it decides whether it had any power to interfere in the first place; *and during all this time it is immune from any restraint by a higher court.* If that is true as applied to this case, then there is no control over unauthorized, arbitrary assumptions of judicial power except the slow process of appeal or petition for hearing. We cannot, of course, lightly accept such a destructive doctrine, and it must be rejected unless compelled by the strongest logic and precedent. But upon careful study and examination of the authorities cited, we find neither.

[17] "The proposition, stated simply, is that a tribunal has jurisdiction to determine its own jurisdiction. This is a truism, and, subject to certain implicit limitations, is ordinarily a correct statement of law. It has its origin mainly in the cases holding that a court has inherent power to inquire into jurisdiction of its own motion, regardless of whether the question is raised by the litigants. See 15 C.J. 851, 852, §§ 170, 171; 14 Am.Jur. 368, sec. 168; Morris v. Gilmer, 129 U.S. 315, 325, 9 S.Ct. 289, 32 L. Ed. 690. It rests also upon the theory that

until the court determines that it has jurisdiction and does some act in consequence, there can be no injury to the party who denies its jurisdiction. See Noland v. Superior Court, 26 Cal.App.2d 708, 80 P. 2d 76. It means only that the trial court or lower tribunal or body to which the question is submitted has such jurisdiction to make the first preliminary determination—not a final one; and no interference is permitted until it does decide the matter one way or the other. Until it acts to assume or refuse jurisdiction over the merits no one is entitled to complain.

"But once the tribunal, judicial or administrative, has made this determination of the issue, and has acted to assume jurisdiction of the cause, the rule no longer has any meaning. *The jurisdiction to determine jurisdiction has been fully exercised* by a determination in favor of jurisdiction over the cause; the question is no longer of jurisdiction to *determine,* but of jurisdiction to *act.* And jurisdiction to act is always a subject of inquiry by a higher court. The cases cited by the employers declare well-established law and are in accord with this basic distinction. For example, in Noland v. Superior Court, supra, the superior court made an order to show cause in a custody proceeding. Petitioner appeared at the hearing and moved to dismiss the order for lack of jurisdiction. The motion was submitted, and while pending and undecided, petitioner sought a writ of prohibition from the District Court of Appeal. The writ was denied. Chester v. Colby, 52 Cal. 516, in which a demurrer raising the jurisdictional point was pending and undetermined, is to the same effect. In neither case had the lower court taken any action in the cause at the time prohibition was sought; it was simply considering whether or not it had jurisdiction to act.

[18] "The situation presented in the instant case is entirely different. If the District Court of Appeal, in response to the employers' application and petitioners' objection thereto, *had taken under consideration* the question *whether it had jurisdiction to issue the writ of mandate,* we would have no reason to interfere pending its determination thereof. But the District Court of Appeal did more than this; it acted. It did not merely deliberate upon the question whether it should intervene in the administrative proceeding; it did intervene. The issuance of the writ of mandate with its stay was a positive assumption of jurisdiction, for it displaced the prior jurisdiction of the commission, and rendered that body powerless to proceed. To say that the District Court of Appeal, left alone, may ultimately reach the same conclusion as we do here, and therefore should not be restrained, is no longer an answer. The writ of prohibition is not refused nor held in abeyance because the lower tribunal may ultimately realize the error of its assumption of jurisdiction; it is granted at the time the act in excess of jurisdiction occurs. This very point was cogently stated by the court in Kilburn v. Law, 111 Cal. 237, 242, 43 P. 615, 617: 'It is said that the objection that the complaint does not state a case of which the court has jurisdiction is in the nature of a demurrer, and that the superior court has jurisdiction to consider all such questions, and they cannot be made the ground for a writ of prohibition. *This point cuts too deep, and, if sustained so broadly, would deprive this court of all power to issue writs of prohibition in cases where a lower tribunal is exceeding its jurisdiction.*' And in Brougham v. Oceanic Steam Nav. Co., 2 Cir., 205 F. 857, 859, the court spoke in similar vein: 'It is sometimes said that every court has jurisdiction to determine its own jurisdiction. This is partly true and partly untrue. A court must as an incident to its general power to administer justice have authority to consider its own right to hear a cause. But the mere decision by a court that it has such right when it does not exist does not give it authority. A court by moving in a cause assumes authority but the assumption does not confer it.'

"The controlling test of the correctness of the employers' theory must necessarily be found in its practical operation. We have already referred to the cases which correctly apply it during the court's deliberation, and up to the time it acts. If it goes further, as the employers contend, we should expect to find some suggestion to that effect in the authorities. But all the California cases dealing with this situation have reached exactly the opposite result. In each case a commission or administrative officer assumed jurisdiction of a cause, and a superior court thereafter sought to take jurisdiction of the same cause. Under the theory urged here, if the court had jurisdiction to determine its jurisdiction, no higher court could stop this interference by prohibition, and the question whether

the interference was proper would have to await an appeal. But in every instance the appellate court issued a writ of prohibition to restrain the lower court from interfering with the administrative proceeding.

"Thus, in Goodyear Tire & Rubber Co. v. Hanby, 111 Cal.App. 382, 295 P. 562, an employee received an award from the Industrial Accident Commission and later sued in the superior court to enforce compliance therewith. It was held that the cause was within the jurisdiction of the commission, that therefore the court had no jurisdiction, and that a writ of prohibition should issue to prevent the trial. In Vallejo Bus Co. v. Superior Court, 19 Cal.App.2d 201, 65 P.2d 86, the Railroad Commission made an order permitting a utility to sell stock. The superior court gave a preliminary injunction. It was held that the court acted beyond its jurisdiction in thus interfering with the commission by such restraining order, and a writ of prohibition was issued to prevent the court from doing so. In Lee v. Superior Court, 191 Cal. 46, 214 P. 972 the Industrial Accident Commission, in a proceeding involving a nonresident minor, appointed a guardian ad litem to handle the award. The probate court sought to appoint a guardian of the estate. It was held that the commission's prior jurisdiction could not be usurped by the probate court, and that prohibition should issue to prevent its interference. Finally, in the recent decision in Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107, the lower court sought to interfere by injunction with an administrative proceeding commenced by the Building and Loan Commissioner. This court issued a writ of prohibition to prevent such interference, saying (page 579 of 14 Cal.2d, page 116 of 96 P.2d): 'We believe that the trial court in the present case has acted and is acting in excess of its jurisdiction * * *. We have heretofore held that the statute authorizes the commissioner to appoint necessary assistants and it appears that the proceedings of the trial court are preventing the exercise of the authority thus conferred upon him.'

"It thus appears that under established principles of legal procedure the District Court of Appeal was without jurisdiction to issue its writ of mandate, and that petitioners are entitled to a peremptory writ of prohibition. The employers' application was founded upon an asserted right to judicial interference with an administrative proceeding before it became final, and hence impliedly claimed a right to interfere in the middle or the beginning, or even before any such proceeding was commenced. This attitude challenges judicial practices of long standing. The courts have repeatedly recognized the necessity of placing the numerous and complex problems arising under statutes of the type involved herein in the hands of expert bodies, familiar with the subject-matter through long experience. They have pointed out that to permit the initial consideration of these matters by the courts would not only preclude the efficient operation of the acts, but would overwhelm the courts with cases of a technical, specialized character, and seriously impair their capacity to handle their normal work. See Myers v. Bethlehem Shipbuilding Corp., supra; United States v. Sing Tuck, supra; United States Nav. Co. v. Cunard S. S. Co., supra; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 60 S.Ct. 437, 440, 443, 84 L.Ed. 656; Armstrong v. United States, 8 Cir., 16 F.2d 387, 389. The observation of the United States Supreme Court in Federal Communications Commission v. Pottsville Broadcasting Co., supra [309 U.S. 134, 60 S.Ct. 443, 84 L.Ed. 656], is a timely reminder: 'It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government.' We can with safety and assurance follow the traditional policy of the courts in this respect, remaining ready to review any final improper action (see the Bodinson Mfg. Co. case, supra), but permitting the administrative body initially to decide its myriad problems unhindered.

"Let a peremptory writ of prohibition issue restraining the respondent District Court of Appeal from taking any steps toward the enforcement of its writ of mandate and temporary restraining order heretofore issued and directed against the California Employment Commission."

We concur: EDMONDS, J.; TRAYNOR, J.; PETERS, J., pro tem.; CARTER, J.

SHENK, Justice.

I dissent.

The majority opinion and decision, when considered in connection with the decisions filed concurrently herewith in Gantner & Mattern Co. v. California Employment

Commission, Cal.Sup., 109 P.2d 932, commenced December 5, 1939, and in Bodinson Manufacturing Co. v. California Employment Commission, Cal.Sup., 109 P.2d 935 commenced December 5, 1939, demonstrates the incongruity of the results which flow from the decisions in this group of cases.

In the Gantner & Mattern Company case, the District Court of Appeal regularly assumed jurisdiction to determine the right of the petitioner to the relief sought. That court issued an alternative writ of *mandamus* pursuant to its constitutional power, Const., Art. VI, Sec. 4b, and to sections 1084 to 1097 of the Code of Civil Procedure. No proceeding was commenced in this court or elsewhere to prohibit the District Court of Appeal from exercising its constitutional and statutory power in that proceeding. That court heard the matter on the merits on the petition and the return to the alternate writ and denied the peremptory writ, with opinion, and on the ground that the petitioner therein had not exhausted its statutory remedy. In due course the cause, transferred to this court for hearing and determination, has been decided by the majority on the same record presented to the District Court of Appeal and likewise on the merits and with the same result. For the purposes of this dissenting opinion, it matters not whether the District Court of Appeal denied or granted the peremptory writ. The fact is that this court has recognized the power of the District Court of Appeal to render a decision in that proceeding on the merits, and to have that proceeding pursue its constitutional course to this court and, in turn, this court has disposed of the proceeding on its merits.

In the present proceeding in prohibition, it appears that on December 16, 1939, the Matson Navigation Company and others commenced a *mandamus* proceeding in the same District Court of Appeal, wherein that court likewise issued an alternative writ and was proceeding to hear and determine the matter on a return to that writ and on a set of facts raising the identical issues on the merits as were involved in the Gantner & Mattern Company case. Yet this court in the present proceeding halted the prompt determination of the Matson Navigation Company case and is now denying power in the District Court of Appeal to dispose of that case in like manner as this court has now disposed of the Gantner & Mattern Co. case.

Furthermore, in the Bodinson Mfg. Co. case, this day filed, this court by a ruling on the merits, and to the same effect as determined by the District Court of Appeal, has decided that the petitioner therein had exhausted the statutory remedies and was entitled to an order of this court compelling the commission to deny the claims for benefits therein involved on the ground that the claimants were ineligible under the act to receive them.

Yet, in the present proceeding, this court has declared that the District Court of Appeal is without jurisdiction to decide whether the Matson Navigation Company had exhausted its statutory remedies and, if so, to decide whether the claimants for benefits in that proceeding were eligible to receive the same, or if not to deny the relief sought, as it had done in the Gantner & Mattern Co. case.

From the foregoing the conclusion is unavoidable that if the District Court of Appeal in the first instance and this court on transfer had jurisdiction to pass upon the merits of the Gantner & Mattern Co. case, as conclusively appears by the course taken in that case, then the District Court of Appeal had jurisdiction to decide, on identical issues, the Matson Navigation Co. case. On the other hand, if the District Court of Appeal had no jurisdiction in the Matson Navigation Co. case (as has been decided), then it would necessarily follow that this court has no such jurisdiction, the petitioners in the *mandamus* proceeding are without remedy in the courts, and the commission allowed to proceed without the restraint universally recognized to be necessary in the proper application of administrative law.

The sole question presented in the present proceeding in prohibition is whether the District Court of Appeal has the power to decide a certain controversy pending before it. That question here is not whether the employees affected are or are not entitled to unemployment benefits, but whether the petitioners in the *mandamus* proceeding pending before the District Court of Appeal have stated a case which that court has jurisdiction to entertain and determine. In my opinion, that court has that power and to deny it by the issuance of a peremptory writ of prohibition is to deny to parties interested the right to seek redress in our courts against threatened unlawful action on the part of a state administrative board.

The case presented to the District Court of Appeal is one calling for a judicial determination of the powers of the board under the statute of its creation. Particularly in that proceeding the problem is whether on the admitted facts the legislative remedy of appeal to the commission from the decision of the referee is adequate and, if not, whether it is not the legal duty of the California Employment Commission of its own motion, if need be, and contrary to its alleged intention, to set aside, pursuant to section 72 of the act, the decision of the referee affirming the initial determination allowing benefits, and in any event to disallow such benefits, and thus prevent the alleged illegal payments from the unemployment fund.

In the *mandamus* proceeding, the District Court of Appeal was called upon to decide two principal questions:

First, whether under the undisputed facts found by or under the authority of the commission, the claimants for payments from the unemployment fund were eligible to receive the benefits. Section 56 (a) of the act provides:

"An individual is not eligible for benefits for unemployment, and no such benefits shall be payable to him under any of the following conditions: (a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

It is contended in the *mandamus* proceeding that the claimants, petitioners here, are not eligible for benefits under the foregoing section and under the facts found by, as distinguished from the conclusions of, the commission's referee. The question of the legal duty of the commission under the law and the facts was there squarely presented for that court's determination. The claimants have taken the position that the decisions of the commission allowing and directing the payment of benefits are beyond judicial review. Indeed, on oral argument counsel for the commission expressed this view. It cannot be true that this is the attitude of the members of the commission, who are public officers acting as trustees of a public fund which now contains an enormous amount of money collected from the employers and employees of the state for a specific purpose, namely, for the relief of employees who have been subjected to involuntary unemployment and who are eligible under the law to receive benefits. If the commission persists in payment to those who are ineligible to receive benefits, as is alleged in the pending *mandamus* proceeding, approximately a half million dollars will be unlawfully paid out of a fund whose beneficial and lawful administration was mistakenly anticipated in the litigation which resulted in declaring the constitutionality of the act under which the commission was created and is functioning. Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595.

To hold that a commission set up by a statute of this state with the highly important and responsible duties of the Employment Commission is not amenable to judicial process in the pending *mandamus* proceeding would be to constitute the commission an autocratic body whose functioning is uncontrolled by any consideration except its own whim and caprice. Such of course is not the law of this state, nor of any other jurisdiction, state or federal. In this state the District Court of Appeal has constitutional and statutory authority to direct public officers to perform their duties under the law. Const., Art. VI, sec. 4b; secs. 1084-1097, Code of Civ. Proc. That power is coextensive with the same power reposed in this court except that the decision of that court is subject to review by this court by appropriate order of transfer. It is contended that not only under section 56 (a) of this act are the petitioners herein ineligible to receive the claimed benefits, but that section 67 also prescribes that benefits shall be paid only to claimants who are eligible to receive them. To deny to the District Court of Appeal the right and power to decide whether the petitioners herein are or are not eligible under the statute and the admitted facts would be deliberately to shut our eyes to an alleged arbitrary, flagrant and unlawful assumption of power by the Employment Commission.

In my opinion there is not the slightest doubt that a justiciable controversy within its jurisdiction has been presented to the District Court of Appeal and that the issues there tendered present for determination also the question whether the petitioners before that court had exhausted their

statutory remedies before the commission. This is the second principal question on the merits involved in the pending *mandamus* proceeding.

The majority opinion holds that the District Court of Appeal is without jurisdiction because the *mandamus* proceeding was prematurely brought in that the petitioners therein had not exhausted their remedies before the commission. It is noted that the Adjustment Unit of the Division of Unemployment Compensation in the department of the commission granted the application of the employees, petitioners herein, for the payment of benefits. Certain of their employers appealed from the determination of the Adjustment Unit under section 67 of the act. The commission designated a referee to hear the appeal pursuant to section 69. On that appeal the referee found the facts. The petitioners in the District Court of Appeal claim that those facts showed conclusively and as a matter of law that the claimants were ineligible to receive the benefits. But the referee concluded that the claimants were eligible to receive benefits and affirmed the initial determination of the Adjustment Unit. Section 72 of the act provides:

"Any party to a decision by a referee may appeal to the commission from such decision. The commission may on its own motion affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence. * * *"

The majority say the District Court of Appeal has no jurisdiction in the *mandamus* proceeding because the petitioners had not taken and prosecuted to a final conclusion an appeal from the decision of the referee to the commission under section 72 of the act. Section 67 of the act provides for an appeal from an initial determination and then provides:

"If an appeal is duly filed benefits with respect to the period prior to the final decision on appeal, shall be paid only after such decision, except as hereinafter provided." Then follows the exception which is the crux of this phase of the present controversy. It reads: "If a referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such determination is finally reversed no employer's account shall be charged with benefits so paid as to each such determination so reversed."

The main opinion decides as a matter of law that an employer must take and pursue to conclusion this last appeal to the commission before he may seek redress from the courts, notwithstanding the presence of an immediately enforceable order for alleged illegal expenditures from the unemployment trust fund. It is clear to me that a bona fide controversy is presented in the *mandamus* proceeding on the question whether the remedy provided by the statute for an appeal to the commission is an adequate statutory remedy as required by law, inasmuch as the benefits must be immediately paid notwithstanding the pendency of such appeal. It is of course well established that when the legislative department has set up an administrative board to ascertain the facts and to take action thereon and has provided in the statute for hearings, rehearings, appeals and other proceedings before the board prior to its final decision, an interested party must exhaust his administrative remedies before he may resort to the courts for a redress of his grievances. But it is equally well settled that the statutory remedies before the board must be both appropriate and adequate. See Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352. To provide for an appeal to the commission from a decision of the referee would certainly appear to be appropriate. But whether the appeal to the commission provided for by this particular statute is adequate, under the circumstances presented to the District Court of Appeal, is a judicial question. The argument against the adequacy of the remedy provided by the final appeal to the commission is that since the benefits must be paid immediately upon affirmance by the referee and notwithstanding the pendency of such appeal to the commission from the order of affirmance, the subject matter of the court controversy, namely, the alleged illegality of the payments by reason of powers usurped by the commission expressly prohibited by the act, has evaporated and the question has become moot; that is, unless the court may intervene to prevent the alleged illegal payments from the trust fund, the express mandate of the statute will be violated and the unlawful action of the

board placed beyond judicial scrutiny and control; that power reposed in an administrative board does not constitute it an autocratic body to the extent that it may, uncontrolled and with impunity, exercise its power contrary to the provisions of the act which created it; that it is well settled that "whether the commission applies the legislative standards validly set up * * * whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision" Federal Radio Commission v. Nelson Bros Co., 289 U.S. 266, 276, 53 S.Ct. 627, 632, 77 L.Ed. 1166, 89 A.L.R. 406; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 60 S.Ct. 437, 440, 84 L.Ed. 656; that prima facie the petition for the writ of *mandamus* before the District Court of Appeal presents a case of a threatened enforcement of an order on the part of the commission which will violate the express legislative mandate which is a prerequisite to valid payments within the rule repeatedly announced by the Supreme Court of the United States; that the so-called remedy by appeal to the commission from the order of affirmance of the referee is just as inadequate and futile as would be a statutory right of appeal from a judgment for money where a stay pending appeal is expressly denied the appellant and with a further statutory mandate that notwithstanding the pendency of the appeal the money must be paid, and the judgment satisfied; that it is no valid answer to this argument that the statute provides that in the event the commission on appeal should reverse the order of the referee "No employer's account shall be charged with the benefits so paid", for the reason that the employer, as a contributor to the trust fund has an additional interest in preserving the integrity of that fund as against illegal expenditure and dissipation thereof contrary to the express provisions of the act.

The foregoing arguments urged on behalf of the respondents are addressed to the merits of the controversy pending before the District Court of Appeal and are mentioned solely for the purpose of indicating that there is clearly a question of law presented to that court in a matter in which it has jurisdiction of both the parties and the subject matter under the constitution and laws of this state.

The majority say that the provision for payment of benefits pending appeal, when an initial determination for payment has been affirmed by the referee, was designed to carry out the policy declared in section 1 of alleviating the evils of unemployment, as part of a legislative plan of social security. This may be true where the payments are to persons eligible to receive the same under the act. But where the fact of ineligibility is concededly established and payments are threatened to be made to persons expressly excluded by the provisions of the act, do the majority still mean to say that such payments will carry out the legislative plan? The majority also say that to permit these "justifiable and necessary" payments to be postponed for long periods would defeat the objectives of the act. Would it defeat the objectives of the act to halt payments of benefits expressly forbidden by the act? On the contrary, would it not defeat the objectives of the act to permit payments of benefits expressly so forbidden? The legislature did not leave any question for determination to the referee or the commission when the facts unquestionably disclose ineligibility on the part of claimants to receive payment of benefits. The provisions of the act direct the commission and leave it no alternative.

Finally, the writ of prohibition should not issue if there is a "plain, speedy, and adequate remedy in the ordinary course of law", sec. 1103, Code of Civil Proc. The petitioners herein would have had such a remedy by petition to this court for a hearing after decision by the District Court of Appeal, if they had been dissatisfied with that decision. If the result in the *mandamus* proceeding had been the same in that court as in the Gantner & Mattern Co. case, as seems likely, it is fair to assume that the petitioners herein would not have been in a position to complain. In any event, if the *mandamus* proceeding had been allowed to take its usual course by decision in the District Court of Appeal and petition to this court, as the "plain, speedy, and adequate remedy" provided by the constitution, the long drawn-out process of the present proceeding for over a year and the consequent uncertainty of jurisdiction of District Courts of Appeal resulting from the majority opinion would have been avoided.

I concur: WARD, J. pro tem.

42 Cal.App.2d 748

HARRIS et al. v. CANNON et al.

Civ. 6491.

District Court of Appeal, Third District, California.

Feb. 5, 1941.

1. Venue ⇐52½

A plaintiff has a right to oppose a motion for a change of place of trial on ground that action was not brought in county of residence of a defendant by showing that convenience of witnesses would be promoted by refusing a change.

2. Venue ⇐52(1)

Determination of question of retention of a cause of action on account of convenience of witnesses rests largely in discretion of trial court to which motion for change of venue is addressed.

3. Appeal and error ⇐965

Court's ruling on motion for change of venue and counter motion for retention of venue on account of convenience of witnesses will only be disturbed when an abuse of discretion appears.

4. Venue ⇐70

Where defendants filed motion for change of venue to county of defendants' residence on ground of convenience of witnesses but plaintiffs filed counter motion on ground of convenience of witnesses, order denying change of venue was not an abuse of discretion where one of plaintiffs set forth in affidavit in support of plaintiffs' motion names of six witnesses upon whom plaintiffs would rely, stating in substance nature of their testimony and defendants set forth in their affidavits the names of several witnesses but did not state what facts they could establish.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Sydney L. Harris and others against Fred B. Cannon and others for damages for failure to properly prepare and deliver certain reconditioned steel pipe or drill stem in accordance with an oral contract. From an order denying the motion of defendants for a change of venue, defendants appeal.

Affirmed.

Jesse A. Hamilton, of Los Angeles, for appellants.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for respondents.

PULLEN, Presiding Justice.

This is an appeal from an order denying the motion of defendants for a change of venue.

The action was for damages for failure to properly prepare and deliver certain reconditioned steel pipe or drill stem in accordance with an oral contract entered into between the parties hereto. The complaint was filed in the county of San Joaquin in which county the plaintiffs resided and had their place of business, and also where it is alleged the drill stem was to have been delivered.

To this complaint defendants filed an answer, and with the answer an affidavit of merits and a demand that the action be transferred to Los Angeles county. The motion for the change was made on the ground that the defendants were residents of the county of Los Angeles, and on the further ground of the convenience of witnesses.

Thereafter plaintiffs filed a counter motion and asked for an order retaining the venue in the county of San Joaquin on the ground of convenience of witnesses. These motions were heard together, and the court denied the motion of defendants for a change of place of trial, from which order this appeal is taken.

[1] The first contention of appellants seems to be that before the court can consider a motion for a change of venue upon the ground of convenience of witnesses the question of residence must be determined, and if defendant is found to be a resident of the county asserted in his affidavit, the action must be moved to such county before the convenience of witnesses can be inquired into. This, however, is not the rule. A similar contention was made in Sheffield v. Pickwick Stages, 191 Cal. 9, 214 P. 852, where Chief Justice Myers, then a Justice of the Supreme Court, clearly and directly held under pleadings similar to those found here, that a plaintiff has a right to oppose a motion for a change of place of trial on the ground that the action was not brought in the county of the residence of a defendant, by showing that the convenience of the witnesses would be promoted by

refusing the change. This rule is also recognized and many cases cited in 25 Cal.Juris, p. 882.

[2, 3] As to the general right of a court to retain a cause on account of the convenience of witnesses, the authorities are in accord that such determination rests largely in the discretion of the trial court to which such motion is addressed, and will only be disturbed when an abuse of discretion appears. Plum v. Forgay Lumber Co., 118 Cal.App. 76, 4 P.2d 804. See, also, cases cited in 25 Cal.Juris, p. 885, note 20.

[4] Here there was no abuse of discretion. Affiant, one of plaintiffs, sets forth in his affidavit in support of his motion, the names of the six witnesses upon whom he would rely, stating in substance the nature of their testimony. Four of these witnesses resided in Stockton (as did, also, the affiant and his partner), one lived in Sacramento and one in Berkeley. Defendants set forth in their affidavits the names of several persons but do not state what facts they could establish.

The order is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.



42 Cal.App.2d 734

MACINTYRE et al. v. RETIREMENT BOARD OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11394.

District Court of Appeal, First District, Division 1, California.

Feb. 3, 1941.

Hearing Denied April 3, 1941.

1. Evidence ⇐83(2)

On acceptance of a position as officer or employee of a governmental agency, such as a municipality, an appointee assumably will perform his duties conscientiously and faithfully, whether or not an oath has been required.

2. Municipal corporations ⇐162(1), 220(9)

A municipal officer or employee who is guilty of conduct warranting dismissal should not continue in office or be permitted to receive other emoluments, such as a pension, offered as an inducement to honesty and efficiency, though he may be otherwise entitled to such other emoluments.

3. Municipal corporations ⇐220(9)

Without regard to time or vesting of pension rights, it is an implied condition of employment, and hence a condition of such vesting that the duties of a municipal employee shall have been faithfully performed, and if not, it is immaterial whether the proper authorities discover the misconduct and file charges before or after application for a pension, so long as the charges are filed before an order is made by the retirement board, since the filing of an application for a pension does not ipso facto retire the applicant.

4. Municipal corporations ⇐187

Municipal police officers who after having reached retirement age with sufficient years of service to entitle them to a pension, but who before order of retirement board granting pension, were dismissed from the police department, were not entitled to a pension.

5. Municipal corporations ⇐187

Retirement board of city and county was under duty to act either in favor of police officers seeking retirement on a pension or against them if it was not legally precluded from acting for or against them, but where officers were dismissed by the police commission because of charges of conduct unbecoming an officer, disobedience of orders, and insubordination, the board was prevented from acting.

6. Municipal corporations ⇐220(9)

Where judgment was entered for retirement board of city and county in proceeding by police officers for writ of mandate to compel the board to permit the retirement of the officers on pension, because of the fact that the officers had been dismissed because of misconduct, board was not, until appeal from the judgment was determined, in a position to act on the applications of the officers for retirement.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Application for writ of mandate by Peter A. MacIntyre and another, against the Re-

tirement Board of the City and County of San Francisco and others to compel the named defendant to permit the retirement of the petitioners on pensions as lieutenants of the Police Department. From an adverse judgment, the petitioners appeal.

Judgment affirmed.

J. Joseph Sullivan, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for respondent City and County of San Francisco.

WARD, Justice.

An appeal by petitioners from a judgment denying their application for a writ of mandate to compel the retirement board of the city and county of San Francisco to permit their retirement on pension as lieutenants of the police department.

At the time of filing the application, each officer had reached the retirement age, with sufficient years of service to his credit, and had made all necessary contributions to the retirement system pension fund. Three days after the application of MacIntyre, and thirteen days prior to that of Mignola, to be retired from active service, a verified complaint setting forth charges of conduct unbecoming an officer, disobedience of orders and insubordination was filed against each petitioner with the board of police commissioners. Both officers were suspended, and tried before the police commission. Each was found guilty of the charges and dismissed from the department.

The question involved is whether an officer otherwise eligible for a pension and who makes an application therefor, but who is dismissed for misconduct by the police commission prior to final action on his application, is entitled to have such application granted. The sufficiency of the verified complaint, the weight of the evidence or the propriety of the order of dismissal are not involved in this proceeding.

Petitioners contend that their right to a pension vested upon attaining the required age, with necessary years of service, and the payment of proper contributions to the fund; in other words, that the right to pension vests upon the filing of the application and can not be defeated by dismissal thereafter. They rely primarily upon O'Dea v. Cook, 176 Cal. 659, 169 P. 366 and Kavanagh v. Board of Police P. F. Com'rs, 134 Cal. 50, 66 P. 36, which deal with pension rights as affected by subsequently enacted legislation. Petitioners' rights have nothing to do with subsequent legislation, but rather with the question whether such rights have been forfeited as the result of misbehavior.

[1, 2] It is assumed that upon acceptance of a position as officer or employee of a governmental agency, an appointee will perform his duties conscientiously and faithfully. In some instances an oath is required. When it is not required, efficiency and fidelity in the performance of duty are nevertheless paramount considerations. It is never contemplated that an officer or employee guilty of conduct warranting dismissal should continue in office or be permitted to receive other emoluments offered as an inducement to honesty and efficiency. The right to a pension is not indefeasible, and an employee, though otherwise entitled thereto, may not be guilty of misconduct in his position and maintain his rights notwithstanding such dereliction of duty.

In Douglas v. Pension Board, 75 Cal.App. 335, 340, 242 P. 756, 757, the court said: "The considerations upon which a government adopts, as a part of its administrative policy, a system for the pensioning of those who have continuously, for a specified period of years, served the government in the performance of public civil duties, both as officers and employees, are, in a large measure, these: (1) To encourage those public officers or employees who have by experience or otherwise demonstrated peculiar fitness for the performance of the public services to which they have been assigned to continue in the service of the government and at all times faithfully discharge the duties involved in such service. The hope held out for future additional reward or compensation for their public services to that which they receive concurrently with the period during which they are actually and actively engaged in performing such services is conducive to uniform faithfulness to and efficiency in discharging the duties which their offices or employments have exacted."

In People v. Greene, 87 App.Div. 589, 84 N.Y.S. 673, 674, the court said: "The pension roll is a roll of honor—a reward of merit, not a refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as

distinguished from mere time of service, might be dismissed from the force for misbehavior."

[3, 4] Without regard to the time of the vesting of pension rights, it is an implied condition of employment, and hence a condition of such vesting that the duties of the employee shall have been faithfully performed; it is immaterial whether the proper authorities discover the misconduct and file charges before or after the application for a pension so long as the charges are filed before an order is made by the retirement board. The filing of the application does not ipso facto retire the applicant. It is necessary that an order of retirement be duly made. Up to that time the police officer, whether under suspension or in actual service, is under the control and jurisdiction of the police commission. If, prior to an order of the retirement board, he is dismissed upon charges of conduct unbecoming an officer, he is not entitled to "a pension" as that term is used in the charter.

[5, 6] In the closing brief, appellants stress the point that "respondents refused * * * to act upon the application". The contention is that the retirement board must act. We agree that it is the duty of such board to act either in favor of petitioners or against them, unless in effect it is legally precluded from acting, which is the condition here. An alternative writ was issued directing respondents to grant the pensions or show cause before the court at a designated time why they had not done so. Respondents filed an answer to the petition for the writ; petitioners demurred thereto and the demurrer was overruled. An agreed statement of facts was filed, with a stipulation waiving findings of fact and conclusions of law, and the matter submitted. Judgment was entered for respondents, and petitioners appeal. Until the appeal is determined, respondents are not in a position to act on the application for retirement.

Each side refers to the fact that unless services are discontinued by death or retirement, the officer or employee is entitled upon demand within a specified period to the "accumulated contributions". Appellants have not permitted respondents "to act". No demand for accumulated contributions appears in the record, and the matter not being an issue on this appeal, it is not necessary to determine any question in relation thereto.

Other questions of a technical nature have been presented by the petitioners but the decision arrived at on the subject discussed renders other consideration unnecessary.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.



In re GUARDIANSHIP OF HUDELSON.*

Civ. 6545.

District Court of Appeal, Third District, California.

Jan. 25, 1941.

Rehearing Denied Feb. 24, 1941.

Hearing Granted March 24, 1941.

1. Appeal and error ⇐907(5)

Where probate court order directing payment of a monthly sum from excess income of an incompetent person's estate to his daughter and providing that sums paid should constitute an advance against any inheritance daughter might receive did not require daughter to acknowledge that payments should constitute advancements, and daughter signed a written election to remain in her father's home in compliance with court order, but that document was not a part of the record on appeal, the reviewing court was required to presume that document did not contain daughter's consent that payments should constitute advancements. Probate Code, § 1558.

2. Appeal and error ⇐553(2)

Under statute, an appeal may be presented and heard on a typewritten transcript of the judgment roll, duly certified by the clerk and the trial judge, even in the absence of a settled bill of exceptions or of a phonographic report of the trial. Code Civ.Proc. § 953a; Rules for the Supreme Court and the District Courts of Appeal, rule 1, § 1.

3. Insane persons ⇐64

Under statute giving the probate court discretion to allow a reasonable sum to be paid to next of kin from the surplus income of the estate of an insane or incompetent person not required for maintenance, if the

* Subsequent opinion 115 P.2d 805.

person would have aided the next of kin had he been of sound mind, the probate court had no authority to create an advancement to be paid to a daughter from the estate of her incompetent father or to direct that the allowance made to daughter should constitute an advance against any inheritance she might receive upon the death of her father. Probate Code, §§ 1050, 1558.

4. Descent and distribution ⇐93

An "advancement" is a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child with the intention on the part of the parent that the gift shall represent a part or the whole of the portion of his estate that the child would be entitled to on the death of the parent intestate.

See Words and Phrases, Permanent Edition, for all other definitions of "Advancement".

5. Descent and distribution ⇐94

Where a statute provides the method for creating advancements to be charged to prospective shares of heirs, that procedure is exclusive. Probate Code, § 1050.

6. Descent and distribution ⇐98, 117

The matter of making advancements to an heir which may have the effect of charging his share of the estate with payments previously made to him depends on the intention of the testator or donor, and that intention must be established by satisfactory evidence in order to charge the payments as advancements. Probate Code, § 1050.

7. Insane persons ⇐64

In absence of a statute authorizing the probate court to do so, it has no power to impress payments from the estate of an incompetent person upon the prospective shares of the heirs or next of kin as advancements. Probate Code, §§ 1050, 1054, 1558.

8. Descent and distribution ⇐110

Ordinarily, the question whether payments to heirs shall be charged against their interests in an estate as advancements is determined by the probate court at the time of distribution of the estate. Probate Code, § 1054.

9. Appeal and error ⇐907(5)

Where written document concerning daughter's election to reside with her incompetent father was signed by daughter at the probate court's request after rendering of order making allowance to daughter from excess income of incompetent father's estate and providing that sums paid to daughter should constitute an advance against any inheritance she might receive upon father's death, and document was not part of evidence adduced at the trial, the reviewing court could not assume, in support of the judgment, that document contained an acknowledgment of advancements merely because it did not appear in the record on appeal. Probate Code, §§ 1050, 1054, 1558.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Proceedings in the matter of the guardianship of the person and estate of Forrest M. Hudelson, an incompetent person, wherein Thirza L. Hudelson procured an order for the payment to her of a monthly sum from the excess income from the estate as necessary maintenance. From that portion of the order providing that any sums paid by the guardian to petitioner under the order should constitute an advance against any inheritance petitioner might receive upon the death of her father, the incompetent person, and that the guardian should keep an account of all sums so paid, Thirza L. Hudelson appeals.

Order modified by striking therefrom the portion from which the appeal was perfected.

Mark A. Joseph, of San Anselmo, for appellant.

Frank B. Collier and Hawkins & Hawkins & Cardoza, all of Modesto, for respondent.

THOMPSON, Justice.

Thirza L. Hudelson, the daughter of Forrest M. Hudelson, an incompetent person, has appealed from a portion of an order which she procured pursuant to section 1558 of the Probate Code to pay her from the excess income from her father's estate the sum of $50 per month, until the further order of the court, as necessary maintenance. That portion of the order from which this appeal was perfected is as follows: "and provided, further, any sum or sums of money paid by the guardian to petitioner under the provisions hereof shall constitute an advance against any inheritance petitioner might receive upon the death of her father, and the guardian of said incompetent shall keep an account of all sums so paid." It

is contended the above-quoted portion of the order is unauthorized by law and void.

Upon the hearing of the application for allowance from the estate of petitioner's father under section 1558 of the Probate Code, the court found that she is the daughter and next kin of the incompetent person; that there is a surplus income from his estate not necessary for his maintenance; that the ward would have contributed to his daughter's support except for the fact that he is of unsound mind; that the petitioner was a resident in the household of the ward, and that a reasonable portion of the surplus income from the estate should be paid to the daughter. It was then ordered that Thirza M. Hudelson be paid $50 per month "until the further order of this court", in addition to her room and board, while she remains in the household of her father, or in lieu thereof, the sum of $100 per month if she resides elsewhere. It was further provided that all such payments shall be deemed to be advancements on account of any inheritance which she might receive from her father's estate at the time of his death, and that unless the petitioner shall elect in writing, within thirty days from the date of the order, whether she will remain in the home of her father or live elsewhere the petition will be deemed to have been denied.

[1] The appeal was perfected under section 953a of the Code of Civil Procedure. It is presented on a typewritten copy of the judgment-roll, duly certified by the clerk and by the trial judge. No bill of exceptions was settled, and no phonographic copy of the proceedings of the trial was procured. The evidence which was adduced at the hearing is not before this court. It is conceded the appellant did sign a written election to remain in the home of her father, in compliance with the court order. But we are not informed of the exact contents of that document. It is not a part of the record on appeal. No motion for diminution of the record, to supply that instrument, was made. We have no means of determining what rights are determined by that written instrument. We must presume it does not contain the consent of the petitioner that her payments shall constitute advancements to be charged to her future share in her father's estate, for the court order requires no such acknowledgment.

[2] The respondent contends that this appeal is ineffectual for the reason that no bill of exceptions was settled, and because the filing of a typewritten transcript of the judgment-roll is in violation of rule I, section 1, of the Rules for the Supreme Court and the District Courts of Appeal. It is further contended that section 1558 of the Probate Code, under which the application for an allowance was made, confers upon the court a discretion to impress payments allowed upon the prospective interests of heirs, as advancements. In support of that theory it is suggested that that section of the code specifically grants the court discretion to determine whether any allowance shall be made, and, if so, to designate the amount thereof.

It has been frequently held that, since the adoption of the amendment to section 953a of the Code of Civil Procedure, in 1915, an appeal may be presented and heard upon a typewritten transcript of the judgment-roll, duly certified by the clerk and the trial judge, even in the absence of a settled bill of exceptions or of a phonographic report of the trial as therein provided. Ramsay v. Rodgers, 189 Cal. 100, 207 P. 516; Benson v. Gardner, 14 Cal.2d 526, 95 P.2d 136; Charles v. City of Crescent City, 12 Cal.2d 241, 83 P.2d 34. The respondent's claim that this appeal is ineffectual is therefore without merit.

[3] The court was without authority to create an advancement to be paid to the daughter from the estate of her incompetent father under the provisions of section 1558 of the Probate Code, or to direct that the allowance should be made a charge against her future inheritance of any portion thereof. The statute contains no such provision. It merely gives the court discretion to allow a reasonable sum to be paid to the next of kin from the surplus income of the estate of an insane or incompetent person, which surplus is not required for the maintenance of the ward, conditioned upon first determining that "the ward would * * * have aided [the petitioner] if said ward had been of sound mind". The only discretionary authority of the court under such circumstances is found in the following language quoted from that section: "The granting of such allowance and the amounts and proportions thereof shall be discretionary within the court, but the court shall give

consideration to the amount of surplus income available after due provision has been made for the proper support and maintenance of the ward, to the circumstances and condition of life to which the ward and said next of kin have been accustomed and to the amount which the ward would, in the judgment of the court, have allowed said next of kin, had said ward been of sound mind."

[4] An advancement is defined in 1 American Jurisprudence, at page 715, as follows: "An advancement is a perfect and irrevocable gift, not required by law, made by a parent, during his lifetime, to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the portion of the donor's estate that the donee would be entitled to on the death of the donor intestate."

Section 1397 of the Civil Code, which defined the nature of advancements, was repealed at the time of the adoption of the Probate Code. Section 1050 of the last-mentioned code now contains the only statutory requirements with relation to the creation of advancements.

[5, 6] Where the statute provides the method for creating advancements to be charged to the prospective shares of heirs, that procedure is the exclusive manner of creating such advancements. It is the uniform rule that advancements to an heir which may have the effect of charging his share of the estate with payments previously made to him, depends upon the intention of the testator or donor. That intention must be established by satisfactory evidence in order to charge the payments as advancements. Estate of Spreckels, 6 Coffey Prob.Dec. 375; 1 Cal.Jur. 477, sec. 2; 1 Am.Jur. 720, secs. 11 and 12; 26 A.L.R. 1089, note. In conformity with that rule, section 1050 of the Probate Code was adopted. It provides that advancements to an heir may be established only by proof of that intention on the part of the testator or donor expressed in writing, or by written acknowledgment thereof signed by the donee. That section reads: "A gift before death shall be considered as an ademption of a bequest or devise of the property given; but such gift shall not be taken as an advancement to an heir or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such."

Quoting with approval from Beebe v. Estabrook, 79 N.Y. 246, it is said in Re Farmers' Loan & Trust Co., 181 App.Div. 642, 168 N.Y.S. 952, 955, with respect to the exclusive control of the statute over the means of determining the existence of advancements that: " 'The right to charge advancements made by an intestate to his children against their distributive shares in his estate depends upon positive law, and the statute regulates the right and prescribes the circumstances and limitations under which the right exists.' "

[7] In the absence of a statute authorizing the court so to do, it has no power to impress payments from the estate of an incompetent person upon the prospective shares of the heirs or next of kin as advancements. It is apparent that such an order would lack the required proof of the intention of the donor to create advancements to be charged against the interests of the heirs. The statute confers upon the court no power to determine what the intention of an incompetent person might be with respect to the payment of allowances to needy relatives. After a person has been declared incompetent he is incapable of determining how his estate shall be disposed of, or whether payments to needy relatives shall be made as mere advancements.

[8] Usually the question as to whether payments to heirs shall be charged against their interests in an estate as advancements is determined by the court at the time of distribution of the estate. Sec. 1054, Probate Code; 3 Bancroft's Probate Practice, p. 1880, sec. 1143.

The respondent asserts that the appellant's signature to the written instrument of election required by the court constitutes an acknowledgment on her part, in conformity with the provisions of section 1050 of the Probate Code, that the payments to be made shall be charged against her interest in the estate as advancements. The appellant admits that she signed the document as required by the court, but declares that it merely consists of an election on her part to remain in the home of her father, and that it contains no acknowledgment or consent that the payments would constitute advancements to be charged against her as an heir of her father's estate. An examination of the

challenged portion of the court's order discloses the fact that the petitioner was not required to sign a written acknowledgment that the payments would be considered as advancements. It merely required her to sign a written "election" within thirty days from the date of the order, with respect to "one of said alternatives" as to whether she would remain in or out of the home of her father. The reason for that requirement, as appears from the petition, was that the petitioner had previously resided with her father for several years and had rendered personal aid to him. It was desirable that she should continue to render that service. The determination as to whether she would remain in her father's home, or elect to live elsewhere fixed the amount of allowances to be received by her under the order of the court.

That portion of the order which clearly shows that the court did not ask nor require the petitioner to sign a written acknowledgment that her payments would constitute advancements reads as follows:

"It is hereby ordered that in the event petitioner continues to reside in the household of her father, she shall receive room and board, together with a monthly sum of $50.00 in cash, * * * until the further order of this court; or in the event petitioner elects to reside elsewhere she shall receive in cash the sum of $100 per month * * * until the further order of this court; provided, however, petitioner shall, within thirty days from this date elect in writing and file in this proceeding her acceptance of one of said alternatives [with respect to her future residence] * * * and provided, further, that any sum or sums of money paid by the guardian to petitioner under the provisions hereof shall constitute an advance against any inheritance petitioner might receive upon the death of her father, and the guardian of said incompetent shall keep an account of all sums so paid.

"It is further ordered that if petitioner fails to make an election within the time * * * as herein required * * * her petition for allowance shall thereupon be deemed denied."

[9] It will be observed the "election" which is required by the clear language of the court order has no application to the subsequent declaration that the payments shall be deemed to constitute advancements against any inheritances she might receive from the estate at the time of the death of her father. In the absence of the written document determining petitioner's choice with respect to her future residence, which is not before this court, we must assume the petitioner merely signed the written declaration of choice of residence, as required by the court, and that she did not voluntarily include therein an acknowledgment not required by the court that the payments might be considered as advancements. The written document, signed at the request of the court, subsequent to the rendering of the order for allowances, was not a part of the evidence adduced at the trial. We may therefore not assume, in support of the judgment, that the written document contained an acknowledgment of advancements, merely because it does not appear in the record on appeal. The court made no finding that such an acknowledgment had been executed, or that it would be required. Section 1558 of the Probate Code, under which the order for allowances was made, does not authorize the court to grant a petition for payments from the estate of an incompetent person, conditioned upon their becoming advancements. If the respondent assumes that the appellant voluntarily signed a written acknowledgment of advancements in conformity with section 1050 of the Probate Code, after the order for allowances was made, it was his duty to offer evidence of that fact by a motion for diminution of the record to present that document to this court. No such motion was made.

Section 1050 of the Probate Code is the only statutory provision of the California laws with respect to the creation of advancements. That section requires proof of the intention of the testator to create advancements, to be shown by his written declaration to that effect, or by written acknowledgment of the donee. Neither alternative has been complied with in this case. The incompetent person was incapable of either consenting to the payments or legally designating them as advancements. The petitioner signed no such acknowledgment. There is an absolute absence of compliance with the statute creating advancements.

Since the court was without authority to make an order of allowance from the estate of the incompetent person subject to the declaration, "and provided, further, any sum or sums of money paid by the

guardian to petitioner under the provisions hereof shall constitute an advance against any inheritance petitioner might receive upon the death of her father, and the guardian of said incompetent shall keep an account of all sums so paid", the order should be modified by striking therefrom the foregoing quoted language, from which portion of the order this appeal was perfected. It is so ordered.

We concur: PULLEN, P. J.; TUTTLE, J.



42 Cal.App.2d 756

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA v. MORF et al.

Civ. 12208.

District Court of Appeal, Second District, Division 1, California.

Feb. 6, 1941.

1. Sales ⇐482

A finance corporation, lending money to retail automobile dealer on automobiles previously obtained by him from wholesalers and receiving in exchange trust receipts reciting that retailer held automobiles as trustee for such corporation, had no cause of action against registered legal owner, who financed wholesalers' acquisition of automobiles under trust receipt transactions, for conversion thereof, as such owner had right to possession of automobiles prior in time and superior to that of finance corporation.

2. Sales ⇐459

Trust receipts, given by automobile retailer to finance corporation loaning him money on automobiles before title thereto passed to him from wholesalers, vested no legal title to automobiles in such corporation, especially where retailer had not approved mechanical condition of automobiles or received properly indorsed certificates of ownership thereof, as contemplated by his contracts with wholesalers for purchase thereof, at time of execution of trust receipts. Vehicle Code, § 186, St.1935, p. 118; Civ.Code, § 1739, rule 3(2).

3. Estoppel ⇐75, 76

Where finance corporation, loaning money to automobile retailer in exchange for trust receipts reciting that retailer held automobiles previously obtained from wholesalers as trustee for such corporation, did not rely on any act of wholesalers, but relied solely on retailer's representation that he had automobiles in his possession, without taking any precautions to verify such statement, while wholesalers merely gave retailer possession of automobiles and did nothing to mislead corporation as to conditions under which retailer held such possession, wholesalers were not "estopped" to assert their title to automobiles in finance corporation's action for conversion thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

4. Estoppel ⇐75

Persons intrusting another with mere possession of personalty do not hold him out as owner thereof, and hence are not "estopped" to assert title thereto.

5. Property ⇐9
Sales ⇐234(2)

Possession of personal property is prima facie, not conclusive, evidence of possessor's title thereto, and maxim caveat emptor applies in dealing with him as to such property.

6. Chattel mortgages ⇐84

Unrecorded trust receipts, given by automobile retailer to finance corporation loaning him money on automobiles of which he was given merely possession by wholesalers, were not valid as "chattel mortgages". Civ Code, §§ 2957, 3440.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Mortgages".

7. Sales ⇐473(1)

A finance corporation, loaning money to automobile retailer in exchange for trust receipts reciting that he held certain automobiles as trustee for such corporation, was not in position of "bona fide purchaser" of automobiles within Uniform Trust Receipts Law, as it did not obtain valid security interest in automobiles, but was nothing more than "pledgee" of personal property without change of possession. Civ.Code, § 3013, subd. 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser" and "Pledgee".

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by the Metropolitan Finance Corporation of California against Haward Morf and others, for conversion of automobiles. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. Edward Haley, of Los Angeles, for appellant.

Pierson & Block, by Ralph K. Pierson, all of Compton, for respondents.

DORAN, Justice.

The appellant herein appeals from a judgment in favor of defendants and respondents entered after a trial of the issues in an action brought by appellant for an alleged conversion of certain automobiles.

There is no conflict in the evidence. It appears therefrom that at the time of the transactions which gave rise to this litigation, one J. K. Woods was engaged in the retail used car business in the city of Los Angeles, and had been so engaged for a period of approximately ten years. Respondents Morf and Fewel were engaged together in the business of wholesaling used cars, either as partners or in the relationship of employee and employer, and the cars here in question were obtained by Woods from the said respondents. According to Woods' own testimony, his general course of business in such matters was as follows: "And I would look them over and whatever car I was interested in, I would ask him what they wanted for it, what price they wanted for it, and so forth, and finally tell him that I would take the car providing it was good mechanically. And they would deliver the cars to my place—their employees—and if the car was in such a condition that I wanted it at the price that they quoted me on it, I would have a check made out for it, my bookkeeper would make out a check for it and I would file it and when they brought in the pink slips, why, I gave them the check for the car. That was the way I handled it." According to Woods' further testimony, the cars here concerned appear to have been obtained upon such terms. Woods appears to have signed order blanks for the cars in question. However, though these blanks were marked for identification, they were not placed in evidence. The cars were apparently delivered to Woods during the period from January 14, 1937, to February 17, 1937.

According to the record, these cars, seven in number, were brought into California from outside the state, and were then registered in this state in the name of respondent Fewel. Respondent Covington was also registered in California as legal owner of four of the cars, and appears to have financed Fewel's acquisition of the said cars under trust receipt transactions.

Shortly after obtaining each of the said cars, Woods applied for and received a loan or advance from appellant upon each, giving to appellant in exchange an instrument denominated "Trust Receipt", which recited that Woods held the car in question as trustee for appellant, with right of sale. In the case of six of the seven cars involved, these so called trust receipts bear a date prior to the date when the cars were registered in California in Fewel's name. Appellant received no other instrument or document of title.

Registration of the said cars was never transferred to Woods or to appellant, nor did Woods or appellant ever receive the certificates of ownership of the said cars. At the time the cars were delivered to Woods, title to the same does not appear to have been transferred to respondent Fewel on the records of the Motor Vehicle Department of California. Although Woods drew checks to Fewel for the cars, the checks were never delivered to Fewel nor was any payment made to respondents for the said cars. Early in March, 1937, Woods was declared bankrupt and shortly before that time the respondents, or some of them, appear to have taken possession of the cars and the same were later sold to other persons.

It also appears that when appellant advanced the money to Woods on the cars there was no particular check made as to Woods' possession of or title to the same. The transaction was negotiated upon the presentation by Woods of slips of paper describing the cars in question, and Woods was not asked for either the white or pink certificate, neither of which he had. The loan transactions between Woods and appellant do not appear to have any direct connection with the acquisition of the cars by Woods from respondents. There was on file with the Secretary of State of California a statement covering trust receipt financing of respondent Fewel by re-

spondent Covington, and a similar statement regarding such financing of Woods by appellant.

The court found that the plaintiff (appellant) was not the owner and entitled to possession of the said cars and that there had been no conversion by defendants (respondents).

[1] It is manifest that under the circumstances appellant could have no cause of action against respondent Covington for conversion of the cars. Covington as registered legal owner, and entruster of Fewel, is clearly shown to have a right to possession of the cars prior in time and superior to that of appellant, assuming appellant to have any interest. As will hereinafter appear, the doctrine of estoppel is not applicable to the facts presented.

[2] The nature of appellant's interest in the cars, if any, depends of course upon the true nature of the so called trust receipt transactions with Woods. These transactions were not of the type within the contemplation of the Uniform Trust Receipts Law, secs. 3012 to 3016.16, Civil Code. Appellant did not purchase the cars on behalf of Woods, nor did it take title to itself as security for its advancement or receive any bill of lading and draft or ownership certificate as agent for the seller. Furthermore it appears that the "Trust Receipts" were given by Woods to appellant before title to the cars passed to Woods. There had been no registration of the cars in Woods' name nor delivery to him of any endorsed certificate of ownership. Short of an estoppel there was nothing to prevent the application of the provisions of section 186 of the Vehicle Code, St.1935, p. 118, and the mere delivery of the cars to Woods was ineffective so far as vesting of any title or interest in Woods was concerned. The trust receipt before the passing of the title to Woods, was inoperative to vest any legal title in appellant, and, even if title had thereafter passed to Woods, the receipt in question could not have deprived him of title. People's Nat. Bank of Boston v. Mulholland, 224 Mass. 448, 113 N.E. 365.

The instant case is readily distinguishable from that of Commercial Credit Co. v. Barney Motor Co., 10 Cal.2d 718, 76 P.2d 1181, cited by appellant, in that there title to the car had been transferred directly to the finance company, while here that essential element of a trust receipt transaction is lacking.

Furthermore, aside from the applicable provisions of the Motor Vehicle Code, it is clear that in the sale of the cars to Woods by respondents the parties did not intend property in the cars to pass to Woods until approval by Woods of the mechanical condition of the cars and the delivery to him of a properly endorsed certificate of ownership. The sale was thus one upon approval, or terms similar thereto, and according to the rules for ascertaining the intention of the parties under section 1739 of the Civil Code, Rule 3(2), and upon the facts of the case, property in the cars had not passed to Woods at the time the trust receipts were executed.

[3-5] Respondents are not estopped to assert their title to the cars in question. In the first place, the evidence shows that appellant did not rely upon any act of respondents but relied solely upon Woods' representation that he had the cars in his possession and did not take any precaution to verify Woods' statement. In the second place, respondents had merely given Woods possession of the cars, and entrusting a third person with mere possession does not constitute holding him out as owner. Bice v. Harold L. Arnold, Inc., 75 Cal.App. 629, 638, 243 P. 468. Respondents had done nothing to mislead appellant as to the conditions under which Woods held possession and "nothing is better settled than that possession of personal property is prima facie, not conclusive, evidence of title and that the maxim caveat emptor applies". Pacific Acceptance Corp. v. Bank of Italy, 59 Cal.App. 76, 81, 209 P. 1024, 1027, quoting from the note to Davis v. First Nat. Bank, 25 L.R.A.,N.S., 760.

[6] Had Woods the authority or right to encumber the cars, the "trust receipts" would still lack validity as chattel mortgages, since they were unrecorded and failed to satisfy the provisions of section 2957 and section 3440 of the Civil Code. Hogan Finance & Mortgage Co. v. Mead, 205 Cal. 1, 4, 269 P. 610; Pacific Finance Corp. v. Hendley, 119 Cal.App. 697, 705, 7 P.2d 391.

[7] Appellant claims to be in the position of a bona fide purchaser of the cars and that it comes within the definition of a purchaser contained in the Uniform Trust Receipts Law, sec. 3013[11] Civil

Code. As seen above, appellant did not obtain a valid security interest in the cars and therefore cannot come within such a definition. Nor does the case of Commercial Credit Co. v. Barney Motor Co., supra, support appellant. The bank in that case was clearly a bona fide purchaser. Appellant's position can be nothing more than that of a pledgee in a pledge of personal property without change of possession. The distinction between a bona fide purchaser and such a pledgee was expressly noted in the Barney Motor Co. case, supra, wherein at page 722 of 10 Cal.2d, 76 P.2d 1181, Pacific Finance Corp. v. Hendley, supra, was cited as involving the situation of a pledgee, and the latter case is directly in point here.

The evidence supports the findings of the court and the conclusions based thereon are correct.

The judgment is therefore affirmed.

We concur: YORK, P. J.; WHITE, J.



42 Cal.App.2d 744

COUNTY OF LAKE v. FORBES et al.

Civ. 6425.

District Court of Appeal, Third District, California.

Feb. 5, 1941.

1. Paupers ⇐51

In county's action to recover from aid recipient's adult sons amount paid to recipient, evidence that during time recipient was receiving aid a son owned an automobile, had bought 20 shares of stock at $175 a share, paying one-third down, that he thereafter bought a new automobile and subsequently another one, and that his net income for one year was $3,000 and for preceding year about $4,000, sustained finding that such son was pecuniarily able to support his father. St.1937, p. 1094, § 2224.

2. Paupers ⇐51

The adult sons of an aged father who received aid from county could not avoid liability to county for sums paid to the father on ground that it was necessary for court to find the amount necessary to support the father before sons could be compelled to support him, since the action by county to recover sums paid does not arise out of statute providing for reciprocal duties of parents and children in maintaining each other. St.1937, p. 1094, § 2224; Civ.Code, § 206.

3. Paupers ⇐51

The statute authorizing an action by a county against spouse or children who are able to support recipient of aid from county is complete in itself and gives right of action to the county where certain facts exist. St. 1937, p. 1094, § 2224.

4. Paupers ⇐51

In county's action to recover from adult sons of aid recipient the amount of aid given, overruling demurrer to complaint which was amended to conform to proofs after trial was not error on ground that original complaint did not state that father was a poor person, where such allegation was required under statute providing for reciprocal duties of parents and children but was not required under Welfare and Institutions Code on which county's action was based. St.1937, p. 1094, § 2224; Civ.Code, § 206.

5. Appeal and error ⇐1040(10)

In county's action against adult sons of aid recipient to recover amount given to recipient alleged error in overruling demurrer to complaint which was amended to conform to proofs after trial was harmless, where no prejudice resulted from such ruling. St.1937, p. 1094, § 2224

6. Paupers ⇐51

A complaint in county's action to recover from aid recipient's adult sons the amount of aid given was not demurrable for failure to allege that board of supervisors passed a resolution authorizing commencement of action, where Welfare and Institutions Code, on which county's action was based, provided that board should merely "request" district attorney to proceed with the action, and no resolution was necessary. St.1937, p. 1094, § 2224.

7. Paupers ⇐51

The adult sons of recipient of aid from county could not avoid liability to county for amount of aid given on ground that under statute existing at time when aid was given it was necessary for board of supervisors to make a finding that sons were un-

able to support their father before relief could be granted to the father, and having made an order granting relief, board must have found that sons were unable to support their father, where legislature in enacting statute authorizing county to maintain action gave the superior court the power to determine whether or not adult children were able to support their father. St.1937, p. 1094, § 2224.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by the County of Lake against George H. Forbes, Jr., and another, to recover the amount paid by plaintiff to defendants' parent, wherein defendants filed a demurrer. From a judgment for plaintiff, defendants appeal.

Affirmed.

Lovett K. Fraser, of Lakeport, for appellants.

Burt W. Busch, Dist. Atty., of Lakeport, for respondent.

TUTTLE, Justice.

This is an action brought by the county of Lake, pursuant to section 2224 of Welfare and Institutions Code, St.1937, p. 1094, against two adult sons, to recover the amount of $526 paid by respondent county to the parent of said sons under the provisions of the aforesaid law. Judgment was rendered in favor of plaintiff for $526, and defendants have appealed.

On October 1, 1937, the board of supervisors of Lake county granted the application of George H. Forbes for aid under the provisions of division III of said code, and ordered that he be paid the sum of $35 per month until the further order of said board. Thereafter, and prior to January 16, 1939, the sum of $526 was paid to George H. Forbes by the county of Lake, pursuant to said order. At the time said order granting aid was made, George H. Forbes, Jr., and O. Forbes were the sons of said aged person, George H. Forbes, and were each of adult age.

Findings were made in favor of respondent upon all issues, and judgment against appellants in the sum of $526 was entered. The appeal is from such judgment.

George H. Forbes, at the time of the trial, was seventy-eight years of age. His only real property consisted of a house and lot, which were reasonably worth, together, $1,000. His personal property was under $50 in value. He had no other property. He was unable to support himself. His adult sons, mentioned above, contributed nothing to his support. Discussion of other facts appears later herein.

[1] It is contended by appellants that the finding to the effect that appellant George H. Forbes was pecuniarily able to support his father is not sustained by the evidence. The record shows that said appellant, during the time his father was receiving aid, owned a Dodge sedan worth $875; that he had bought twenty shares of American Telephone and Telegraph Company stock at $175 a share, paying one-third down; that in November, 1938, he bought a new Buick automobile; that after he bought the Buick, he bought a Chevrolet sedan; that his net income for the year 1938 was $3,000, and for the year 1937, about $4,000. It also appeared that he was married, but had no children. We hold the contention to be without merit.

[2] It is next contended by appellants that under section 206 of the Civil Code, it was necessary for the court to find the amount necessary to support the father before they could be compelled to support him. That section reads as follows:

"Reciprocal duties of parents and children in maintaining each other. It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding."

We do not believe that the action arises out of, or is governed in any manner by said section, but is based solely upon the provisions of section 2224 of the Welfare and Institutions Code, which we quote:

"Action by county against spouse or children able to support aid recipient: Disposition of sums recovered: Continuance of aid. If the person receiving aid has within the State a spouse or adult child pecuniarily able to support said person, the board of supervisors shall request the district attorney or other civil legal officer of the county granting such aid to proceed against the kindred in the order of their responsibility to support. Upon such demand the district attorney or other civil legal officer of the county granting aid

shall, on behalf of said county, maintain an action, in the superior court of the county granting such aid, against said relatives, in the order named, to recover for said county such portion of the aid granted as said relative is able to pay. Any sum so recovered shall be credited by the county to the county and to the State in proportion to the contributions of the county and the State respectively.

"The granting of or continued receipt of aid shall not be contingent upon such recovery."

[3] This section is complete in itself, and gives a right of action to the county where certain facts exist. All of these facts have been here proven. The main question to be determined was whether or not the adult children were pecuniarily able to support the parent. The findings here are in the language of the statute, and, as we have pointed out, they are abundantly supported by the evidence. This contention is not made by the other appellant.

[4-6] It is also contended by appellants that the court erred in overruling the demurrer to the complaint, which was amended to conform to proofs after the trial. The original complaint did not state that the father was a "poor person". Such allegation is required, appellants contend, by the provisions of said section of the Civil Code. As we have held that the complaint states a cause of action under the Welfare and Institutions Code, it was unnecessary to comply with section 206 of the Civil Code, in stating a cause of action in a case of this character. Assuming that the trial court erred in permitting the amendment, no prejudice resulted from the ruling. The point is without merit. It is also contended that the complaint is vulnerable to demurrer because it does not allege that the board of supervisors passed a resolution authorizing the commencement of the action. The point has no merit. The section of the Welfare and Institutions Code quoted above, provides that the board shall merely "request" the District Attorney to proceed with the action. No resolution was necessary.

[7] Appellants next contend that the board of supervisors found that they were not able to support their father, and that such finding is a conclusive determination of that issue. No express finding of that character was introduced in evidence. It is argued, however, that as the law stood in 1935, it was necessary for the board to make such a finding before relief could be granted to the father. Having made an order granting relief, they argue that the board then must have found that they were not able to support the parent. The legislature, in enacting said section 2224, gave the Superior Court the power to determine whether or not the adult children were able to support their father. The point is without merit.

Other questions are raised by appellants, but they lack sufficient merit to require discussion.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



42 Cal.App.2d 721

PEOPLE v. FONG SHEE SHUNG.

Cr. 3422.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1941.

As amended Feb. 17, 1941.

1. Criminal law ⇐938(1)

The claim of newly discovered evidence as ground for new trial is looked upon with distrust and disfavor, and public policy demands that a litigant exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. Pen.Code, § 1181, subd. 7.

2. Criminal law ⇐945(1)

New trial on ground of newly discovered evidence is given for cases where new evidence most material to the issues, which would probably have produced a different result, is discovered after trial. Pen.Code, § 1181, subd. 7.

3. Criminal law ⇐938(1)

In addition to due diligence in discovering new evidence, as affecting right to new trial for newly discovered evidence, evidence must be material and such as to render a

different verdict reasonably probable upon retrial. Pen.Code, § 1181, subd. 7.

4. Criminal law ⇐945(1)

The question of probable effect of newly discovered evidence upon the case, as affecting grant of new trial, is peculiarly addressed to trial court's discretion. Pen.Code, § 1181, subd. 7.

5. Criminal law ⇐1156(1)

Action of trial court on motion for new trial will be disturbed on appeal only when clear and unmistakable abuse of discretion is shown. Pen.Code, § 1181, subd. 7.

6. Criminal law ⇐945(1)

Where evidence of defendant's guilt of robbery was overwhelming, court did not abuse discretion in denying new trial sought on ground of newly discovered evidence, comprising testimony of new witnesses, who had allegedly been intimidated from testifying for defendant, that defendant was at home of one new witness at time of robbery. Pen. Code, § 1181, subd. 7.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Raymond Fong Shee Shung was convicted of robbery, and, from an order denying his motion for a new trial, he appeals.

Affirmed.

Abbott C. Bernay, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Following his conviction after a trial before a jury on three counts of robbery, defendant prosecutes this appeal from the order denying his motion for a new trial.

Epitomizing the facts as they appear in the record, it was testified at the trial that about one o'clock on the morning of Monday, June 17, 1940, a Chinese restaurant located at 11916 Ventura boulevard in the county of Los Angeles was held up and robbed by three men armed with guns, who bound the proprietor, William Wong, his wife and brother, and placed them in a rest room. One of the robbers, identified at the trial as the appellant, then at the point of a pistol commanded the victims to remain quiet. Certain money and other personal property was taken from the persons of the victims and from the premises. At the trial appellant was identified by Mrs. Wong and Paul L. Wong, while William Wong, who also identified appellant as one of the perpetrators of the robbery, testified that he had seen him in several other restaurants prior to the night of the holdup. On the occasion of the robbery appellant wore no mask and his face was visible to the victims. In the course of the robbery appellant took the wallet of Paul L. Wong, which contained a social security card and a chauffeur's license in the name of the latter. Six different witnesses were produced by the prosecution who identified the appellant as having used these documents while impersonating Paul L. Wong in order to cash fictitious checks to which he had forged Mr. Wong's name as an endorser.

Appellant took the witness stand in his own defense. He denied participation in the robbery or that he had ever been in the restaurant prior to his arrest. He claimed that he was sleeping in a Chinese laundry on West Sixth street in the city of Los Angeles on the Sunday night and Monday morning in question; that he went to sleep about 11:30 and did not arise until six in the morning. He admitted possession of the social security card and chauffeur's license of Mr. Wong, as well as the illegal use thereof, but claimed he found them in the rest room of a restaurant.

Upon this appeal appellant challenges only the correctness of the trial court's ruling in denying his motion for a new trial which was based solely upon the ground of newly discovered evidence. Pen.Code, sec. 1181, subd. 7. In support of this motion defendant tendered the trial court two affidavits in which the affiants deposed that they both were present at the home of one of them on the night the robberies were committed, and that appellant was also in that home at the hour when the victims testified they were held up. Both of these affiants further swore that they did not advise appellant of such knowledge on their part because of the receipt by them of an anonymous telephone call warning them not to testify for the defendant "upon penalty of incurring great harm to their persons". The affidavits further set forth the fact that by reason of such threats they were intimidated and did not acquaint defendant with such knowledge in their possession until after his trial. Although the affidavits do not set forth the location of the premises where the deponents stated the defendant was on the night of the robbery,

we assume from a statement of counsel made on the hearing of the motion for a new trial that the home of one of the affiants was the Chinese laundry in which the defendant testified he spent the night in question.

[1, 2] It has repeatedly been said that the claim of newly discovered evidence as a ground for or warranting a new trial is uniformly looked upon by the courts with distrust and disfavor; that public policy demands that a litigant exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. Indeed, the courts have gone so far as to say that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that the very strictest showing of diligence is required. People v. Freeman, 92 Cal. 359, 366, 28 P. 261. Of course, it is recognized that despite the exercise of such effort, cases will sometimes occur where, after trial, new evidence most material to the issues, and which would probably have produced a different result is discovered. It is for such cases that the remedy of a motion for a new trial on the ground of newly discovered evidence has been given. People v. Byrne, 160 Cal. 217, 225, 116 P. 521. Manifestly, in the instant case appellant before the time of his trial was aware of the identity of the people present on the premises where he claimed to have spent the night when the charged offenses were committed. In fact, it appears from one of the affidavits filed with the motion for a new trial that defendant and his counsel, prior to the trial, were aware of the availability as a witness of one of the affiants whose evidence is now characterized as "newly discovered".

[3-6] In addition to due diligence, it is further required that the evidence be material and such as to render a different verdict reasonably probable upon a retrial. The question of the effect upon the case of the newly discovered evidence is, from its nature, peculiarly one that is addressed to the discretion of the trial court, and it is only when a clear and unmistakable abuse of discretion is shown that the action of the trial court on a motion for a new trial will be disturbed on appeal. People v. Sing Yow, 145 Cal. 1, 78 P. 235. In the instant case we find no such abuse of the discretion vested in the trial judge when he determined that the newly discovered evidence was not of such character as to render a different verdict probable upon a retrial. The evidence of appellant's guilt was overwhelming and practically amounted to a demonstration thereof. He was positively identified by the witnesses for the prosecution, one of whom testified he had seen appellant on previous occasions prior to the night of the robbery, and as heretofore pointed out, six different witnesses testified to the possession by appellant of some of the property taken in the holdup.

For the reasons herein stated, the order denying the motion for a new trial is affirmed.

We concur: YORK, P. J.; DORAN, J.



42 Cal.App.2d 740

OLIVERO v. ROSANO et al.

Civ. 2557.

District Court of Appeal, Fourth District, California.

Feb. 4, 1941.

1. Bills and notes ⇐499

The payees' possession of note on which was no indorsement of payments raised a presumption that note had not been paid.

2. Appeal and error ⇐994(3), 996, 1011(1)

It is the exclusive province of trial court to determine credibility of witnesses and weight and effect to be given to evidence, to consider inferences reasonably deducible therefrom, and to determine disputed fact from conflicting evidence.

3. Appeal and error ⇐1010(1)

The reviewing court has jurisdiction to consider evidence only where there is no evidence to sustain a finding, or it can be said as a matter of law that evidence is insufficient to sustain it.

4. Appeal and error ⇐1009(2)

In suit involving a trust, findings that certain note was included in trust agreement and that it had not been outlawed would not be disturbed by reviewing court where findings were supported by ample evidence.

5. Appeal and error ⇐1078(1)

Although argument in brief was confined to question of whether certain note was barred by limitations before making of trust agreement, reviewing court would consider question raised by plea of statute of limitations going to entire cause of action contained in cross-complaint setting up trust agreement. Code Civ.Proc. § 337.

6. Equity ⇐66

Under equitable maxim that he who seeks equity must first do equity, plea of statute of limitations in answer to cross-complaint in equitable action would not be sustained. Code Civ.Proc. § 337.

7. Equity ⇐66

Unwillingness to pay a just indebtedness, found to be due, does not command one who seeks the aid of equity, to avoid payment of such indebtedness, on the ground that the debt, though morally due, is barred by provisions of a statute limiting time within which an action to enforce payment of obligation may be instituted.

8. Appeal and error ⇐110, 782

An order denying motion for new trial being nonappealable, an attempted appeal therefrom was dismissed.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Suit by Mary Olivero against August Rosano and another, to quiet title to certain real property, wherein the defendants filed a cross-complaint naming Mary Olivero and another as cross-defendants. From an interlocutory judgment and an order denying a new trial, the plaintiff and the cross-defendants appeal.

Judgment affirmed, and the appeal from the order dismissed.

Julius Hansen, of Fresno, for appellants.

Arthur Frame, of Clovis, for respondents.

KLETTE, Justice, pro tem.

Mary Olivero, plaintiff and appellant, brought suit against August Rosano and Mary Rosano, defendants and respondents, to quiet title to certain real property. Defendants and respondents filed a cross-complaint in which they named G. E. Olivero and Mary Olivero, husband and wife, as cross-defendants, and in which they alleged that on November 15, 1934, the Oliveros were indebted to defendants and respondents in the sum of $835, on a promissory note, and that on that date a deed was taken to the real property in question, in the name of defendants and respondents, who advanced the purchase price of $4,000, in cash and credit, upon the verbal understanding and agreement, that they were to hold title in trust for appellants, until all advances made by them, together with said sum of $835, represented by said note, were paid, with interest. Payment was to be made within one year, but time for payment was extended to November, 1936. It was alleged that there still remained unpaid on said advances, the sum of $1,837.13, and said sum of $835, together with interest.

The answer to the cross-complaint admits, in effect, most of the allegations thereof, merely realleging them in somewhat different detail, excepting as to the $835, which it is alleged was not included in the transaction, had been repaid prior to November 15, 1934, and that the entire transaction was barred by section 337 of the Code of Civil Procedure. Appellants admitted owing $1,653.08, which they were willing to pay upon execution of deed to them.

It was stipulated by respective counsel, in open court, that appellants were indebted to respondents in the sum of $1,837.13, besides interest, but that this did not include the $835, and that the only issues before the court were as to whether this $835 had been paid, and also if barred by the statute of limitations.

The $835 note bore no date, other than 1930, and provided no date for payment, appearing to be the usual printed form of note, without the blanks filled in. Respective counsel have treated it as a demand note, which would outlaw within four years from the date of execution.

The trial court found for respondents on both of the issues presented, and rendered an interlocutory judgment that respondents held title to the real property in trust for appellants, as security for the payment of the sum of $3,153.85 (which included the $835, with interest thereon), which appellants were required to pay within ten months after the entry of judgment, whereupon respondents were required to convey said property to appellants. If said sum was not paid within the time specified, title to the real property was quieted in respondents. Plaintiff and cross-defendants appealed from this interlocutory judgment,

and from the order denying them a new trial.

[1] There was a sharp conflict in the testimony, both as to the date when the note was made, and also as to whether paid. Respondents, the payees named in the note, had the note in their possession, with no endorsement of payments thereon, which raised a presumption it had not been paid. Rice v. Union Trust Co., 50 Cal.App. 643, 195 P. 720. Mary Rosano, one of the respondents, testified that the note was not paid, and that it was executed after Thanksgiving, 1930, which would bring it within four years of the time the trust was created, on November 15, 1934. Mary Olivero testified, just as positively, that the note had been paid, by being merged into another note, in 1931, and that the date of its execution was September, 1930, which would be more than four years before the creation of the trust.

[2, 3] It is a well recognized principle of law, that it is the exclusive province of the trial court to determine the credibility of the witnesses, the weight and effect to be given to the evidence, to consider inferences reasonably deducible from it, and from the conflicting evidence determine the disputed fact. It is only in cases where there is no evidence to sustain a finding, or where it can be said, as a matter of law, that the evidence is insufficient to sustain it, that this court has jurisdiction to consider the evidence. Thom v. Stewart, 162 Cal. 413, 122 P. 1069; Wood v. Lehne, 30 Cal. App.2d 222, 85 P.2d 910; Woods v. Cook, 14 Cal.App.2d 560, 58 P.2d 965.

[4] There is ample evidence in the record to support the findings that the $835 note was included in the trust agreement, that it had not outlawed at that time, and that it has not been paid, and therefore we cannot disturb these findings.

[5] While appellants, in their brief, confine their argument to the question as to whether the $835 note had outlawed before the trust agreement was made, yet in their answer to the cross-complaint, the plea of the statute of limitations goes to the entire cause of action set forth in the cross-complaint. We deem it necessary, therefore, to pass upon the question, from that point also.

[6, 7] This is an equitable action, to establish a trust, and must therefore be governed by the rules and maxims of equity. One of these is, that, "he who seeks equity must first do equity". Unwillingness to pay a just indebtedness, found to be due, does not commend one who seeks the aid of equity, to avoid payment of such indebtedness, on the ground that the debt, though morally due, is barred by the provisions of a statute, limiting the time within which an action to enforce payment of the obligation may be instituted. Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194.

[8] The judgment appealed from is affirmed. The order denying the motion for a new trial, being non-appealable Hill v. Fricke, 5 Cal.2d 320, 54 P.2d 460; Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698, the attempted appeal therefrom is dismissed.

We concur: BARNARD, P. J., MARKS, J.



42 Cal.App.2d 729

MATTHEWS v. NAYLOR et al.

Civ. 6522.

District Court of Appeal, Third District, California.

Feb. 1, 1941.

1. Workmen's compensation ⇐1939

An award by the Industrial Accident Commission must be upheld, if commission's finding is supported by any substantial evidence. St.1937, p. 265, § 3201 et seq.

2. Workmen's compensation ⇐665

An injury to mechanic in collision with truck while driving his automobile from town in which he was employed to city at time fixed by his employer for purpose of buying a hoist and arc welder for employer occurred in "course of his employment", and hence was compensable under Workmen's Compensation Act, though he had been expressly permitted by employer and planned to stop off at another city on route to visit relatives, as major purpose of trip was to perform employer's business. St.1937, p. 265, § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of His Employment".

3. Workmen's compensation ⇐665

An employee making trip necessitated by his work is in "course of his employment", so as to entitle him to compensation under Workmen's Compensation Act for injury sustained during trip, though he is serving some purpose of his own at same time. St. 1937, p. 265, § 3201 et seq.

4. Workmen's compensation ⇐617

Any reasonable doubt as to whether employee's act was contemplated by employment should be resolved in his favor in determining compensability of injury sustained while performing act, in view of state's policy of liberal construction of Workmen's Compensation Act in employee's favor. St.1937, p. 265, § 3201 et seq.

Proceeding by Walter Matthews for a writ of review to annul an order of the Industrial Accident Commission denying petitioner compensation for injuries sustained while employed by Granville Naylor.

Award annulled.

Tebbe & Correia, of Yreka, and Edmund D. Leonard, of San Francisco, for petitioner.

E. A. Corten, of San Francisco, for respondents.

TUTTLE, Justice.

Petitioner seeks to review and annul an order of the Industrial Accident Commission denying him compensation on a finding that injuries sustained by him did not arise out of, and in the course of his employment.

[1] There were two hearings held by respondent Commission. The first terminated in a denial of any relief to petitioner upon the ground that the claim was barred by the statute of limitations. A rehearing was granted, and the second trial also resulted in the denial of any relief, upon the ground that the evidence failed to show that petitioner was injured in the course of his employment. That is the sole issue before us here. If there is any substantial evidence to support the finding of the Commission, the award must be upheld. At the second hearing it was stipulated that all the evidence introduced at the first hearing might be considered as a part of the record in the case.

[2, 3] There is no substantial conflict in the evidence, and respondents do not so contend. They insist, however, that from all the evidence adduced they were justified in inferring and finding that the injury did not arise out of the employment of petitioner.

On or about December 3, 1937, petitioner started out from Etna for San Francisco, by way of Healdsburg. He used his own automobile, and drove down Highway 99, which is admittedly, as the record shows, the usual and most direct route from Etna to San Francisco. While he was between the cities of Redding and Anderson, his car collided with a truck. As a result he suffered a fracture of the right hip and multiple contusions. He was confined to a hospital for twenty-one weeks, and his expenses in that connection were $458.95. His doctor bill was $522.50. The Commission held that the trip upon which he started was a personal mission, hence not compensable. Petitioner contends that he was, in making the trip, on the business of his employer, hence the injury arose out of his employment and he was therefore entitled to compensation under the Workmen's Compensation Act. Division IV of the Labor Code, St.1937, p. 265, § 3201 et seq.

It now becomes necessary to look at the evidence bearing upon the purpose and object of the trip. For a number of years petitioner was employed by respondent Naylor, at the town of Etna, Siskiyou county, as a mechanic. Around Thanksgiving Day, 1937, he told his employer that he wished to visit relatives in the city of Healdsburg, Sonoma county. Respondent Naylor gave the following testimony in respect to his reply to that request:

"A. He said he would like to go to Healdsburg to see his people.

"Q. Did he say how long he intended to be gone? A. He didn't say.

"Q. Did he say when he wished to go when he first mentioned it? A. He would like to go around Thanksgiving.

"Q. At the time of that statement or request to you, what conversation did you have with him about it; what request if any did you make of him with reference to it? A. We were pretty busy at the time; I had quite a little work, and I asked him if he couldn't put it off until a little later and do some work for me at the same time.

"Q. What was this work you wanted him to do for you at the same time he made the trip? A. I was figuring on buying a hoist and an arc welder, and he had worked in San Francisco and knew a lot of mechan-

ics and knew how to get around better than I did, and I figured he would be better to hunt this equipment up than I would because he knew more about it."

The proposed trip was deferred until December 3rd. In the meantime they had another conversation, in which they agreed upon the date of departure, and the work to be done by petitioner in San Francisco. It was the same work as that described in the testimony given above. In respect to the date of the trip, respondent Naylor testified: "I picked the time for the trip; he didn't." The testimony of petitioner is as follows:

"A. We were talking one day and I asked him couldn't I get off for about a week for Thanksgiving; he said, 'You ain't going to leave me now because I got too much work.' He said, 'Will a little later do?' And I told him, 'Sure'. So I waited until we got the work caught up.

"Q. At that time when you asked him about the Thanksgiving trip was anything said about doing any errands for him in San Francisco? A. Yes.

"Q. Will you state just what was said at that time by Mr. Naylor? A. Going to Healdsburg he wished I would go on down to the City and look over some hoists and an arc welder down there that might be worth while to buy, and see about some new ones, too."

During the time of his absence, he was to receive his usual wages.

We believe that the only reasonable conclusion to be reached from the evidence is that petitioner was in the employ of respondent Naylor when the accident occurred, and the injury was therefore a compensable one. "If the trip is undertaken from a mixture of motives and the duty within the employment is not the major factor of the journey or movement, the injury is not compensable. * * * What is the major purpose of the trip is frequently a very close question of fact. *The test is: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own.*" Vol. I, Workmen's Compensation (Campbell) page 177, sec. 188. Here, the undisputed evidence shows that the employer refused to permit petitioner to make the trip as first planned. The undisputed evidence is that the second date of departure was picked by the employer and not by the employee. Thus it appears that there would have been no trip at all unless the business of the employer was attended to and performed. The city of Healdsburg is (though not in the most direct way), on the route between Etna and San Francisco. In our opinion the only reasonable conclusion to be drawn is that the main and chief purpose of the trip, as rearranged, was the business of the employer. It was the major factor of the journey. The only case on this point, cited by respondents, is London G. & A. v. Industrial Accident Commission, 190 Cal. 587, 213 P. 977. There the claimant took some work to be done in his home instead of in the office where he was employed. He completed the work at noon, had lunch, and was opening the front door of his home, on his way to return to his office. He slipped on the floor and broke his hip. Compensation was denied, upon the ground that the particular work which he had taken home had been finished, and the injury, therefore, did not arise out of his employment. In the instant case the work which the employee had undertaken for his employer had not been performed. We are unable to accept the view that the evidence will support a finding that the petitioner was on a personal mission when he was injured. On the contrary, we believe that the only reasonable conclusion to be drawn from the evidence is that the work of the employer created the necessity for the travel. Respondent Naylor refused to permit petitioner to take the trip when it was first suggested by the latter, and picked the time for the second. Furthermore, he expressly permitted petitioner to stop off at Healdsburg on his way to San Francisco. The employer cannot now be heard to contend that because he merely planned to make such stop, petitioner lost all right to compensation.

[4] In reaching our conclusion, we have, throughout, been guided by the section of the Act mentioned which expressly enjoins us to construe the law liberally. Also, we have been mindful of the rule that "Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee". Employers', etc., Corporation v. Industrial Accident Commission, 37 Cal.App.2d 567-574, 99 P.2d 1089, 1092.

The award is annulled.

We concur: PULLEN, P. J.; THOMPson, J.

42 Cal.App.2d 725

ANDERSON v. LANG.

Civ. 6468.

District Court of Appeal, Third District, California.

Jan. 31, 1941.

1. Automobiles ⇐171(9)

Driver of each of two automobiles which collided at intersection had duty to look for approaching automobiles before entering the intersection.

2. Automobiles ⇐245(14, 61)

In action for injuries sustained in automobile collision by plaintiff who was riding with co-employee, which occurred at unobstructed intersection, evidence failed to establish as a matter of law absence of negligence on part of defendant, which was proximate cause of collision. Vehicle Code, St. 1935, p. 93 et seq.

3. Appeal and error ⇐977(3)

The granting of new trial is a matter resting so largely in discretion of trial court that its action in that regard will not be disturbed except on disclosure of a manifest and unmistakable abuse of discretion.

4. New trial ⇐6

Discretion to grant new trial is not a right to exert mere personal or arbitrary will of the judge, but is governed by fixed rules of law to be reasonably exercised for accomplishment of justice.

5. Appeal and error ⇐977(3)

Action of trial court in granting new trial will not be set aside on appeal even if, as a matter of first impression, reviewing court might feel inclined to take a different view from that of trial court concerning propriety of its action, so long as the case made presents an instance showing a reasonable or even fairly debatable justification, especially where the question rests largely in fact and involves proper deduction to be drawn from the evidence.

6. New trial ⇐70

In action for injuries sustained in automobile collision which occurred at an unobstructed intersection, action of trial court in granting to plaintiff a new trial on ground of insufficiency of evidence to sustain verdict for defendant was not an abuse of discretion. Vehicle Code, St.1935, p. 93 et seq.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by Vincil Anderson against Edward F. Lang for injuries sustained in an automobile collision. Verdict was for the defendant. From an order granting motion for new trial, defendant appeals.

Affirmed.

Gerald M. Desmond, of Sacramento, for appellant.

Manwell & Manwell, of Marysville, for respondent.

MONCUR, Justice pro tem.

This is an action on the part of plaintiff and respondent Vincil Anderson to recover damages from defendant and appellant for personal injuries incurred by respondent as the result of a collision between an automobile in which respondent was riding and one driven by defendant and appellant.

The following is a sufficient statement of the facts for the purpose of a decision upon this appeal:

On June 21, 1938, plaintiff was riding in an automobile driven by one Oscar Benton, a fellow employee of the Pacific Gas and Electric Company, who was driving south on a rural highway in Sutter county, known as Township road. The automobile driven by appellant Lang was proceeding easterly on the highway known as Franklin road. The two roads intersect at right angles, and the collision occurred east of the intersection at about 10 o'clock in the morning. Respondent and Benton were the only occupants of the Pacific Gas and Electric Company's automobile, and appellant was the sole occupant of the automobile which he was driving at the time of the accident.

The trial was before the court and jury, and after verdict by the jury and judgment thereon in favor of defendant, appellant herein, the trial court granted plaintiff's motion for a new trial upon the grounds stated in the motion, including that of the insufficiency of the evidence to justify the verdict, and that the verdict is against law; and it is from the order granting the motion that this appeal has been taken.

[1, 2] The question for determination is whether there was an abuse of discretion on the part of the trial court in granting the motion. It is conceded that the question of contributory negligence on the

part of Oscar Benton, the driver of the Pacific Gas and Electric Company automobile, is not involved in this appeal. It is the contention of appellant that it appears from the evidence as a matter of law that there was no negligence on the part of appellant Lang, which was the proximate cause of the accident and the resulting injuries to respondent. With this contention we do not agree. An examination of the record discloses that there was a substantial conflict in the evidence in many material respects. The intersection was an unobstructed one under the provisions of the Vehicle Code of this state, St. 1935, p. 93 et seq.

Appellant Lang testified that before entering the intersection he looked to the right and left and did not see any automobiles approaching. Both respondent and Benton testified that they saw appellant Lang approaching the intersection but that he did not appear to be looking or to see them approaching. It was the duty of both drivers of the automobiles to look for approaching automobiles before entering the intersection. If appellant Lang looked, as he testified that he did, he should have seen the approaching automobile in which respondent was riding. Either he did not look, or having looked, did not see that which was plainly to be seen. Also there is a sharp conflict as to the speed of the two automobiles, and as to which entered the intersection first.

[3-5] The law of this state concerning appeals in matters of this kind is so well settled that it scarcely requires the citation of authorities in connection with the law in this respect. Both appellant and respondent cite the case of Harrison v. Sutter Street Railway Co., 116 Cal. 156, at page 161, 47 P. 1019, at page 1020, and we quote as follows from that case:

"That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse, has become axiomatic, and requires no citation of authority in its support. It is true that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But, so long as a case made presents an instance showing a reasonable, or even fairly debatable, justification under the law for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn from the evidence. The opportunities of the trial court in such instances for reaching just conclusions are, as a general thing, so superior to our own that we will not presume to set our judgment against that of the former where there appears any reasonable room for difference."

The foregoing has been cited with approval by the Supreme and Appellate courts of this state in many instances. It will suffice to refer to two of those cases, both of which have been cited in the instant case. Koyer v. McComber, 12 Cal. 2d 175, 82 P.2d 941, and Menne v. Friermuth Co., 130 Cal.App. 106, 19 P.2d 535.

The appeal in the case of Koyer v. McComber, supra, cited and relied upon by appellant, was before the district court of appeal in the first instance, and the decision therein appears in Cal.App., 75 P.2d 89. In that case there was an order granting a motion for a new trial. The district court of appeal reversed the trial court. A hearing was granted by the Supreme Court, and that court affirmed the trial court's order granting a new trial. Thereon concerning the question of the insufficiency of the evidence the Supreme Court, 12 Cal.2d at page 183, 82 P.2d at page 945, said:

"We think it unnecessary to discuss the further ground upon which the motion for a new trial was granted—that is, that the evidence was insufficient to justify the verdict finding the defendants guilty of fraud in said transaction. Conceding that there was sufficient evidence to support the verdict as to all answering defendants, it is apparent that there was a substantial conflict in this evidence [respecting the class of building of an apartment house] * * *. This conflict was evidently resolved by the trial court in favor of the defendants and, as shown by the authorities heretofore cited, all intendments are to be indulged in by a reviewing court in support of the action of a trial court in passing upon a motion for a new trial, and it will not be disturbed if the question of its propriety be open to debate."

Appellant cites and relies upon the case of Chase v. Jonkey, 12 Cal.App.2d 365, 55 P.2d 1229, and cases therein cited. Those cases involve appeals from judgments after denials of motions for new trials. The rule as set forth in said decisions and invoked herein is correct, but cannot be applied in the situation herein existing. In the case of Menne v. Friermuth, supra, 130 Cal.App. at page 108, 19 P.2d at page 535, the appellate court quotes from the case of Harrison v. Sutter Street Railway Co., supra, as follows:

"The rule invoked is correct, as addressed to the function of the trial court, or when asking this court to set aside the verdict where it has been refused by the court below. But when we are asked to review the act of that court, where, in the exercise of its discretionary power, it has seen fit to set aside the verdict on this ground, a very different rule prevails. Every intendment is to be indulged here in support of the action of the court below, and, as elsewhere suggested, it will not be disturbed if the question of its propriety be open to debate."

[6] We are satisfied that the trial court was well within the proper exercise of its discretion in granting the motion for a new trial, and its order is therefore affirmed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.



CHILDRESS et al. v. PETERSON et al.*

Civ. 2715.

District Court of Appeal, Fourth District, California.

Feb. 4, 1941.

Hearing Granted April 3, 1941.

1. Municipal corporations ⇐185(4)

If city council intended to economize by dispensing with services of policewomen and if discharge of an employee within the civil service could be accomplished by failing to appropriate money for his salary, some official action was necessary to give effect to council's intent in order to effectuate discharge of policewomen. St.1931, p. 2906, § 115 et seq.

2. Municipal corporations ⇐886

Under charter provision of San Diego the unappropriated balance of the general fund would be available for appropriation to cover shortages in any other fund, including the salary fund of the police department. St.1931, p. 2886, § 69(h).

3. Municipal corporations ⇐186(6)

In action to compel reinstatement of plaintiffs as policewomen of San Diego and to recover salaries from date of commencing action, evidence as to balance in fund budgeted for police salaries after payment of salaries for first seven months of fiscal year established that after payment of salaries for remainder of year, on basis of same average monthly salaries as during first seven months thereof, there would remain in fund more than sufficient to pay salaries of policewomen for the period from commencement of action to date of judgment.

4. Municipal corporations ⇐185(4)

Where city council appropriated sufficient funds for police salaries to pay salaries of policewomen as well as salaries of other members of police department, and took no other action to dismiss policewomen, the policewomen were not removed from their civil service positions, notwithstanding city council's intention to economize by dispensing with their services. St. 1931, pp. 2888, 2906, §§ 71, 115 et seq.

5. Appeal and error ⇐843(2)

In action to compel plaintiffs' reinstatement as policewomen and to recover salaries from commencement of action until date of judgment, district court of appeal would not consider question with respect to payment of salaries from date of purported discharge until commencement of action nor during period following entry of superior court's judgment for plaintiffs.

6. Appeal and error ⇐1170(7)

Errors in the admission and exclusion of evidence were without prejudice, where district court of appeal determined case without regard to erroneously admitted evidence and assumed the facts sought to be established by excluded evidence and the other excluded evidence was merely cumulative. Const. art. 6, § 4½.

* Subsequent opinion 117 P.2d 336.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Mrs. Beula F. Childress and others against John T. Peterson, etc., and others, seeking a writ of mandate to compel reinstatement of plaintiffs as policewomen of the City of San Diego and for the recovery of back salaries. From a judgment for plaintiffs, defendants appeal.

Judgment affirmed.

See also, 105 P.2d 376.

Dayton L. Ault, City Atty. and Morey S. Levenson and J. H. McKinney, Deputy City Attys., all of San Diego, for appellants.

Thomas Whelan and Vincent Whelan, both of San Diego, for respondents.

MARKS, Justice.

Plaintiffs brought this action against the city of San Diego and a number of its officers and agents seeking a writ of mandate to compel their reinstatement to the positions of policewomen of that city and to compel the payment of their salaries from and after July 15, 1939. During the trial plaintiffs dismissed the portions of the complaint under which their salaries were sought to be recovered prior to the filing of the complaint on November 29, 1939.

Several years prior to July 15, 1939, plaintiffs had reached the status of classified employees of the city of San Diego and had come within the protection of its civil service rules and regulations. (See art. VIII, Charter of San Diego, Stats.1931, pp. 2838, 2906.)

The fiscal year of the city of San Diego commences on July 1st, and ends on June 30th of the next year. It is the duty of the city manager to file his budget for each fiscal year before the first meeting of the city council in May. The then city manager, Robert W. Flack, filed such a budget on May 2, 1939.

There had been an election in San Diego and several new members of the city council took office on, or prior to May 8, 1939. F. A. Rhodes was appointed city manager. He took office on June 1, 1939, supplanting Flack. The councilmen instructed Rhodes to prepare a budget that would reduce the city expenditures by $500,000. He submitted his budget on June 16, 1939. Section 71 of the charter prohibits the city council from increasing any budgeted item but permits a reduction of any of them.

Both the Flack and the Rhodes budgets contained an appropriation to pay the salaries of five policewomen.

On June 13, 1939, the city council passed Ordinance Number 1611, New Series, "* * * creating and establishing certain positions in the service of the City of San Diego. * * *" This ordinance repeated the provisions for the creation of positions for eight policewomen, which was the same number provided for in several prior ordinances. It is admitted that this ordinance, and others preceding it, created many positions that were not filled. These provisions were made to take care of any emergency that might arise after the passage of the ordinance. San Diego had never employed more than six policewomen, and just prior to June 1, 1939, there were five in the service.

The duties of the policewomen were largely to supervise dine and dance establishments, to prohibit minors from entering such places or being served with intoxicants there, and to regulate the conduct of a certain class of women.

In the interest of economy, the council, in considering various items in the budget, decided to dispense with the services of the policewomen and to try the experiment of having the dine and dance places supervised by policemen accompanied by police matrons. It is clear from the evidence that it was the intention of the majority of the councilmen to effect a saving by reducing the budgeted appropriation for salaries of those employed in the police department, and by such reduced appropriation to dispense with the services of all policewomen. Whether or not they accomplished that purpose is the important issue in this case.

The budget ordinance appropriating money with which to pay the cost of the various departments of the city was passed on July 5, 1939. It appropriated for the police department, to pay for "personal service, $345,560.50". An additional $165,000 from certain specified revenues was appropriated for the same purpose. Thus there was appropriated $510,560.50 to pay the salaries of police department employees. These appropriations were general in their terms and there is nothing on the face of the ordinance to indicate that the money was to be used to pay any particular class of employees or that policewomen were not to be paid out of these funds.

Counsel for both parties argue many questions in their briefs with sincerity, force and logic. They support their arguments with generous citations of authorities. But when we strip the case of nonessentials and leave out of consideration several hundred pages of the transcript treating with immaterial collateral matters, the issue presented for decision is simple. It may thus be stated: Did the city council, by its appropriation ordinance, accomplish its declared purpose of dispensing with the services of the policewomen then employed by the city, who were within the protection of the civil service, by failing to appropriate money with which to pay their salaries?

In approaching this question we will assume, without holding, the soundness of practically all the arguments advanced by defendants; that it was the honest and praiseworthy intent of the councilmen to reduce the expenditures of the city; that as one step toward accomplishing this purpose they intended to dispense with the services of all policewomen by not appropriating any money for their salaries; that in this they were not actuated by any bad motives but were honestly and sincerely attempting to reduce taxes; that the discharge of an employee within the civil service can be accomplished by failing to appropriate money for his salary.

[1] The decision of the whole problem lies in the answer to the question: Was the money directly appropriated for salaries of those in the police department (together with other money appropriated that could be lawfully used for that purpose) sufficient to pay plaintiffs' salaries? If it was sufficient it would seem that the councilmen failed to carry their purpose into effect, for the only means used to accomplish that intent was the ordinances they passed. The mere intent to eliminate the policewomen was not sufficient to effect their discharge. In addition, there must have been some official action to give effect to that intent. The only action taken was the passage of Ordinance Number 1611, New Series, on June 13, 1939, and the budget ordinance on July 5, 1939. That Ordinance Number 1611 did not accomplish that purpose is clear from its terms. It created positions for eight policewomen. That the budget ordinance failed to give effect to that intent is rather clear from the evidence.

[2] As we have seen, the budget ordinance appropriated $510,560.50 to pay the salaries of employees of the police department. The deputy auditor of San Diego testified that between July 1, 1939, and January 31, 1940, both inclusive, there had been expended for that purpose, $292,285.86, leaving an unexpended balance in this salary fund of $218,274.64. If the monthly expenditures for salaries during the last five months of that fiscal year remained at the same average level as they were during the first seven months there would remain in this fund an unexpended balance of over $9,000. The same witness testified that on January 31, 1940, there remained $25,932.89 in the unappropriated balance of the general fund. This was evidently the unexpended balance of a budget appropriation of $150,000, designated in the ordinance as "unappropriated balance". Under subdivision "h" of section 69 of the charter, it is provided that the " 'unappropriated balance' * * * shall be available for appropriation later in the fiscal year to meet contingencies which might arise". It seems clear that this balance of $25,932.89 was available for appropriation to cover shortages in any other fund, including the salary fund of the police department.

Plaintiffs each received a salary of $157 per month. Under the judgment they will receive their salaries from November 29, 1939, the date of the commencement of this action, to March 29, 1940, the date of the rendition and entry of judgment.

[3, 4] From the evidence of the deputy city auditor it seems too clear to permit of serious argument that, after paying all other salaries of the employees of the police department for the entire fiscal year, there will remain in the fund directly budgeted for that purpose, more than sufficient to pay the salaries of plaintiffs for the period here involved without drawing upon the "unappropriated balance". It also seems clear that the councilmen failed to put into effect their purpose of causing the dismissal of plaintiffs by reducing the salary appropriations to an amount where the salaries of plaintiffs could not be paid. That being true, it follows that plaintiffs were not removed from their civil service positions, there having been no other action taken which could possibly result in their dismissal.

[5] It is not necessary to consider the payment of plaintiffs' salaries between July 15, and November 29, 1939, and after March 29, 1940, as those questions are not here directly involved. Any questions as to the payment of salaries for those periods

should be determined if and when they arise and not before. See Buck v. City of Eureka, 119 Cal. 44, 50 P. 1065; Buck v. City of Eureka, 124 Cal. 61, 56 P. 612; Higgins v. City of San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670.

[6] Defendants complain of rulings overruling their objections to many questions asked by counsel for plaintiffs and in sustaining objections to evidence offered by them. There is considerable merit in many of their arguments. However, because of the view we take of the case those errors cannot be regarded as prejudicial. The erroneously admitted evidence has had no influence on this decision and we have disregarded it in its entirety. Some of the excluded evidence was cumulative. We have assumed the facts sought to be established by some other portions of the excluded evidence. We cannot reverse the judgment because of such errors. § 4½, art. VI, Const.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



DAVIS et al. v. EAST CONTRA COSTA IRR. DIST.

Civ. 11371.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1941.

Hearing Granted March 31, 1941.

1. Eminent domain ⇐271

The seepage and overflow of water from irrigation district's canals and ditches resulting in an increase in the water level and rendering adjoining land unfit for agricultural and horticultural purposes give rise to cause of action for damages against district under eminent domain provisions of state Constitution regardless of whether district was guilty of negligence. Const. art. 1, § 14.

2. Eminent domain ⇐277

Actions in eminent domain for taking or damaging of private property are not immune from the operation of claims statutes if terms of statutes are broad enough to include such actions. Const. art. 1, § 14.

3. Eminent domain ⇐267

The constitutional provision authorizing recovery of compensation for taking or damaging of private property grants only the right to compensation, but does not provide mode of procedure for enforcement of right, which may be provided by either statutory or charter provisions. Const. art. 1, § 14

4. Eminent domain ⇐267

Where procedure for enforcement of constitutional right to compensation for taking or damaging of private property has been established by legislative enactment, failure to comply therewith constitutes a "waiver" of right to enforce payment of damages. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

5. Eminent domain ⇐277

Whether action in eminent domain to recover compensation for taking or damaging of private property falls within scope of a particular claims statute depends upon terms of statute and alleged facts upon which action is founded. Const. art. 1, § 14.

6. Pleading ⇐214(1)

Facts set forth in complaint must be taken as true on demurrer.

7. Eminent domain ⇐277

The increase of water level beneath plaintiffs' lands, which were thereby rendered unfit for agricultural and horticultural purposes, as result of seepage and overflow of water from irrigation district's nearby canals and ditches, was result of a "dangerous condition" of district's property necessitating filing of claim for damages with district as prerequisite to right to maintain action in eminent domain against district for damages to land. St.1935, p. 2250, § 2; Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Condition".

8. Waters and water courses ⇐228¾

It was to be presumed that Legislature in enactment of statute relating to claims against irrigation districts for damages resulting from dangerous condition of property under control of district used word "dangerous" in its ordinary sense of attended or be-

set with danger; full of risk; causing danger; likely to harm; perilous; hazardous; unsafe. St.1935, p. 2250, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous".

9. Eminent domain ⇐277

Where facts alleged, in plaintiffs' complaint in action in eminent domain for damages resulting from increase of water level beneath their property as result of seepage from irrigation district's canals and ditches, established that condition created by district was dangerous to plaintiffs' property, absence of word "dangerous" in complaint did not relieve plaintiffs of duty to file claim with district as prerequisite to right to maintain action. St.1935, p. 2250, § 2; Const. art. 1, § 14.

10. Waters and water courses ⇐228¾

The filing of claim with irrigation district for damages resulting from dangerous condition of property under district's control was required not only in cases of accidental injury or specific damage resulting at a given time and place, but also in case of any claim for damage to realty resulting from any dangerous condition brought about by district in operation of its properties. St. 1935, p. 2250, § 2.

Appeal from Superior Court, Contra Costa County; Edward I. Butler, Judge.

Action in eminent domain to recover compensation for damages to plaintiffs' property by Andrew M. Davis, Jr., and others, against the East Contra Costa Irrigation District. From a judgment of dismissal, the plaintiffs appeal.

Judgment affirmed.

Hearing granted; PETERS, Justice pro tem., took no part in the consideration or decision of this matter.

Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel, and Donald W. Falconer, all of San Francisco, for appellants.

A. L. Cowell, of Stockton, and Downey, Brand & Seymour, of Sacramento, for respondent.

KNIGHT, Justice.

Defendant's demurrer to the third amended complaint was sustained without leave to amend, and from the judgment of dismissal entered thereon plaintiffs appeal.

The action was one in eminent domain (Const. of Cal., Art. I, sec. 14) to recover compensation for damages to plaintiffs' property. The basic facts pleaded were that since 1924 the defendant irrigation district has maintained canals and ditches along the lands to the north, west and south of plaintiffs' lands, whereby it has transported waters for irrigation purposes to lands in the vicinity of plaintiffs' property; that since 1927 seepage and overflow from said canals and ditches, the release of the waters therefrom upon the lands in the vicinity of plaintiffs' property, and the failure since 1935 to provide drainage facilities, has caused a fluctuating increase in the water level beneath the surface of plaintiffs' lands, and thereby destroyed the walnut and apricot orchards growing thereon, and deprived plaintiffs of the use of their lands for agricultural and horticultural purposes. The demurrer was sustained upon the ground that prior to the commencement of the action plaintiffs failed to file a claim with the secretary of the board as provided in section 2 of the Irrigation District Claims Statute (Stats. 1935, Chap. 833, p. 2250). It is plaintiffs' contention that said statute has no application to any of the four causes of action sued upon.

[1-5] It appears to be well settled that facts similar to those pleaded in the complaint herein give rise to a cause of action for damages against an irrigation district under the eminent domain provisions of the state constitution, regardless of whether the acts complained of were the result of negligence (Ketcham v. Modesto Irr. Dist., 135 Cal.App. 180, 26 P.2d 876; Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 69 P.2d 483; Massetti v. Madera Canal & Irr. Dist., 20 Cal.App.2d 708, 68 P.2d 260; see also order of Supreme Court denying hearing in Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, 568, 200 P. 814); but it is equally well settled that actions in eminent domain for the taking or damaging of private property are not immune from the operation of claims statutes, if the terms of the statutes are broad enough to include such actions. In other words, while the constitution grants the right to compensation, it does not provide the procedure by which the right may be enforced (Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102); and that being so, the mode of procedure for the enforcement of such right may be provided by either statutory or charter provisions. Crescent Wharf, etc., Co. v. Los

Angeles, 207 Cal. 430, 278 P. 1028. It is held, therefore, that where such procedure has been established by legislative enactment, a failure to comply therewith is deemed to be a waiver of the right to enforce the payment of damages. Young v. County of Ventura, supra, citing Musto-Keenan Co. v. City of Los Angeles 139 Cal. App. 506, 34 P.2d 506; Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539; and Yonker v. City of San Gabriel, 23 Cal.App. 2d 556, 73 P.2d 623. Some of the cases wherein it has been held that charter provisions were controlling in the matter of the bringing of an action in eminent domain are Crescent Wharf, etc., Co. v. Los Angeles, supra; Bigelow v. City of Los Angeles, 141 Cal. 503, 75 P. 111; Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712; other cases applying the same doctrine under statutory enactments are McCann v. Sierra County, 7 Cal. 121, and Young v. County of Ventura, supra. It is apparent, therefore, that the determination of the question of whether an action in eminent domain to recover compensation for the taking or damaging of private property falls within the scope of a particular claims statute depends upon the terms of the statute and the alleged facts upon which the action is founded.

[6, 7] The claims statute here involved is entitled "An act relating to the liability of irrigation districts, their officers and employees", and section 2 is as follows: "Whenever it is claimed that any person or property has been injured or damaged as a result of any dangerous or defective condition of any property owned or operated and under the control of any irrigation district or its officers or employees and/or the negligence or carelessness of any officer or employee of an irrigation district, a verified claim for damages shall be presented in writing and filed with such officer or employee and the secretary of said board within ninety days after such accident or injury has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident or injury or damage and the nature and extent of the injury or damages claimed. The foregoing shall be a condition precedent to the filing or maintaining of any action for said injury or damages." As will be noted, the statute embraces all cases wherein it is claimed that property has been damaged as the result of "any dangerous" condition of any property owned, operated, or under the control of the district; and it is our conclusion that the trial court was justified in holding that the facts set forth in the complaint, which on demurrer must be taken as true, show that the operation by the district of the properties under its control created a condition dangerous to plaintiffs' property, as the result of which plaintiffs' property was damaged, and that therefore the case was brought within the scope of the clause of the statute above mentioned.

The pertinent facts as they were alleged by plaintiffs upon which the foregoing conclusion is based may be stated as follows: (first cause of action) Plaintiffs' lands (containing 54.7 acres) were planted to walnut and apricot trees, and up to August 1, 1935, produced large and valuable agricultural and orchard crops. Prior to 1927 the water level of said lands was not less than fifteen feet below the surface, which did not adversely affect the fertility or productiveness of the soil; and the lands were not subject to overflow of water by seepage or otherwise. From 1927 to 1929 seepage from defendant's canals and ditches, together with the water brought to and released upon lands within the district, caused the water level of plaintiffs' lands to fluctuate so that in 1929 it was brought within four feet of the surface of the soil; and during that period, so it was alleged, Andrew M. Davis, Jr., one of the plaintiffs, "repeatedly advised the defendant district of the increasing ground water level and the threat of damage to his orchard therefrom, and the district installed drainage facilities designed to lower said water table purportedly to comply with the provisions of the Drainage Act of 1907 (Stats. of 1907, p. 569)." However, at that time plaintiffs' lands did not show evidence of permanent injury or damage. From 1930 to 1935, due to seepage and overflow from said canals and ditches and the release of waters on other lands in the district, the water level beneath plaintiffs' lands fluctuated to within eight feet of the surface; and during that period also drainage facilities were maintained by defendant whereby quantities of ground water were removed from the immediate vicinity of plaintiffs' lands, so that at that time plaintiffs' lands did not show evidence of permanent injury or damage. Continuing, it was alleged: "Ever since the 1st day of August, 1935, water has constantly escaped and seeped through the bottom, sides, and banks of canals and

ditches maintained by defendant district in the immediate vicinity of plaintiffs' hereinabove described lands. During all of said period to and including the date of filing the complaint herein and thereafter the drainage facilities maintained by defendant district were not maintained in such manner as to prevent the rise of ground water hereinafter described. During said period the ground water of all of the plaintiffs' lands as hereinabove described has been raised by reason of the said escaped water and seepage water from the canals and ditches of defendant district to a level of less than five feet below the surface of said lands, by reason whereof the fertility and productiveness of plaintiffs' said lands has been destroyed and the said lands have been rendered entirely unavailable for the raising of apricots or walnuts and have been rendered in large part unavailable for any other useful purpose; the said apricot trees and part of said walnut orchard trees have died in large numbers." In the second cause of action it was alleged: "II. Ever since the latter part of the year 1924 defendant district has owned, maintained and used irrigation canals and ditches in the vicinity of plaintiffs' property described in the Paragraph of the first cause of action in this complaint numbered II and within the boundaries of the said irrigation district. During all of said period defendant district has removed waters from the San Joaquin River, has transported and distributed such waters by seepage and overflow through said canals and ditches to lands within the said irrigation district, including lands not owned by defendant district in the vicinity of plaintiffs' said lands." "III. By means of such distribution of water defendant corporation within three years last past * * * has deprived plaintiffs of their said properties * * * without just or any compensation. * * *" "IV. But for such distribution of water by defendant district within three years last past before the filing of the complaint herein the plaintiffs' said lands hereinabove described and the apricot and walnut orchards on said property would have remained in a healthy condition and would not have suffered from disease and destruction." "V. Defendant at no time had or now has any easement or prescriptive right or other interest in property for the seepage, escape, or overflow of water hereinabove in paragraphs II and III of this second cause of action described. * * *" The third cause of action appears to be based on the combined allegations of the first and second causes of action, most of the allegations thereof either being incorporated therein by reference or realleged in substantially the same form. The fourth cause of action rests largely upon the following portions of paragraph II thereof, to-wit: "From the 1st day of August, 1935, to the date of the filing of the complaint herein, the canals and ditches of defendant irrigation district have been and now are so negligently and carelessly maintained by defendant that water has constantly escaped and seeped through the bottoms, sides and banks of said canals and ditches, and said defendant during said period has negligently, carelessly, and without right allowed said water to flow to and upon the lands of plaintiffs hereinabove described and to and upon lands not owned by defendant district in the immediate vicinity of the lands of plaintiffs hereinabove described. During all of said period defendant, well knowing that drainage facilities were required to prevent the damage herein complained of to plaintiffs' lands, failed, neglected and refused to provide drainage facilities as required by the statutes of the State of California."

[8, 9] It must be presumed that when the legislature in the enactment of the claims statute employed the word "dangerous" it intended that said word should be interpreted in the sense in which it is ordinarily used; and as defined in the dictionaries, it means attended or beset with danger; full of risk; causing danger; likely to harm; perilous; hazardous; unsafe. Here it appears from the allegations of each of the causes of action sued upon that over a period of many years great quantities of water to be used for irrigation purposes were brought into the district by the defendant by means of canals and ditches which it owned and over which it had control and thereupon released on lands in the vicinity of plaintiffs' property, and also allowed same to escape, seep and overflow from its canals and ditches, as the result of which the water level of plaintiffs' lands was increased to the extent of rendering the lands useless for agricultural or horticultural purposes. Manifestly a condition so created was dangerous to plaintiffs' property; and that the danger was apparent to plaintiffs and to the district is shown by the allegation that

prior to 1930 one of the plaintiffs "repeatedly advised the defendant district of the increasing ground water level and the threat of damage to his orchard therefrom."

It is true, as pointed out by plaintiffs, that nowhere in the complaint was it alleged that the condition so created was "dangerous"; however, the facts alleged in themselves show that it was and therefore an allegation to that effect would merely have been the statement of a conclusion. And plaintiffs are not in a position on this appeal to claim that any part of the responsibility for the distribution, seepage or overflow of said waters rests with any adjoining owners, for the reason that all four causes of action are based upon allegations to the effect that the district alone is responsible therefor, and for the damage resulting therefrom.

It is also true that the eminent domain provisions of the constitution declare that "Private property shall not be taken or damaged for public use without just compensation * * *"; whereas the claims statute under consideration pertains only to cases where property has been damaged. But there is nothing whatever in the complaint herein indicating that there was any "taking" of any property belonging to plaintiffs; so that the question of whether such a case would be subject to the provisions of the claims statute is one with which we are not here concerned.

[10] Plaintiffs' final contention is that the provisions of section 2 prescribing the time and manner of filing claims and the contents thereof indicate that in the enactment of the statute the legislature had in mind only cases of accidental injury or specific damage resulting at a given time and place from the negligent manipulation of the property of the irrigation district. When, however, the section is read as a whole it becomes apparent that it was not contemplated that the act should be given such a limited construction, because by the opening clause thereof it includes within the scope of the act any claim for damage or injury to real property resulting from "any" dangerous condition brought about by the district in the operation of its properties.

Furthermore, it does not appear that it was impracticable for plaintiffs to have complied with the requirements of the act by filing a claim prior to the commencement of the action. A similar question was raised in Young v. County of Ventura, supra, which involved a different state of facts, but a claims statute almost identical with the one here under consideration. It was the claims statute governing the commencement of actions against counties municipalities and school districts (Act 5149, Deering's General Laws; Stats. 1931, p. 2475), which as here is made applicable to actions wherein it is claimed that a person has been injured or any property damaged "as a result of the dangerous or defective condition" of any street, building, grounds, etc. With respect thereto the court said [39 Cal.App.2d 732, 104 P.2d 105]: "The purpose of the law requiring an early filing of a claim is to give the county notice that it will be called upon to make payment and to enable it to investigate the circumstances at such time as the facts can be ascertained and thereby negotiate a settlement or prepare its defense. This is a reasonable provision on behalf of the county and it causes no hardship upon the claimants. Plaintiffs were not called upon to file more than a general statement of their claim, which could doubtless be prepared within a period of ninety days. If their claim could not be settled by negotiation with the authorities of defendant county, accurate and complete proof of the extent of the damages could be prepared for an action in court. In this regard they are in no different position from that of most of the claimants for damages for personal injuries, who as a general rule cannot determine the exact amounts of their damages within ninety days from the dates of the accidents. Plaintiffs cannot successfully argue that by the statutory requirement of filing a claim they were deprived of due process of law. The legislature has furnished due process to them but they did not avail themselves of it." The same may be said with regard to the present case, for while plaintiffs were permitted to file suit for the recovery of damages at any time within the period of the statute of limitations, there was nothing to prevent them from filing a claim with the district when it became evident that their property had been rendered useless; and having failed so to do, it must be held in accordance with the mandate of the statute that the recovery of damages is barred.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

AHRENS v. NAFTZGER et al.

Civ. 12795.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1941.

Rehearing Denied Feb. 27, 1941.

Hearing Denied April 3, 1941.

1. Appeal and error ⇐116

Orders denying motions of party brought before the court in supplementary proceedings to quash subpœna duces tecum and order requiring appearance of such party are not appealable.

2. Appeal and error ⇐66

In absence of statutory authority therefor, an appellate tribunal should not review an order of the lower court unless it be a final determination of the subject matter.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Myrtle Viola Ahrens against Roy E. Naftzger and others, wherein Muriel Evans was brought into court on supplementary proceedings. From orders denying her motions to quash subpoena duces tecum and order requiring her appearance, Muriel Evans appeals.

Appeals dismissed.

Goudge, Robinson & Hughes, Edgar F. Hughes, and Charles M. Fueller, all of Los Angeles, for appellant.

R. C. W. Friday and Ira A. Gwin, both of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff obtained a judgment against defendants Hugh Evans and Ed. Bischoff. Thereafter supplementary proceedings were commenced and Muriel Evans, the appellant, who was not a party to the action, was ordered by the court to appear and answer "concerning her property". Plaintiff was attempting to conduct the examination in accordance with section 717 of the Code of Civil Procedure. Muriel Evans made a special appearance for the purpose of presenting motions to quash a subpoena duces tecum and the order of the court requiring her appearance. She appeals from the orders of the court denying her motions.

[1] Appellant points out deficiencies in the affidavits on which the order for her appearance was based and also claims that the order was defective in that it ordered her to answer concerning her own property instead of ordering her to answer concerning the property of the judgment debtor. Without discussing these alleged defects respondent contends that the orders from which the appeal is prosecuted are not appealable and that the appeal must be dismissed.

It was held in Frost v. Superior Court, 41 Cal.App. 580, 183 P. 206, 207, that orders such as those now under review are not final orders. In that case the petitioner was a judgment debtor in a case pending in the superior court of Modoc county. A writ of execution was issued and returned partially satisfied and thereafter the court made an order directing the petitioner to appear before a referee in the city of San Francisco to answer concerning his property. The petitioner did not appear before the referee and the court issued "a writ of attachment for contempt" against the petitioner. A writ of certiorari was sought in the District Court of Appeal, the petitioner contending that the affidavit filed as a basis for the order for the petitioner to appear in San Francisco was defective in that it did not set forth necessary jurisdictional facts. The reviewing court held that the writ should not be allowed unless there had been a final adjudication or determination of the subject matter in the lower court. In deciding that the order under review was not a final order the court held that the superior court had jurisdiction to hear and determine the supplementary proceeding; that the court should be permitted without interruption to exercise its jurisdiction until final judgment; and that the proceedings could not be arrested "at any particular time in the progress thereof to determine whether the court has committed error either in the matter of putting its jurisdiction in motion or in ruling upon some proposition arising during the course of the hearing of the proceeding".

[2] We are in accord with the ruling in the Frost case. Although in that case the court was considering an application for a writ of certiorari, while in the case now before us an appeal has been taken, the governing principle is identical. In the absence of statutory authority therefor

an appellate tribunal should not review an order of the lower court unless it be a final determination of the subject matter.

The appeals are dismissed.

We concur: MOORE, P. J.; McCOMB, J.



42 Cal.App.2d 622

WILLIAMSON et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

Civ. 11552.

District Court of Appeal, First District, Division 2, California.

Jan. 27, 1941.

Hearing Denied March 28, 1941.

1. Counties ⇐113(5)
Levees and flood control ⇐9

Power to make contract for county and flood control district for payment of attorneys' fees and expenses in taxpayers' suits, rests with board of supervisors. Pol. Code, §§ 4001, 4031, 4039; St.1915, p. 1503, § 3; Civ.Code, § 1565.

2. Counties ⇐121
Levees and flood control ⇐9

Express contract of board of supervisors rendering county or flood control district liable for attorneys' fees and expenses incurred in taxpayers' suits can be made only by resolution or ordinance duly adopted. Pol.Code, §§ 4001, 4031, 4039; St.1915, p. 1503, § 3; Civ.Code, § 1565.

3. Levees and flood control ⇐9

An express contract rendering flood control district liable for attorneys' fees and expenses incurred in taxpayers' suits did not exist where record did not contain facts showing adoption of resolution or ordinance by majority of board of supervisors in regard to such matter. Pol.Code, §§ 4001, 4031, 4039; St.1915, p. 1503, § 3; Civ.Code, § 1565.

4. Levees and flood control ⇐11

In action against flood control district to recover attorney's fees and expenses incurred in taxpayers' suits instituted to recover amount paid in settlement of claim against district, plaintiffs relying on implied contract were bound to show that privity of contract existed between plaintiffs and district.

5. Levees and flood control ⇐11

Attorneys' fees and expenses incurred in taxpayer's suit instituted to recover money paid in settlement of claim against flood control district could not be recovered from the district on theory of implied contract where it was not shown that the services were rendered and expenses incurred in such circumstances as authorized the plaintiffs to entertain a reasonable expectation of their payment by the district.

6. Levees and flood control ⇐11

Attorneys' fees and expenses incurred in taxpayers' suits to recover money paid by flood control district in settlement of claim against district could not be recovered from district on trust theory where the taxpayers' suits were dismissed either voluntarily or for lack of prosecution, and there was no evidence that any one of the suits or all of them together contributed in any way to the ultimate recovery which was accomplished in action instituted by the district.

7. Costs ⇐103

A court of equity having possession of a fund may in certain instances allow an attorney's fee and costs.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by J. C. Williamson and others against Los Angeles County Flood Control District, to recover for attorneys' fees and expenses claimed to have been earned or incurred in certain so-called "taxpayers' suits". From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Hearing denied; SPENCE, Justice pro tem., took no part in the consideration or decision of this matter.

E. D. Martindale, in pro. per., of Los Angeles (Fred W. Heath and Charles E. McGinnis, both of Los Angeles, of counsel), for appellants.

J. H. O'Connor, Co. Counsel, S. V. O. Pritchard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles, for respondent.

STURTEVANT, Justice.

This is an appeal by the plaintiffs from a judgment of nonsuit entered upon motion of the defendant made at the conclusion

of the plaintiffs' affirmative case. The plaintiffs are seeking by this action to recover from a political entity, a flood control district, for attorneys' fees and expenses claimed to have been earned or incurred by them in certain so-called "taxpayers' suits".

On December 7, 1928, the district entered into a contract for the construction of a concrete dam across San Gabriel Canyon. The contractors entered upon the performance of the contract and excavated large quantities of material from the damsite for which they were paid progress payments aggregating $1,831,312.80. In October, 1929, acting pursuant to the Dam Act, St.1929, p. 1505, which became effective on August 14, 1929, the state engineer examined and condemned the damsite. A dispute arose between the contracting parties as to their respective rights under the contract of December 7, 1928. The contractors filed a claim for $4,290,-459.20, representing their view of the matter, and on February 3, 1930, a compromise was made by the partial allowance of the claim to the extent of $737,986.90 and the purchase from the contractors of certain personal property left at the damsite for $92,779. In executing this compromise the contractors were given a full and complete release of all liability.

In the making of this contract of compromise one of the supervisors of the district was "interested" in violation of section 920 of the Political Code and section 71 of the Penal Code. The "interest" of the supervisor was bribery, a fact which was not known to the district until February 6, 1933, at which time the supervisor was indicted by the grand jury. The "taxpayer plaintiffs" were likewise ignorant of the bribery until the time of the indictment.

On August 5, 1930, Mr. Shorb, one of the "taxpayer plaintiffs", filed the first of the "taxpayers' suits" here involved. That case is No. 306952. The original complaint sets forth a simple cause of action for money had and received for $737,986.90 against the dam contractors. The amended complaint assailed the original contract of December 7, 1928, as fraudulent and the compromise contract as ill-advised. In neither complaint was any showing made to justify a collateral attack upon the quasi-judicial action of the board of supervisors in partly allowing the claim of the contractors as required by such cases as County of Alameda v. Evers, 136 Cal. 132, 68 P. 475; McFarland v. McCowen, 98 Cal. 329, 33 P. 113; El Dorado County v. Elstner, 18 Cal. 144; Andrews v. Pratt, 44 Cal. 309. This "taxpayer's suit" was brought on behalf of the taxpayers of Los Angeles County, and not on behalf of the taxpayers of the Flood Control District. In bringing said suit no demand upon the board of supervisors or any officer or agent of the district was ever made. The action was voluntarily dismissed by the "taxpayer plaintiff" on June 19, 1931. By this action the plaintiff recovered nothing for the district.

Within a few days after the voluntary dismissal of this first "taxpayer's suit" Mr. Shorb, one of the "taxpayer plaintiffs", filed the second suit, No. 323822. In this suit the "taxpayer plaintiff" sought to set up a cause of action upon the theory that the original contract of December 7, 1928, had been procured by fraud. Again no attempt was made to attack directly the quasi-judicial action of the board of supervisors in making a settlement with the contractors and giving to them a full and complete release.

The complaint was demurred to and the demurrer sustained. The plaintiff failed, however, to amend within the time allowed by the court, and judgment was entered dismissing the action as to all defendants but one, C. R. Ross, and the district. A stipulation for the dismissal of the action as against the district was later filed on October 28, 1932. Nothing was recovered for the district.

On February 6, 1933, the supervisor who was bribed in connection with the settlement was indicted by the grand jury. On April 20, 1933, Mr. Williamson, one of the plaintiffs, made demand on the supervisors that a suit be commenced. On May 15, 1933, about three weeks later, the board of supervisors instructed the county counsel to file a civil action to set aside the said settlement. On June 12th the board employed special counsel to assist in the prosecution of the action authorized on May 15th. The grand jury completed its investigation on September 7, 1933, and by an extended resolution directed a suit to be brought pursuant to the provisions of section 929 of the Penal Code. On September 21st the board of supervisors authorized the same suit and appropriated $25,000 for its maintenance. On the same day suit was filed, No. 363102, and was prosecuted by the district to a successful conclusion.

On July 13, 1936, three years after commencement, the sum of $737,986.90 in cash was collected upon compromise of the litigation. The action was most vigorously contested. The district bore the entire expense and burden of the prosecution at an outlay of upwards of $75,000.

To return, however, to the situation in 1933—on June 1, 1933, fifteen days after the board had authorized suit "to set aside the said settlement" and while the grand jury was still investigating the matter, Mr. Williamson, without presenting any further demand, filed the third "taxpayer's suit", No. 357986. On December 28, 1933, two other taxpayers who are not joined as parties plaintiff in this present suit although their counsel are so joined, filed a complaint in intervention. On October 10, 1934, Mr. Williamson filed an amended complaint. Other than filing these complaints no steps were taken by the "taxpayer plaintiffs" or their counsel to prosecute this action. On April 12, 1935, the action was voluntarily dismissed by the plaintiff and on July 13, 1936, it was dismissed by the court as to the intervener for lack of prosecution.

With reference to this third "taxpayer's suit" it will be noted (1) it was dismissed in the manner just indicated; (2) nothing was recovered by it for the district; (3) the action was never prosecuted beyond the filing of the complaint; (4) there was no refusal on the part of the district to bring an action. The "taxpayer's suit" was filed in the midst of diligent preparation on the part of public officials to proceed with their suit.

In the present suit Williamson and Shorb, as taxpayers, and Martindale, Phillips, Park, Cavaney, McGee and Robnett, as attorneys, all joined as plaintiffs seeking to recover attorneys' fees and expenses incurred in the three "taxpayers' suits", in no one of which was any recovery had. All of the suits were dismissed either voluntarily or for lack of prosecution. There is no evidence that any one of these suits, or all of them together, contributed in any way to the ultimate recovery which was accomplished in case No. 363102. In that action no one of the plaintiffs in this action asked an allowance for attorney fees or expenses incurred in any of the other actions specifically designated above.

The plaintiffs inserted in their complaint ten separate counts. In presenting their cause they rely on any one of three different theories.

[1-3] They contend that under the facts they had an express contract. But, a most careful examination of the record discloses no facts that will support that contention. The power to make a contract, for the county, on the subjects discussed, rested with the board of supervisors of Los Angeles County. Pol. Code, § 4001. The same power, as to the affairs of a flood control district, rests with the board of supervisors of the district. Stats. 1915, p. 1503, § 3. The board of supervisors can act in such matters only by resolution or ordinance duly adopted. The record does not disclose the adoption of any resolution or ordinance. Pol.Code, § 4039. And, if a resolution is relied on it must further appear that "a majority of all the members concur therein". Pol.Code, § 4031. No such facts are contained in the record. Therefore there was no evidence of the "minds" of the members of the board of supervisors. It is equally true there was no evidence of the mind of any one, or all, of the plaintiffs on the subject of the payment of costs and attorney fees by the defendant. Obviously under these circumstances the consent of each party was not "communicated by each to the other", but that was one of the essential elements to constitute the making of an express contract. Civ.Code, § 1565. It follows that no express contract existed. Nevills v. Moore Min. Co., 135 Cal. 561, 566, 67 P. 1054. That conclusion is particularly applicable in actions brought against public boards and officers. Von Schmidt v. Widber, 105 Cal. 151, 157, 38 P. 682.

[4, 5] Not waiving the contention that they held an express contract, the plaintiffs next assert that they had an implied contract. They cite and rely on Young v. Bruere, 78 Cal.App. 127, 248 P. 301; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189; Brown v. Board of Education, 103 Cal. 531, 37 P. 503; and Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670. The facts in each of these cases were in no respect similar to the facts in this case and those cases are not in point even as a matter of argument. The contention which these plaintiffs make was made before the supreme court of South Carolina in the case Park v. City of Laurens, 68 S.C. 212, 46 S.E. 1012. On page 1014 of 46 S.E., that court said: "When municipal officers

refuse to perform their plain ministerial duty, any citizen interested is allowed to put the machinery of the courts in motion to require the performance of such duty, because of his own interest in its performance; but it would be stretching the doctrine of representation very far to hold that in such case he was the representative, agent, or trustee of the corporation, in the sense that his attorney could bring a direct action against the city for his services. * * * The sole question we are called upon to decide in this case is whether the conduct of this litigation by the plaintiff under contract with Mr. Garrison implied a contract between the city and the plaintiff upon which he could bring a direct action. We are obliged to hold that there was no privity of contract between the city and the plaintiff, and therefore the action cannot be sustained." That in such actions the plaintiff is bound to show that "privity of contract" existed between the plaintiff and the defendant, clearly appears from the leading case entitled Woods v. Ayres, 39 Mich. 345, 33 Am.Rep. 396. That case is a very complete exposition of the law as to when an implied contract arises. It was recently cited and followed in Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 593, 43 S.Ct. 425, 67 L.Ed. 816. The facts in Coleman v. United States, 152 U.S. 96, 14 S.Ct. 473, 474, 38 L.Ed. 368, were far more favorable to the plaintiff than the facts in the instant case. Coleman was appointed by the attorney general of the United States to maintain actions against Maxwell Land Grant Company to have certain patents cancelled, to a large tract of land, to a part of which Coleman's clients claimed title and to the balance of which the United States claimed title. The action was commenced and carried on for a while. Later Coleman commenced an action against the United States in the court of claims to recover for services rendered and expenditures made on an alleged implied contract. The court of claims ruled against him. He took an appeal. Having stated that under certain circumstances a liability on an implied contract could arise against the federal government, the court said: "But we think that a promise to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited. * * * For their past services they are entitled to recover from the settlers who employed them, but the admitted facts clearly show that the United States are under no express or implied obligation to answer for a breach of contract between the appellants and their clients." The case of Baltimore & Ohio R. Co. v. United States, supra, was also based on facts more favorable to the plaintiff than the facts in the instant case. There the plaintiff provided quarters for federal troops who were guarding the property of the plaintiff and adjoining property of the government. The court carefully analyzed the facts and reached the conclusion that neither an express nor an implied contract was shown.

[6, 7] Nor were the plaintiffs entitled to recover under any trust theory. It will be remembered that they did not appear in action No. 363102, the action brought by the district and in which the fund, $737,986.90, was recovered. In that action they made no application to be reimbursed. In that action the claim to be reimbursed might have had some merit when the court had actual charge of the fund. But in the present action the court had no charge whatever of the fund. That a court of equity having possession of a fund may in certain instances allow an attorney fee and costs is settled law. The instances in which that may be done are quite fully set forth in County of Tulare v. City of Dinuba, 205 Cal. 111, 117, 118, 270 P. 201. The same doctrine has been declared in many well considered cases. State v. Andrews, 131 Tenn. 554, 175 S.W. 563; Hempstead v. Meadville Theological School, 286 Pa. 493, 134 A. 103, 49 A.L.R. 1145. But no authority has been cited to us and we know of none that holds the facts contained in this record would constitute an action in equity against the defendant district.

It follows that the plaintiffs were not entitled to recover on any theory which they advance. Having reached these conclusions it is unnecessary to discuss other points presented in the briefs.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

42 Cal.App.2d 750

PORTER et al. v. NELSON et al.

Civ. 2526.

District Court of Appeal, Fourth District, California.

Feb. 5, 1941.

1. Husband and wife ⇐262(1)

Where realty was deeded to wife, there was a presumption that it was her separate property, but the presumption was rebuttable. Civ.Code, § 164.

2. Husband and wife ⇐268(2)

The statutory exemption of the earnings of a wife from liability for the debts of her husband except for necessities, is "waived" where such earnings are so mingled with community property as to lose their identity. Civ.Code, § 168.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

3. Husband and wife ⇐249

Where separate property and community property are so commingled that they cannot be traced, and the identity of each has been lost, the whole will be treated as community property, since the burden is on the one claiming that property is separate to establish that fact. Civ.Code, § 164.

4. Husband and wife ⇐268(2)

Where separate property and community property are so commingled that they cannot be traced, a wife may not thereafter claim an exemption as to a sum which equals the amount of her earnings which she has theretofore placed in the common fund. Civ. Code, § 168.

5. Husband and wife ⇐264

In action to quiet title to realty purchased at sale under execution to satisfy a judgment which plaintiff held against a husband, wherein wife set up defense that realty was her separate property, on ground that it had been purchased with funds partly owned by her before her marriage and partly derived from her earnings after her marriage, evidence justified judgment for plaintiff on ground that wife's funds had been so commingled with community funds that the identity of each had been lost, and that hence all would be treated as community funds. Civ.Code, § 168.

6. Execution ⇐264

At time of sale under execution which was levied to satisfy a judgment, purchaser acquired any interest possessed by the judgment debtor in the realty. Code Civ.Proc. § 700.

7. Execution ⇐283

The fact that any interest acquired by purchaser of realty under execution, which was levied to satisfy a judgment, was still subject to a right of redemption did not deprive the purchaser of a present interest, and purchaser had sufficient claim of title to enable him at that time to bring an action to quiet title, though the action might have been defeated by timely redemption. Code Civ. Proc. §§ 700, 738.

8. Appeal and error ⇐762

Where point was raised for the first time in appellant's reply brief, the District Court of Appeal was not required to act on it.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action to quiet title by Knud M. Truelsen against Herman K. Nelson and Mrs. Herman K. Nelson. From an adverse judgment, the defendants appeal, and F. F. Porter and another as executors of the plaintiff are substituted in his place on his death.

Judgment affirmed.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for appellants.

McFadzean & Crowe, of Visalia, for respondents.

BARNARD, Presiding Justice.

This was an action to quiet title to three parcels of land. The plaintiff, Knud M. Truelsen, died while this appeal was pending and his executors have been substituted. For convenience, we will refer to Knud M. Truelsen as the plaintiff and respondent.

The plaintiff purchased these parcels at a sale under execution which was levied to satisfy a judgment for $35,601.57 which he held against the defendant Herman K. Nelson. The defense to this action was that these parcels of land were the separate property of Mrs. Nelson, the other defendant, having been purchased with funds partly owned by her before her mar-

riage and partly derived from her earnings as a school teacher after her marriage. The defendants have appealed from the judgment on the ground that the evidence is insufficient to support certain findings to the effect that the properties in question were the community property of Mr. and Mrs. Nelson and not the separate property of the latter.

Mr. and Mrs. Nelson were married in 1924. From then until 1928 Mr. Nelson received a salary as manager of a 260-acre ranch. In 1928 he acquired a half interest in a contract to purchase that ranch, the purchase price being $56,000. In the same year he became indebted to this respondent in the sum of $21,750, giving a note therefor. About a year later he gave the respondent a new note, secured by his interest in the contract for the purchase of the 260 acres. Later that year he seems to have lost his interest in that ranch, although he continued to manage it until 1931, drawing the same salary he had drawn prior to 1928.

The first parcel of the property here in question was purchased on contract on July 29, 1931, $1,266.92 being paid on account of the purchase price. In 1934 this property was deeded to Mrs. Nelson, at which time a trust deed signed by both Mr. and Mrs. Nelson was placed on the property to secure a loan of $4,000. Payments on that loan were made each year thereafter until 1938, at which time $3,500 had been paid on the principal sum. The second parcel was purchased on November 25, 1931, for $800, of which $200 was paid in cash. The property was deeded to Mrs. Nelson and a trust deed given for the balance of the purchase price, which was signed by both Mr. and Mrs. Nelson. This trust deed was paid off in two instalments in 1934. The third parcel was deeded to Mrs. Nelson in 1935, the purchase price of $1,106 being paid in full. Mr. Nelson farmed the three parcels in question each year after they were deeded to his wife and, in 1932, 1934 and 1935, respectively, he executed crop mortgages covering the crops thereon, in which he represented that he was the owner of the land. In 1936 such a crop mortgage was given, which was signed by both Mr. and Mrs. Nelson. A well was drilled and a pumping plant was installed for the purpose of furnishing water to a part of this land, one of these contracts being executed by both Mr. and Mrs. Nelson and the other by Mr. Nelson alone.

There is evidence that Mrs. Nelson had $5,000 at the time of her marriage, that between that time and 1929 she earned $6,450 by teaching school, and that from 1930 to 1938 she earned an additional $4,892.84 in that manner. All of this money was placed in bank accounts in the name of Mrs. Nelson, but there is no evidence as to when any particular amount was placed therein or when any amounts were withdrawn therefrom. She testified that she had kept no accounts and had made no segregations except that she had, about a week before the trial, made a list of her earnings as a school teacher through these years. Mr. Nelson discontinued his bank account about the time his debt to the respondent was created in 1928 and from then until the date of the trial all moneys earned by Mr. Nelson, and all moneys received from his farming operations on the lands here in question and on other lands were deposited in Mrs. Nelson's bank account. He testified that he had farmed other lands during this time and that he had done contracting work for other farmers. Checks were drawn on the wife's bank account to pay the expenses of the farming operations on the lands here in question and on other lands and to pay for equipment used in his contracting work. Checks were also drawn on the same account for the living expenses of both Mr. and Mrs. Nelson and for any other expenses of both. All payments made on the three parcels of land here in question were also made by checks drawn on this account.

While Mrs. Nelson testified that at the time of their marriage she and her husband agreed that the money she then had and the money she should earn by teaching were to be retained by her as her separate property, Mr. Nelson twice testified that there was no such agreement. Many thousands of dollars which came from Mr. Nelson's farming and contracting operations were thus placed in Mrs. Nelson's bank account. Mrs. Nelson testified that she kept no books, had no record of deposits or withdrawals from this account and that she could not tell within $5,000 of how much money she had had in the bank in 1931, or within $5,000 of the amount in her bank accounts since 1932. Each of the appellants gave conflicting testimony on material matters and each contradicted the other in several important respects. The evidence indicates and justifies the inference that after 1928 all money received by

these parties from all sources were mingled in a common bank account standing in the name of the wife, that no records were kept and that no attempt at segregation was made at any time. It further appears that a few days before the trial Mrs. Nelson put down from memory the amounts she had received as a teacher during the various years, and one of the contentions seems to be that a sum equal to the amount of these earnings together with her original $5,000, should be considered as her separate property and be exempt from her husband's debt.

[1-4] This property having been deeded to Mrs. Nelson there was a presumption that it was her separate property. Civ. Code, § 164. This presumption, however, is a rebuttable one. Estate of Cronvall, 220 Cal. 503, 31 P.2d 372. In that case, while the court said that the evidence was meager, it was held sufficient to overcome the presumption and to establish the community character of the property. Section 168 of the Civil Code provides that the earnings of a wife are not liable for the debts of her husband, except for necessities. This exemption may be waived and is waived where such earnings are so mingled with community property as to lose their identity. Pfunder v. Goodwin, 83 Cal.App. 551, 257 P. 119. It is well settled in this state that where separate and community property are so commingled that they cannot be traced, and the identity of each has been lost, the whole will be treated as community property since the burden is upon the party claiming that the property is separate to establish that fact. Fountain v. Maxim, 210 Cal. 48, 290 P. 576; Estate of Fellows, 106 Cal.App. 681, 289 P. 887. And where separate and community property is thus mingled a wife may not thereafter claim an exemption as to a sum which equals the amount of her earnings which she has theretofore placed in the common fund. Street v. Bertolone, 193 Cal. 751, 226 P. 913.

[5] In the light of these established rules it cannot be here held that the evidence is not sufficient to support the findings of which the appellants complain. While there are conflicts in the evidence these have been resolved by the trial court in favor of the respondent.

In their final brief the appellants raise the point that this action was begun some nine months after the delivery of the sheriff's certificate of sale, and some three months before the expiration of the year of redemption and the issuance of the sheriff's deed, and that the sheriff's deed had not been recorded at the time of the trial. It is argued that this action was premature, that the respondent had no title at the time the action was brought, and that he has failed to prove that he ever had title.

[6, 7] Section 738 of the Code of Civil Procedure provides that such an action may be brought by any person against another who claims an interest in real property, adverse to him. At the time of the sale the respondent acquired any interest in this property possessed by the judgment debtor (§ 700, Code Civ.Proc.), and the other appellant claimed title adversely to him. The fact that any interest acquired by the respondent was then subject to a right of redemption did not deprive him of a present interest. In Pollard v. Harlow, 138 Cal. 390, 71 P. 454, 455, 648, it was pointed out that while the property is still subject to redemption "the case is simply the familiar one of a legal title defeasible upon the happening of a condition subsequent", and also that while a deed is subsequently to be given that deed gives to the purchaser no new title to the land but is merely evidence that his title has become absolute. It would seem to follow that the respondent had sufficient claim of title to enable him to bring and maintain this action, although it might have been defeated by a timely redemption.

[8] A further consideration is that this point was raised for the first time in appellants' reply brief, and we are not required to act upon it. Tagus Ranch Co. v. First Nat. Bank, 7 Cal.App.2d 457, 46 P.2d 809; Lady v. Palen, 12 Cal.App.2d 3, 54 P.2d 1134; Lotts v. Board of Park Com'rs, 13 Cal.App.2d 625, 57 P.2d 215; Witter v. Bank of Milpitas, 204 Cal. 570, 269 P. 614. We would be the more disinclined to act upon it since the situation could have been met by appropriate proceedings in the trial court, had the point there been raised, and since the evidence so clearly discloses a commingling of the various funds owned by the appellants that it may not reasonably be expected that a reversal and new trial would change the result.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

42 Cal.App.2d 769

NOURSE et al. v. KOVACEVICH.

Civ. 2586.

District Court of Appeal, Fourth District, California.

Feb. 6, 1941.

1. Evidence ⇐384, 397(1), 429, 433(1), 448

When terms of an agreement have been reduced to writing by parties, it is to be construed as containing all terms of agreement, and there can be, between parties and their representatives or successors in interest, no other evidence of terms of agreement than contents of writing, except where a mistake or imperfection in writing is put in issue by pleadings, where validity of agreement is the fact in dispute, or to explain an ambiguity in agreement. Code Civ.Proc. § 1856; Civ.Code, § 1625.

2. Evidence ⇐384

The "parol evidence rule" is not a rule of evidence but is a rule of substantive law.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

3. Evidence ⇐384

The "parol evidence rule" does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on probative value of such evidence, or policy of its exclusion.

4. Evidence ⇐384

The "parol evidence rule", as applied to contracts, is that as a matter of substantive law the act of embodying complete terms of an agreement in a writing becomes the contract of parties, and extrinsic evidence is excluded because it cannot serve to prove what an agreement was, this being determined, as matter of law, to be the writing itself.

5. Evidence ⇐442(1)

The "parol evidence rule" comes into operation when there is a single and final memorial of understanding of parties, and, when that takes place, prior and contemporaneous negotiations, oral or written, are excluded.

6. Mines and minerals ⇐55(5)

Under written contract and deed providing that grantors reserved from land conveyed an "equal one-eighth of any royalty of all oil, gas * * *" developed on or received from land "together with one-eighth of any cash bonus received from said land", quoted words meant that grantors reserved to themselves one-eighth of any royalties and one-eighth of any bonus, and words "equal one-eighth" meant an amount equal to each of the other one-eighths, and use of "any royalties" indicated that parties intended that whatever royalties were received grantors were to receive an equal one-eighth thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal One-Eighth of Any Royalty of All Oil, Gas * * *".

7. Evidence ⇐450(3, 5)

Under written contract and deed providing that grantors reserved from land conveyed an "equal one-eighth of any royalty of all oil, gas * * *" developed on or received from land "together with one-eighth of any cash bonus received from said land", there was no ambiguity in instruments, and hence parol testimony of statements and intentions of parties when contract was made was inadmissible in proceeding for declaratory relief concerning contract and deed. Code Civ.Proc. §§ 1060, 1856; Civ.Code, § 1625.

8. Contracts ⇐154

Where plain, unambiguous wording of a contract permits a complete fulfillment of obligations assumed and promotes object of agreement, that construction is to be preferred, to one dependent upon forced addition to, or elimination of, the terms of agreement.

9. Contracts ⇐143

It is not the province of the court to alter a contract by construction, or to make a new contract for parties, nor can the court rewrite clear terms of a lawful contract.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Proceeding by Laurence B. Nourse and others against Ellen Kovacevich for declaratory relief respecting a written contract and deed. From a judgment of the superior court in favor of plaintiffs, defendant appeals.

Reversed.

Iener W. Nielsen and Harold V. Thompson, both of Fresno, for appellant.

Harvey, Johnston & Baker, of Bakersfield, for respondents.

KLETTE, Justice pro tem.

On October 4, 1930, plaintiffs and respondents, entered into a contract to sell to John J. Kovacevich and David Freedman, certain real property in Kern county. On October 29, 1937, in accordance with said contract, plaintiffs and respondents, deeded said real property to John J. Kovacevich, who had acquired the interest of David Freedman. Title to the real property later passed to Ellen Kovacevich, defendant and appellant.

Both the contract and deed contained the following reservations as to oil royalties: "It is understood and agreed that the sellers do hereby reserve from the land herein mentioned an equal one-eighth of any royalty of all oil, gas, gasoline or other hydrocarbon substances developed on or received from said land, together with one-eighth of any cash bonus received from said land, and that said property is sold subject thereto, and second party shall have the right to lease said land for oil development without signature or authorization of first party, * * *".

On January 3, 1935, about four years and three months after the contract of sale was made, but before the deed was executed, an oil and gas lease was placed on the real property, by the parties, which provided for a one-eighth royalty.

This action was instituted by plaintiffs and respondents, against defendant and appellant, for declaratory relief under section 1060 of the Code of Civil Procedure. The complaint alleges that an actual controversy has arisen, between plaintiffs and defendant, relative to said reservation of oil and gas royalties, plaintiffs claiming they are entitled to one-half thereof, and that defendant claimed that plaintiffs were only entitled to one-eighth thereof, and that she, the defendant, was entitled to seven-eighths thereof.

After answer was filed, a trial was had before the court, without a jury, and evidence was received as to the surrounding circumstances, conversations, and understanding of the parties at the time the contract was made. The court found for plaintiffs and respondents, and against defendant and appellant, on all of the issues, and entered its judgment in accordance therewith, that plaintiffs and respondents were to receive one-half of all royalties from said land, and that defendant and appellant was to receive one-half of said royalties. Appeal was taken by defendant from this judgment.

[1] It is the established law, that when the terms of an agreement have been reduced to writing, by the parties, it is to be construed as containing all the terms of the agreement, and there can be, between the parties and their representatives or successors in interest, no other evidence of the terms of the agreement, than the contents of the writing, except (1) where a mistake or imperfection in the writing is put in issue by the pleadings, (2) where the validity of the agreement is the fact in dispute, or (3) to explain an ambiguity in the agreement. Sec. 1856, Code Civ.Proc.; sec. 1625, Civ.Code; First Bond & Mortgage Co. v. Malouf, 37 Cal.App.2d 74, 98 P.2d 824; Williams v. Silverstein, 213 Cal. 269, 2 P.2d 165; Lynch v. Melby, 129 Cal.App. 646, 19 P.2d 49; Harding v. Robinson, 175 Cal. 534, 166 P. 808; Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055.

This case does not come under the first or second clauses above mentioned but under the third clause, and is based upon the claim that an ambiguity exists in the reservation clause in the contract and deed.

[2-5] The parol evidence rule, as is now universally recognized, is not a rule of evidence, but is one of substantive law. It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence, or the policy of its exclusion. The rule, as applied to contracts, is, simply, that as a matter of substantive law, the act of embodying the complete terms of an agreement in a writing, *becomes the contract of the parties.* Extrinsic evidence is excluded, because it cannot serve to prove what an agreement was, this being determined as a matter of law, to be the writing itself. The rule comes into operation, when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded. Estate of Gaines, supra; Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 23 Cal.App.2d 642, 73 P.2d 1241; Rottman v. Hevener, 54 Cal. App. 474, 202 P. 329.

[6, 7] We find no ambiguity in the writing involved in this appeal, hence, parol evidence was not admissible to explain

away an ambiguity. The words, "equal one-eighth of any royalty of all oil, gas," etc. "together with one-eighth of any cash bonus received from said land," can only mean one thing, and that is, that respondent grantors reserved to themselves, one-eighth of any royalties, and one-eighth of any bonus. The words "equal one-eighth", can only mean an amount equal to each of the other one-eighths. Certainly it did not mean that they had reserved a "one-half of all royalties from said premises," as the court held. The use of the words, "any royalties", used in the phrase, under consideration, indicates that the parties did not, at that time, have in mind any specific royalties which might be obtained under a lease, but rather, whatever the royalties received, the respondents were to receive an "equal one-eighth" thereof. Had they meant one-half, why did they not say "equal one-half", instead of "equal one-eighth"?

[8] Where the plain, unambiguous wording of a contract, permits a complete fulfillment of the obligations assumed, and promotes the object of the agreement, that construction is to be preferred, to one dependent upon forced addition to or elimination of, the terms of the agreement. Winship v. Wilkes, 121 Cal.App. 44, 8 P.2d 502; Oberwise v. Poulos, 124 Cal.App. 247, 12 P.2d 156.

[9] It is not the province of the court to alter a contract by construction, or to make a new contract for the parties, nor can the court rewrite the clear terms of a lawful contract. Wells v. Union Oil Co., 25 Cal.App.2d 165, 76 P.2d 696; Grey v. Tubbs, 43 Cal. 359; Greene v. Vargas, 7 Cal.App.2d 127, 45 P.2d 347; Hill v. General Petroleum Corp., 128 Cal.App. 284, 16 P.2d 1035.

The court holds that there is no ambiguity in the reservations in the contract and deed, which the trial court was called upon to construe; that the trial court erred in admitting oral testimony of the statements and intentions of the parties at the time the contract was made; and that the trial court has, by its judgment, made a new and different contract for the parties, than that which they entered into.

The judgment appealed from is reversed.

We concur: BARNARD, P. J.; MARKS, J.

42 Cal.App.2d 710

ARONSON et al. v. BANK OF AMERICA N. T. & S. A., et al.

Civ. 12250.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1941.

Rehearing Denied Feb. 17, 1941.

Hearing Denied March 31, 1941.

1. Banks and banking ⇐40
Executors and administrators ⇐334, 349 (2)

At any time before decree of distribution, administrators of an estate had authority to effect a sale of personalty, and short of knowledge or notice of a wrongful purpose, a bank's predecessor was in no position to question a request by administrators for transfer of stock made on presentation of a properly endorsed certificate, and without such knowledge, no liability could attach to bank for a transfer so made. Code Civ.Proc. § 1523; Civ.Code, § 324.

2. Banks and banking ⇐40

Whether bank's predecessor on whose books administrators caused stock to be transferred knew or did not know that transferee would hold or sell stock was of no consequence on question of bank's liability for conversion of stock, nor did fact alone that predecessor knew that stock was later to be used for account of administrators individually charge predecessor with knowledge of a wrongful purpose.

3. Banks and banking ⇐40

Where certain counts of complaint in action against bank and administrators for conversion of bank stock complained of transfers of stock made by bank's predecessor before distribution of estate was decreed and did not show that predecessor had any knowledge at time of transfers that administrators intended to apply stock or proceeds of transfer to their own use and benefit or to the benefit of any third party or that at the time predecessor was in possession of facts amounting to notice of any such plan or purpose, those counts did not state a cause of action against bank.

4. Pleading ⇐8(3, 15)

In action against bank and administrators for conversion of bank stock, allegations of fraud and conspiracy, unsupported by any facts and standing alone, constituted

pure "conclusions" of the pleaders insufficient to charge bank and administrators with any wrong.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusions".

5. Pleading ⇐8(21)

In action against bank and administrators to recover for conversion of bank stock allegedly transferred by bank's predecessor after date when decree of distribution was made and entered, allegation that at all times up to and including stated date predecessor and its officers, managers, and directors had actual knowledge of all facts and matters alleged which occurred or existed before that date was an allegation of an "ultimate fact" and not a "conclusion of law" with respect to existence of decree of distribution.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law" and "Ultimate Fact".

6. Corporations ⇐134

A wrongful transfer of stock on the books of a corporation renders the corporation liable for a "conversion" of the stock, and where the corporation has knowledge of the lack of authority of an agent demanding the transfer, the corporation is so liable if it transfers the stock upon such a demand.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

7. Executors and administrators ⇐315(6)

A decree of distribution of an estate confirms the title which has accrued under the law of descent and is intended to be a final disposition of the entire estate, so that nothing remains for the court to act upon, and there is nothing left for the legal representatives to do but to obey the decree and deliver the property of the estate into the hands of the heirs or legatees. Code Civ.Proc. § 1666; Probate Code, § 1021.

8. Executors and administrators ⇐315(7)

Where distribution of an estate has been decreed, the representative of the estate becomes personally liable for refusing to comply with the decree, and the court may compel performance on his part. Code Civ.Proc. § 1666; Probate Code, § 1021.

9. Banks and banking ⇐40

In action against bank and administrators to recover for conversion of bank stock, counts of complaint charging that transfers of stock by bank's predecessor occurred after date when decree of distribution was entered and alleging that predecessor had knowledge of that decree when transfers were demanded by administrators contained a sufficient charge that transfers were made with knowledge of lack of authority in administrators demanding transfers and hence were sufficient to state a cause of action for "conversion" against bank. Code Civ.Proc. § 1666; Probate Code, § 1021.

10. Banks and banking ⇐40
Executors and administrators ⇐431(1)

In action against bank and administrators to recover for conversion of bank stock, where facts alleged showed that defendant bank's predecessor committed an actual conversion in effecting an unauthorized transfer of stock, no demand for stock certificates was necessary before commencement of action for conversion.

11. Banks and banking ⇐40
Executors and administrators ⇐443(7)

A complaint charging bank and administrators with conversion of bank stock was not fatally defective because of failure to allege a demand for stock certificates, even if demand was necessary, where complaint revealed circumstances rendering a demand futile, and it was alleged that a demand was made for value of stock converted and that bank and administrators refused to pay the same or any part thereof.

12. Banks and banking ⇐40

Where complaint in action against bank and administrators for conversion of bank stock alleged that bank took over all assets of its predecessor and paid no consideration therefor and that predecessor was dissolved before commencement of action and revealed that predecessor was left with nothing with which to respond in damages, bank was the only party able to respond in damages for conversion of stock by predecessor, as against contention that bank did not succeed to or assume any liabilities arising out of the relationship of predecessor with its shareholders. Gen.Laws 1937, Act 652, § 31.

13. Banks and banking ⇐40

The statute providing that the rights of creditors of a bank selling its business to another bank shall not be impaired by sale and that any liability or obligation for payment of any money due or to become due or any claim or demand in any manner or for any

cause existing against selling bank or any stockholder thereof shall not be released or impaired, but that buying bank shall succeed to all such relations, obligations, trusts, and liabilities is broad enough to include contingent liabilities for tortious acts of selling bank, particularly where sale leaves selling bank without ability to respond in damages. Gen.Laws 1937, Act 652, § 31.

14. Limitation of actions ⇐72(2)

A cause of action for conversion of bank stock "accrued" to minors themselves, and the existence of a general guardian had no effect on the tolling of the statute of limitations during minority under statute. Code Civ.Proc. § 352.

See Words and Phrases, Permanent Edition, for all other definitions of "Accrued".

15. Limitation of actions ⇐72(1)

The appointment of a general guardian has no effect on the tolling of the statute of limitations with respect to a cause of action accruing to or vesting in a minor. Code Civ. Proc. § 352.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Herbert Hellman Aronson and others against Bank of America N. T. & S. A. and others to recover damages for an alleged conversion of certain shares of bank stock. From a judgment dismissing the action as to the defendant bank after a demurrer interposed by the bank to the first amended complaint was sustained without leave to amend further, plaintiffs appeal.

Judgment reversed with directions.

Mitchell, Silberberg, Roth & Knupp and Livingston & Livingston, all of Los Angeles, for appellants.

Edmund Nelson, G. L. Berrey, and Freston & Files, and James A. McLaughlin, all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for respondent Bank of America, etc.

DORAN, Justice.

Appellants as plaintiffs instituted this action to recover damages for an alleged conversion of certain shares of bank stock and now appeal from a judgment dismissing the said action as to the respondent bank after a demurrer interposed by the bank to the first amended complaint herein was sustained without leave to amend further. The appeal is prosecuted from the judgment of dismissal upon a bill of exceptions, in which appellants assign as error the order sustaining the demurrer without leave to amend, the denial of appellants' motion to amend the said order so as to permit further amendment of the complaint and the denial of a motion for an order granting leave to amend the complaint by filing certain proposed amendments. The respondent bank demurred both generally and specially.

The instant action is the second such between the same parties and for the same cause. A general demurrer to plaintiff's complaint in the first action was sustained without leave to amend, the cause was dismissed and the judgment of dismissal was affirmed by the Supreme Court of this state on October 4, 1937, the opinion being reported in Aronson v. Bank of America, etc., Ass'n, 9 Cal.2d 640, 72 P.2d 548. The facts which form the basis of appellants' complaint are briefly summarized in that opinion.

The court there held that the complaint failed to state a cause of action because it failed to show that the administrators had exercised dominion over the shares and converted them to their own use and benefit, that in the absence of allegations to the contrary it must be presumed that they were acting in their capacity as administrators of the estate, that there were no allegations showing that the plaintiffs suffered any injury in the transaction, and that as to the predecessor bank, it was not shown that it did anything more than obey the provisions of section 324 of the Civil Code, as it then read, which section then provided that "such shares of stock * * may be transferred by indorsement by the signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate". The court held that the said section did not require proof of the authority of the legal representative, and the bank could not be held guilty of a conversion in following the mode of conduct prescribed by the statute.

Before the affirmance of the judgment in the former action and on November 28, 1936, the present action was commenced by appellants and the complaint therein was thereafter amended on June 18, 1937, and

again on May 21, 1938, after which respondent bank put in an appearance and interposed its demurrer.

The complaint sets forth four separate counts, each count based upon a transaction whereby defendants Marco and Irving Hellman as administrators of the estate of appellants' mother, Amy Hellman Aronson, deceased, caused certain shares of stock, the property of the estate, to be transferred upon the books of a predecessor of respondent bank, whose assets and business respondent bank later purchased and whose liabilities the said respondent thereby assumed. The complaint alleges that distribution of the estate was decreed in October, 1925. The first and second counts of the complaint are concerned with transfers of stock made before the decree of distribution, the third and fourth counts have to do with transfers after such decree was made and entered. The transfers are alleged to have been made either to third parties or to one of the administrators, and it is alleged that the said administrators never applied to the court for approval and confirmation of the transfer and never accounted to the plaintiffs for said stock, but converted the same to their own use and benefit.

[1] Appellants in their brief confine their argument to the fourth count of the complaint on the ground that if any one of the counts states a cause of action, then the general demurrer to such count was not well taken. It should be pointed out, however, that the first two counts of the complaint differ from the third and fourth in a vital respect, namely, that they involve transfers made before the decree of distribution of the estate. As will hereinafter appear, upon the facts alleged, and under the ruling of the Supreme Court in the first action hereinabove cited, the only basis for the liability of respondent bank's predecessor for conversion of the stock would be knowledge of lack of authority of the administrators at the time of the transfer of the stock in question. Without such knowledge, under the law as it then existed, no liability could attach to the predecessor bank for a transfer of stock made under the circumstances alleged in the complaint. At any time before the decree of distribution the administrators were clothed with authority to effect a sale of the personal property and, short of knowledge or notice of a wrongful purpose, the bank was not in a position to question a request for transfer of stock made on presentation of a properly endorsed certificate. § 1523, Code Civ.Proc.; 324 Civ. Code; Aronson v. Bank of America, supra.

Appellants have failed in any attempt to charge the predecessor bank in any one of the counts of the complaint with knowledge of a wrongful purpose of the administrators in procuring the transfer of the stock. The facts of which the said bank is alleged to have knowledge are not such as would even put the bank on notice that the transaction was wrongful. The allegations of all four counts are similar in this respect. The bank is in effect charged with knowledge that the transfer of the stock was not made for the purpose of enabling the administrators to continue to hold said stock in the said estate, nor for the purpose of effecting a subsequent sale for the benefit of the estate, but was, on the contrary, made so as to permit a third party to deal with the stock as his own and for his own account and for the account of the administrators, individually and personally, and to permit the third party and the administrators to use the stock in their own personal speculations. All of which is no more than to charge the bank with knowledge that the stock was transferred to a third party so that he could use it as his own; which is the principal purpose of any transfer of stock.

[2] The term "subsequent sale" as used in the complaint can only be taken to mean a resale of the stock by the transferee. What the transferee did with the stock after it became his could have no bearing upon the nature of the transfer here complained of and whether the bank knew or did not know that the transferee would hold or sell the stock is of no consequence. Nor does the fact alone that the bank knew that the stock was later to be used for the account of the administrators individually charge the bank with knowledge of a wrongful purpose. The Supreme Court in its decision in the first action above referred to had before it the fact that one of the transactions complained of involved a direct transfer of stock to one of the administrators individually, yet the court there held that the complaint did not state a cause of action against the bank for a wrongful conversion. If a direct transfer of stock to one of the administrators as an individual

does not put the transferring bank on notice as to a wrongful purpose it cannot be said that knowledge that the administrator would later use the stock for his own account could be of any greater effect. It should be obvious that if the stock is transferred to any person as an individual, an administrator included, it is that person's intention to use the stock for his own account. The decision of the Supreme Court in the first action is controlling upon the question of the effect of any such knowledge upon the part of the predecessor bank.

[3, 4] The important factor is knowledge on the part of the bank as to what disposition was to be made of the proceeds received on the transfer and whether any proceeds were to be forthcoming. As to this the complaint is silent and fails to show that the bank in question had any knowledge at the time of the transfers that the administrators intended to apply the stock or the proceeds of the transfer to their own use and benefit or to the benefit of any third party, or that, at the time, the bank was in possession of such facts as to amount to notice of any such plan or purpose.

Since the transfers complained of in the first and second counts of appellants' complaint occurred before distribution of the estate was decreed and since appellants have failed to charge the predecessor bank with the requisite knowledge of a wrongful purpose on the part of the administrators, those two counts still fall within the rule laid down in Aronson v. Bank of America, supra, and for the reasons there given the said counts fail to state a cause of action against respondent bank. The allegations of fraud and conspiracy are unsupported by any facts stated in the first and second counts and, standing alone as they do, constitute pure conclusions on the part of the pleaders, insufficient to charge the defendants with any wrong. See Kavanagh v. Wade, Cal. App., 108 P.2d 475; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 683, 200 P. 601.

[5] As to the remaining counts, however, the transfers of stock are alleged to have occurred at a time after the date when the decree of distribution was made and entered, and it is further alleged that: "At all said times from the date of its incorporation up to and including December 8, 1928, Merchants National Trust and Savings Bank of Los Angeles, and its executive officers, managers, and directors, had actual knowledge of all the facts and matters hereinabove alleged which occurred or existed prior to December 8, 1928." The bank named in the allegation is the predecessor of respondent bank.

Respondent attacks the above quoted allegation as insufficient to charge the bank with knowledge in that it amounts to a mere conclusion of law. The point was raised by respondent's special demurrer. As to the existence of the decree of distribution, which according to the complaint is a "fact" and "matter" existing prior to December 8, 1928, the above allegation, though very general and perhaps not in the best form, is in effect an allegation that the bank knew of the existence of the decree of distribution at all such times, and constitutes an allegation of an ultimate fact and not a conclusion of law. Farmers Life Ins. Co. v. Ignacio State Bank, 85 Colo. 46, 272 P. 1116; 49 C.J. 69 and cases cited in note 85 thereof.

[6] A wrongful transfer of stock upon the books of a corporation renders the corporation liable for a conversion of the stock, Aronson v. Bank of America, supra, 9 Cal.2d at page 646, 72 P.2d 548, citing 26 Ruling Case Law 1115; and where the corporation has knowledge of the lack of authority of the agent demanding the transfer the corporation is so liable if it transfers the stock upon such a demand. Quay v. Presidio & Ferries R. R. Co., 82 Cal. 1, 22 P. 925; Tafft v. Presidio & Ferries R. R. Co., 84 Cal. 131, 132, 24 P. 436, 11 L.R.A. 125, 18 Am.St.Rep. 166. Therefore, to decide whether the third and fourth counts of the complaint state a cause of action against respondent bank it first becomes necessary to determine what authority, if any, was possessed by the administrators to procure the transfer of the stock in question to themselves or a third party after the entry of the decree of distribution. If the decree terminated any authority of the administrators to procure such a transfer then knowledge on the part of respondent bank's predecessor of the existence of the decree must be held to be knowledge of the lack of authority in the administrators, at the time of the transfers complained of. Quay v. Presidio and Ferries R. R. Co., supra.

[7-9] Section 1666 of the Code of Civil Procedure, then in effect, provided as to

such a decree that it was "conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal". Provisions to the same effect are now embodied in section 1021 of the Probate Code. Accordingly, it has been held that the decree of distribution confirms the title which has accrued under the law of descent, and is intended to be a final disposition of the entire estate, so that nothing remains for the court to act upon; and there is nothing left for the legal representative to do but to obey the decree and deliver the property. See the article on Executors and Administrators in 11b Cal.Jur., § 1289, pages 785, 786, and cases there cited; St. Mary's Hospital v. Perry, 152 Cal. 338, 342, 92 P. 864; Rafferty v. Mitchell, 4 Cal.App.2d 491, 41 P. 2d 563. The representative of the estate becomes personally liable for refusing to comply with the decree and the court may compel performance on his part. Estate of Kennedy, 129 Cal. 384, 388, 62 P. 64; 11b Cal.Jur., § 1311, p. 820. From the foregoing, it is clear that after distribution of an estate is decreed the executor or administrator has no further authority but to deliver the property of the estate into the hands of the heirs or legatees; and, specifically, in the instant case the administrators were without authority to demand the transfers of stock complained of in the third and fourth counts of the complaint herein. Furthermore, since it is alleged that the predecessor bank had knowledge of the decree of distribution at the time the said transfers were demanded, it follows that the complaint herein contains a sufficient charge that the transfers in question were made by the said bank with knowledge of the lack of authority in the agent demanding the same; and hence, if true, such transfers constituted an unlawful exercise of dominion over the property of the plaintiffs (appellants), who are shown by the complaint to be the heirs at law entitled to inherit their mother's estate. On the facts as alleged in said counts, it must be held that a cause of action for conversion is therein stated.

[10, 11] Respondent contends that appellants' statement of the cause of action is fatally defective because of failure to allege a demand for the stock certificates. But the facts alleged show that respondent's predecessor committed an actual conversion in effecting an unauthorized transfer of the stock and under such circumstances no demand is necessary before the commencement of an action for conversion. Mier v. Southern California Ice Co., 56 Cal.App. 512, 518, 206 P. 83. Even if demand were necessary the complaint reveals circumstances which would render such a demand futile; moreover, it is alleged that a demand was made for the value of the stock converted and that the defendants refused to pay the same or any part thereof.

[12, 13] Respondent also contends that through its purchase of the banking business and assets of its predecessor under section 31 of the Bank Act, it did not succeed to or assume any liabilities arising out of the relationship of its predecessor with the shareholders thereof, but only assumed the liabilities incurred by its predecessor in the course of its banking business. The complaint herein sets forth that respondent took over all the assets of its predecessor and paid its predecessor no consideration therefor, and reveals a situation wherein the predecessor was left with nothing with which to respond in damages. The purchase of the business is alleged to have been effected through an exchange of shares directly with the shareholders of the predecessor bank. It is also alleged that the predecessor was dissolved prior to the commencement of the instant action. It appears therefore that respondent bank is the only party now able to respond in damages for the conversion of the stock by its predecessor. In view of the broad language employed in section 31 of the Bank Act, as amended by Statutes 1913, page 151; Statutes 1921, page 1373; Statutes 1927, page 1792, Vol. 1, Deering's General Laws 1937, Act 652, p. 234, it cannot reasonably be said that a purchase of assets such as the one here alleged was not intended to carry with it responsibility for all liabilities of whatever kind or nature. In fact, the act expressly so provides, where in section 31 it is said: "The rights of creditors of the selling bank shall not in any manner be impaired by any such sale, nor shall *any* liability or obligation for the payment of *any* money due *or to become due, or any claim or demand,* in any manner, *or for any cause existing against such selling bank* or against any stockholder thereof, be in any manner released or impaired * * *, but such bank to which the other shall sell all its business or all the business of any of its departments, shall suc-

ceed to all such relations, obligations, trusts and liabilities and be held liable to pay and discharge all such debts and liabilities and to perform all such trusts of the selling bank in the same manner as if such bank to which the other had sold had itself incurred the obligation or liability * * *." (Italics added.) The language of the section above quoted is broad enough to include contingent liabilities for tortious acts of the selling bank, particularly when, as it appears here, the sale leaves the selling bank without ability to respond in damages.

Respondent contends that there is a distinction to be drawn between the "internal" and "external" affairs of a corporation. While that may be conceded, it is not the point here involved. The question here to be determined is whether the language of section 31 of the Bank Act is broad enough to cover all liabilities of a selling bank regardless of distinction or classification, and, as seen above, the answer in the instant case is in the affirmative.

[14, 15] Respondent by its demurrer attempted to raise the bar of the statute of limitations. The complaint affirmatively shows that at the time of the transfers complained of the plaintiffs were minors under the protection of a general guardian and continued under such custody until arriving at their majority. Appellants contend the statute of limitations was tolled during their minority and rely upon the provisions of section 352 of the Code of Civil Procedure. Respondent argues that the cause of action vested in the general guardian and that the period of limitation commenced to run from the time the cause of action accrued. In the previous action hereinabove referred to this question was considered by division two of this court (See Aronson v. Bank of America, Cal.App., 65 P.2d 823) when the case was before it prior to the hearing in the Supreme Court, and the question was not passed upon by the Supreme Court in its decision. Aronson v. Bank of America, supra. This court held that the existence of a general guardian had no effect upon the tolling of the statute during minority under section 352, Code of Civil Procedure, and the reasons there given and the authorities there cited are sound. It is clear that the cause of action herein accrued to appellants themselves and that it is generally held that the appointment of a general guardian has no effect upon the tolling of the statute of limitations as to a cause of action accruing to or "vesting" in a minor. See Funk v. Wingert, 134 Md. 523, 107 A. 345, 6 A.L.R. 1686, and annotation, 6 A.L.R. 1689.

Although not discussed to any extent in the briefs, it appears that respondent's special demurrer to the third and fourth counts of the complaint on the grounds of uncertainty is not well taken, either because uncertainties specified do not exist or because the matter objected to is immaterial or surplus matter which may be left out of the pleading without impairing its sufficiency. 21 Cal.Jur. 105, 106. It should be mentioned in passing that the complaint is far from a model of pleading and is in no sense concise. It is clear, however, that no attempt has been made to set out more than one cause of action in each count.

In view of the fact that the allegations of the first and second counts of the complaint reveal a situation wherein no cause of action would lie against respondent bank or its predecessor the trial court did not err in refusing to grant leave to plaintiffs to amend those counts, but for the reasons above given the court erred in sustaining the demurrer to the third and fourth counts and in dismissing the action.

The judgment of dismissal is therefore reversed with directions to the trial court to grant appellants leave to file an amended complaint if they are so advised.

We concur: YORK, P. J.; WHITE, J.

CAMPBELL v. BIRCH et al.

Civ. 12069.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1941.

Hearing Granted April 3, 1941.

1. Appeal and error ⇐1008(1)

In action based upon fraud, issues as to the falsity of representations made, their materiality and plaintiff's reliance upon them are "questions of fact" for the trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Questions of Fact".

2. Appeal and error ⇐1010(1)

On appeal in action based on fraud, the District Court of Appeal may not interfere with findings of fact which are supported by substantial evidence, though it may not agree with the conclusions reached by the trial judge.

3. Trusts ⇐262

In action by trustee to recover difference between rental stipulated in lease and lesser amount which trustee was allegedly induced to accept by fraud and deceit respecting solvency of obligors, evidence sustained recovery.

4. Landlord and tenant ⇐238

Where lease provided that lessee should pay all reasonable costs, expenses and attorney's fees incurred by or against lessors in any litigation between the parties arising out of or in connection with the lease, in case the lessors or parties claiming under them should prove successful, attorney's fees and expenses were properly awarded trustee who was successful in action to recover difference between rental stipulated and lesser amount which he was induced to accept by fraud.

5. Appeal and error ⇐1050(1)

Where evidence alleged to have been erroneously admitted was of such character that appellant suffered no prejudice, any slight error in admission was not ground for reversal.

Appeals from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Roy Campbell, as trustee, against A. Otis Birch and others, to recover difference between stipulated rental and lesser amount which plaintiff was allegedly induced to accept by fraud and deceit of the defendants. Judgment for plaintiff and defendants appeal.

Affirmed.

George Acret, of Los Angeles (substituted for Clifford A. Rohe), for appellants Birch.

Clyde F. Murphy, of North Hollywood, for appellant Minter.

Syril S. Tipton, of Los Angeles, for respondent.

YORK, Presiding Justice.

This action arises out of a 99-year lease of real property located in the city of Los Angeles, which lease was executed on June 6, 1928, and provided that appellant A. Otis Birch should pay rental of $1,000 per month during the period covered by this action. Respondent in his trustee capacity prosecutes the action as the successor in interest of the original lessors, and seeks to recover the difference between the stipulated rental of the lease and a lesser amount which he alleges he was induced to accept by the fraud and deceit of the appellants, A. Otis Birch, his wife, M. Estelle C. Birch, and his cousin, Lula M. Minter, together with costs, expenses and attorney's fees as provided in the lease.

It is alleged, and admitted, that on August 1, 1935, there remained unpaid certain judgments amounting to $6,395.70 which had theretofore been recovered by respondent against appellant A. Otis Birch for rental due under said lease, and in addition there was due from said appellant on the said date the further sum of $3,016.89 for unpaid rent and interest thereon for the months of May, June and July of 1935, or a total of $9,413.59.

It is also alleged that just prior to August 1, 1935, appellants Birch made an offer to compromise said claims for the sum of $6,000 upon the condition that respondent "agree to a reduction in the rent provided in said lease for a period of five years". Accordingly, on said August 1, 1935, respondent and appellants Birch executed a modification agreement providing that in lieu of the payment of $1,000 monthly instalments of rental required by the original lease, appellants should pay the sum of $500 per month for the period of August 1, 1935, to August 1, 1936, and for the four-year period thereafter ensuing appellants should pay a reduced rental pursuant to a

graduated schedule agreed upon. Thereafter, the probate court granted respondent's petition for permission to accept said compromise and to execute said modification agreement.

The instant action was instituted on April 17, 1937, to recover the sum of $8,413.59 in damages, of which the sum of $3,413.59 was alleged to have been sustained by reason of the compromise and settlement of judgments and claims for rent, and of which the sum of $5,000 was alleged to have been sustained by reason of the modification agreement and the acceptance of a reduced rental for a period of ten months.

The gist of this action is fraud in inducing respondent to alter his position to his damage, it being alleged that prior to August 1, 1935, respondent had levied execution under some of the judgments above mentioned upon real property of appellant Birch, including that parcel known as 1144 South Broadway, Los Angeles, and that on or prior to October 15, 1934, appellants had entered into a conspiracy to defraud and deceive respondent; that in pursuance thereof and with the express intent to defraud and deceive respondent, appellants Birch executed a note for $15,000 secured by a trust deed naming Lula M. Minter as beneficiary, covering and purporting to be a lien upon the property situate at 1144 South Broadway; that said trust deed was fictitious and false and appellants Birch did not receive the $15,000 thereunder, nor a further advance of $10,000 under said deed of trust; that appellant Minter did not pay to appellants Birch said sums of $15,000 or $10,000 or any part thereof, and said note and trust deed were executed and recorded pursuant to the scheme and conspiracy of appellants to defraud and deceive respondent and to make the latter believe that A. Otis Birch was insolvent or nearing insolvency.

It was also alleged: "That between the dates of November 8, 1934 and August 1, 1935, the defendants * * * by words and acts lead this plaintiff to believe that the defendants were indebted to the defendant Lula M. Minter, in approximately the sum of 130,000, and that said sum was secured by a pledge of the stock of the Birch Holding Company, and that if this plaintiff insisted upon the collection of the judgments he had recovered against the defendant A. Otis Birch, and insisted upon the payment by said Birch of the monthly rental, as provided in the 99-year lease above mentioned, that the defendant Lula M. Minter would foreclose her pledge on the stock of the Birch Holding Company, as above set out, thereby causing the defendants A. Otis Birch and M. Estelle C. Birch to become insolvent. * * *

"That the various statements and acts of the defendants, and each of them, as above set out, as to the indebtedness between the defendants A. Otis Birch and M. Estelle C. Birch and Lula M. Minter, were false and said indebtedness was false and fictitious and non-existent in fact, which fact was known to the defendants, and each of them, and the statements and acts of the defendants, and each of them, were made and done for the purpose and express intent of deceiving the plaintiff. * * *

"That relying upon the statements and acts of the defendants * * * that (they) were indebted to Lula M. Minter in the sum of $130,000 and that said indebtedness was secured by a pledge of all of the stock of the Birch Holding Company, which company owned all of the property formerly owned by A. Otis Birch, and in fear that the defendant Lula M. Minter would foreclose her pledge upon said stock and for fear that the defendant A. Otis Birch would become insolvent, this plaintiff did, on or about August 20, 1935, accept said offer of $6,000 for his judgments and claims against the defendant A. Otis Birch, which claims at said time totalled the sum of $9,413.59, and further agreed to a modification of said lease, whereby he would accept a lower rental for a period of five years." That had respondent known that the acts and statements of appellants as to the financial condition of the defendant A. Otis Birch were false and the alleged indebtedness of $130,000 existing in favor of appellant Minter was fictitious and false, "he would not have accepted said offer of settlement and would not have agreed to a reduction of rent under said lease."

The trial court found in favor of respondent trustee in accordance with the allegations of the complaint, and judgment was thereafter entered against the three appellants for the sum of $8,413.59 by way of general damages, and for $313.35 for costs of suit; and against appellant A. Otis Birch for the sum of $375 by way of special damages, and for the sum of $878.85 as attorney's fees.

Appellants contend upon this appeal that the evidence is insufficient to support the findings and judgment.

It appears from the record herein that in 1928, when the lease from which this litigation arose was executed and its obligations assumed by appellant A. Otis Birch, his net worth was in excess of three millions of dollars; and that in October, 1934, appellant and his wife, M. Estelle C. Birch, formed three corporations, to-wit: (1) Birch Ranch & Oil Company, (2) Birch Securities Company, and (3) Birch Holding Company. They then vested in the Birch Ranch & Oil Company all of their interests and assets in the Conaway Ranch, the Birch Oil Company and the Birch-Royer Oil Company, and vested in Birch Securities Company ownership of the bonds of reclamation district No. 2035 on the Conaway Ranch which was located in Yolo county. Ownership of all of the stock of the Birch Ranch & Oil Company and of the Birch Securities Company was then vested in the Birch Holding Company.

By reference to a financial statement of appellant A. Otis Birch dated April 11, 1933 (Plaintiff's Exhibit 13), it appears that the Birch Oil Company which was thus transferred was valued at $500,000, that its property was clear and that 70% was owned by appellant A. Otis Birch; that the Birch-Royer Oil Company was valued at $300,000, its property was clear and 87½% was owned by Mr. Birch. With respect to the Conaway Ranch, this statement recites: "Conaway Ranch, Woodlands, Calif., 22,000 acres, value $2,200,000; 2,000,000 bonds issued for reclamation work; $454,000 bonds sold, rest of bonds held by Mr. Birch and put up for security for loans. Some of bonds are with Citizens Bank."

All of the stock of the Birch Holding Company was owned by appellants, A. Otis Birch holding 49% and M. Estelle C. Birch holding 51% thereof.

In October, 1934, at the time of the formation of these corporations and the vesting of ownerships, as above noted, appellants Birch executed and delivered to appellant Minter their promissory note for $130,000, and also delivered to her all of the stock of the Birch Holding Company, as security, and she took physical possession of the stock and held it until about the middle of July, 1935.

On August 1, 1935, or thereabouts, the agreement compromising respondent's accrued claims and reducing the rent under the lease was executed.

Shortly before this, to-wit, on July 16, 1935, appellants A. Otis Birch, M. Estelle C. Birch and one Stanley C. Benson, executed an instrument by which it was agreed that appellants Birch "will arrange with Lula M. Minter so that she will release the $25,000 lien she has upon the Broadway property which you (Benson) just purchased, which amount is represented by a $15,000 note secured by a second trust deed, and $10,000 additional advance according to the terms of the note and trust deed. This $25,000 is to be added to our present liability to Miss Minter in the sum of $130,000 as security for the payment of which she holds all of the capital stock of the Birch Holding Company. The Birch Holding Company owns all of the issued and outstanding stock of the Birch Ranch & Oil Company and Birch Securities Company.

"We hereby transfer, sell and assign the entire issued and outstanding capital stock of the Birch Holding Company, to-wit, 100,000 shares, which we own, to you, subject to our present indebtedness of $130,000 to Miss Minter, the $25,000 additional to be added as above mentioned, about $76,000 which we now owe Mrs. Conaway, (the payment of our obligation to Mrs. Conaway being also secured by the Birch Holding Company stock after Miss Minter is paid) and subject also to our right to additional sums which we may be able to borrow from Miss Minter and Mrs. Conaway from time to time, but the maximum for which the Birch Holding Company stock will be held by Miss Minter will be $200,000, and the maximum to Mrs. Conaway $150,000, and they are to be so notified by you and ourselves. * * *

"You (Benson) hereby assume and agree to pay as soon as possible all liabilities of the corporation, also what we personally owe the Citizens National Trust & Savings Bank, California Trust Company, California Bank of Los Angeles, the Hopkins family, and all deficiencies which may be obtained on our notes secured by trust deeds or mortgages on property which we still own or which we have owned and either lost or sold. Any refinancing you may find it necessary to do in order to pay these liabilities or indebtedness, or to operate those corporations, or their properties, *shall be done in such manner that we will have no personal liability.* * * *

"You and Mr. Birch are to work actively to enhance the value of all assets, lessen the liabilities and expenses, assist in all refinancing, and put the affairs of the cor-

porations and properties in the best condition possible, financially and otherwise, *but in so doing, we are not to assume any personal liability. Mr. Birch is to continue to manage the properties of the corporations,* subject to the direction and control of the respective Boards of Directors.

"Our present liabilities to any of the corporations for cash advances and otherwise are to be cancelled immediately.

"If and when the corporations and their properties and liabilities are refinanced and reorganized, and you and we agree that the capital stock of the Birch Holding Company has a net market value of at least $1,000,000 you are to pay us the sum of $500,000 in cash." (Italics added.)

On July 16, 1935, coincident with the execution of the foregoing instrument, the appellant Minter delivered to appellants Birch their note in her favor for $130,000 and the note and trust deed for $25,000 also in her favor, released the Birches from all personal obligation to her and accepted in lieu thereof the personal note of Stanley C. Benson for $162,574.66 in her favor, dated July 16, 1935, payable ten years after date. This note provided that Benson should pledge and deposit with the payee thereof (appellant Minter) 100,000 shares of the capital stock of the Birch Holding Company "as collateral security for the payment of this note and of all other obligations of the undersigned (Benson), and also other obligations which may be incurred by A. Otis Birch and M. Estelle C. Birch, as hereinafter more particularly mentioned, in favor of the payee or the holder hereof. * * *"

This personal note of Benson also provided: "This obligation is made and given by the undersigned, Stanley C. Benson, in favor of the payee, Lula M. Minter, to replace the obligation which A. Otis Birch and M. Estelle C. Birch now have to the said payee, Lula M. Minter, in a sum equivalent to the principal of this note, and from which they are hereby fully released by the payee."

In connection with this last mentioned transaction, appellant Minter testified in a deposition given by her on November 7, 1936, that the stock she had held of the Birch Holding Company was returned by her to appellant A. Otis Birch on July 16, 1935, and that it was reissued and returned to her in the name of Mr. Benson.

With reference to the agreement of July 16, 1935, between the Birches and Benson, and the Benson note to Minter providing for pledge of and deposit by Benson of the Birch Holding Company stock to Minter, the stock was not returned to Miss Minter as collateral security for the said Benson note, but instead the Birches and Benson executed an instrument denominated a voting trust agreement designating the Birches as trustees and Benson as beneficiary, and providing that all of the stock of the Birch Holding Company, comprising 100,000 shares, should be deposited with the trustees, who were vested with "all of the powers, rights and privileges of a shareholder of the corporation", and also the power to "vote for, do or assent, or consent to, any act or proceeding which the shareholders of said company might or could vote for, do or assent, or consent to." At the same time, to-wit, on July 16, 1935, appellants Birch executed a purported trustee's certificate certifying that they had received from Stanley C. Benson certain certificates issued in their names evidencing ownership of 100,000 shares of the capital stock of the Birch Holding Company, and reciting that these shares were to be transferred on the books of said corporation to appellants Birch, as trustees, and to be held by them under the so-called voting trust agreement of July 16, 1935. Neither this certificate nor the voting trust agreement made any mention of Lula M. Minter or the fact that said stock had been pledged to her as collateral security for the Benson note.

Respondent Campbell testified that early in the spring of 1935 (prior to the execution of the various instruments between the Birches, Minter and Benson dated July 16, 1935), appellant A. Otis Birch came to his office and informed him that "his financial condition was such that he did not have funds available to pay the rent (of the 99-year lease) and he would have to have a modification; that he simply could not go on. That he owed lots of money * * * (to appellant Minter) $130,000 on a note she held the stock of the Birch Holding Company as security for, and that he owed her $25,000 on a second mortgage (trust deed) on the Broadway property." Said witness testified he talked to Mrs. Birch on the telephone and she told him they were "very anxious to settle this case and get together and make a settlement rather than to go

to court to fight about it." He also talked to Mr. Benson who told the witness Campbell that he was acting as intermediary between Mr. Birch and Miss Minter and that he (Benson) "thought he would be able to get her (Minter) to cooperate and not close out Mr. Birch in the event that we could make some kind of a settlement on this lease. * * * He also told me that he personally knew that this was a good mortgage—this second mortgage for $25,000, she had really loaned him (Birch) the money, and that he knew that the $130,000 was actually loaned, in his opinion. Finally, Mr. Benson and I worked out a modified agreement", which was consummated on August 1, 1935.

When respondent Campbell was asked if he relied upon the statements of Birch and Benson to the effect that if the modification agreement was not made that Miss Minter would take some action against the Birch properties, said witness replied: "Yes, I believed * * * that Mr. Birch on August 1st really owed Miss Minter $130,000 on the property which was what I considered the fact * * * and I believed that all I could do would be to attach the stock in order to collect any money, and that Miss Minter would come in with a $130,000 mortgage, and take it away from me, because I could not pay off that large amount of a loan, as well as relying upon the fact that Mr. Birch had said unless he did get relief he would have to go into insolvency, or bankruptcy, or something." Respondent also testified that he had a title search made and was informed that the second mortgage of $25,000 in favor of Minter was a matter of record. Upon cross-examination, respondent stated that Mr. Birch gave him a financial statement signed by him in April, 1933, so that respondent was familiar with the amounts then owed by said appellant Birch, and that it was in March of 1935 at a supplementary proceeding that he first heard that Miss Minter was holding certain stock as security for certain loans she had made to appellant Birch; that when Mr. Birch came to his office in the spring of 1935 and stated that he was unable to borrow from the banks and had to borrow from his relatives, respondent "believed that * * until I found that Lula M. Minter was not holding the stock of the Birch Holding Company." He said he made this discovery when Miss Minter made a deposition on November 7, 1936, at which time she stated "she was holding the stock of the Birch Holding Company under the name of Stanley C. Benson." Continuing on cross-examination, respondent stated that certain statements made by appellant A. Otis Birch during the course of supplementary proceedings in May of 1935 induced him to make the agreement of August 1, 1935, such statements being to the effect that said appellant owed a great deal of money; that he was living by borrowing from his relatives; that he was practically broke; and that the only available funds he had were those borrowed from his relatives. Certain statements made by said appellant at a supplementary proceeding had in July of 1935 also constituted an inducing factor for the agreement of August 1, 1935, as well as telephone conversations which he had with Mrs. Birch.

In answer to the question, "Now, when did you first come to the conclusion, Dr. Campbell, that the statements that were made by Mr. Birch in the month of March, 1935, to the effect that he owed Miss Minter $130,000 were untrue, give me the date, approximately.", the respondent answered: "Well, it was right after Miss Minter's deposition of November 7, 1936, when I had a court order for a handwriting expert to examine the stock, and when they came to court to produce the stock, she did not have it, and that is when I first saw that they were telling things that were not true."

Continuing: "Q. What stock did you request? A. The Birch Holding Company.

"Q. What date was that again, please? A. November 7, 1936.

"Q. * * * Well, Dr. Campbell, didn't you know, as a matter of fact, that Miss Minter was not supposed to have the stock at that time in accordance with the contracts that had been made, did you not know that the stock was being held in a voting trust at that time? A. When—that is when I first found it out; I did not know that.

"Q. Did you not know that Miss Minter in November of 1936 was holding what was known as a voting trust certificate for those shares of stock? A. No, not until I came up to the court on the court order to produce the stock, and they did not have the stock, and they produced this trust certificate in lieu of it, that was the first thing I knew about it.

"Q. Now, when did you first learn that a contract had been made between Mr. Birch, Mrs. Birch and Mr. Stanley Benson on the 16th of July, 1935? A. I learned that at a supplementary proceeding of Mr. Birch when we started to question him, we had a judgment against him and—

"Q. (Interrupting) About what date was that, please? A. The transcript is there.

"Mr. Tipton: About September 22nd, 1936.

"By Mr. Murphy: Was that the first time you knew that such a contract had been made? A. Yes. * * *

"Q. Do you know, Dr. Campbell, whether when Mr. Otis Birch was talking to you in the early month of March, 1935, whether it was a fact that at that time Miss Lula M. Minter was holding all of the stock of the Birch Holding Company as security for the payment of the $130,000 note? A. I knew it only as Mr. Birch said so, * * * I did not doubt it at all. He said she had it, and I believed she did. * * *

"Q. * * * Dr. Campbell, I am going to ask you a question point blank: What did you find out was untrue in November of 1936? * * * A. Miss or Mrs. Minter stated she was holding the stock of the Birch Holding Company in the name—the stock was in the name of Stanley C. Benson, and that was not true. The stock has never been in the name, so they say, of Stanley C. Benson, and she was not holding the stock.

"Q. By Mr. Murphy: And you learned that when? * * * A. November the 7th, 1936. * * *

"Q. Yes. So as to understand it correctly, this statement that Miss Minter was holding stock in the name of Stanley C. Benson was not one of the statements which induced you or assisted in inducing you to make the contract of August 1, 1935? A. I did not even know of it at that time. * * *

"Q. But what was there that happened on November 7, 1936, that led you to believe that the statement made by Mr. Birch on May 7, 1935 to the effect that he had given to Miss Minter the Birch Storage stock as security for a loan was not true? * * * A. It is my remembrance Miss Minter said he gave her the stock.

"Q. All right. Did the fact that Mr. Birch told in a supplementary proceeding on May 7, 1935, that he had put up the Birch Storage stock with Miss Minter as security induce you or assist in inducing you to make the contract of August 1, 1935? A. Yes. * * *

"Q. Now, don't you know, as a matter of fact, Mr. Campbell, and didn't you know on November 7, 1936, that it was a fact that on July 16, 1935, a contract was made between Mr. Benson and Mr. Birch and Mrs. Birch by which the stock which stood in the name of Mr. Birch and Mrs. Birch in the Birch Holding Company was issued to them as trustees, and that they as trustees executed a voting trust certificate with Stanley C. Benson, and issued to Stanley C. Benson a voting trust for all these shares of stock, which voting trust certificate standing in the name of Stanley C. Benson was endorsed by Stanley C. Benson to Miss Minter, and that she held the voting trust certificate as a pledge to secure the $130,000 note? A. I found that out when I subpoened the stock into court for examination, and she did not have the stock; it was through your office, or your assistant brought up this other agreement, and that is the first I ever knew of it."

Voluminous records consisting of checks, notes, bank statements, deeds, trust deeds, mortgages and other legal documents were introduced in evidence by appellants to show a course of dealing between A. Otis Birch and Lula M. Minter for many years prior to the execution of the 99-year lease which forms the basis of the instant litigation. Appellants maintain that by means of these records they proved the existence of a bona fide obligation between themselves beginning as early as 1897 and steadily growing until 1934 when A. Otis Birch was indebted to Miss Minter in the sum of $130,000; that the representations made to respondent, and which he claimed induced him to enter into the compromise agreement and reduce the rental under the lease, were true; consequently, the findings as to false representations, intention to defraud and as to the existence of a conspiracy are not supported by the evidence.

It is a noteworthy fact that when appellant Birch arranged to have Mr. Benson take over the stock of the Birch Holding Company and to refinance his business and assume his great load of li-

abilities, no mention was made of the 99-year lease, and when examined under section 2055 of the Code of Civil Procedure by counsel for respondent, Mr. Birch admitted that during the time when he was seeking a modification of the terms of the lease and a compromise agreement with respect to the judgments held against him by respondent, he never mentioned to the latter his negotiations with Benson. He also admitted that under the agreement with Benson and the arrangement with Miss Minter, his obligation of $130,000 and interest thereon was released on July 16, 1935; that he had no agreement, either oral or written, with Miss Minter by which he agreed to pay her the $130,000 which was assumed as an individual obligation by Benson; and that on August 1, 1935 when the compromise and modification agreement was consummated with respondent, he (Birch) did not owe Miss Minter anything. Appellant Birch further testified that he and Benson continued to operate the Birch companies under the agreement with Benson until November 27, 1937.

As hereinbefore stated, the gist of this action is fraud in that appellants deceived respondent and induced the belief, contrary to the facts, that they were insolvent or would forthwith become insolvent and all of their assets would be taken from them by Lula M. Minter through foreclosure of her liens thereon, and that relying upon such belief respondent discounted his existing claims and reduced the rental under the 99-year lease, all to his damage.

A review of the voluminous record in this case conclusively establishes the fact that appellants Birch were not insolvent and that they never even slightly approximated that status. Moreover, the evidence, only a small portion of which is recited in this opinion, clearly indicates that appellants suppressed the true state of facts concerning their affairs, and that this was one means by which they induced respondent to change his position.

[1-3] In actions based upon fraud, issues as to the falsity of representations made, their materiality and plaintiff's reliance upon them are questions of fact for the trial court. (See 12 Cal.Jur. 835, and authorities there cited.) Even though this court might not agree with the conclusions reached by the trial judge in the instant case, it is powerless to interfere because it is obvious that there is substantial evidence to support his findings of fact.

[4] With appellants' contention that attorney's fees and expenses were improperly awarded herein, we cannot agree, for the reason that it was provided by the 99-year lease from which this litigation stems that "It is hereby agreed between the parties hereto that lessee shall pay all reasonable costs, expenses and attorney's fees incurred by or against lessors in any litigation between the parties hereto or persons claiming under them, arising out of or in connection with this lease or the construction or enforcement thereof, in case the lessors or parties claiming under them shall prove successful in such litigation."

[5] Appellants complain of two errors in the admission of evidence. The evidence referred to was of such character that appellants suffered no prejudice through its introduction; consequently, if any slight error resulted therefrom, it would be insufficient upon which to base a reversal of the judgment herein.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.



KENNEDY v. OCCIDENTAL LIFE INS. CO.*

Civ. 2574.

District Court of Appeal, Fourth District, California.

Feb. 4, 1941.

Hearing Granted April 3, 1941.

1. Trial ⇦171

Trial courts have full power, in a proper case, to direct the jury to render a verdict for defendant, where there is no substantial evidence tending to prove all controverted facts necessary to establish the plaintiff's case.

2. Trial ⇦143

To authorize a trial court to direct a jury to render a verdict for defendant, it is

* Subsequent opinion 117 P.2d 3.

not necessary that there should be an absence of conflict in the evidence, but if there be a conflict, it must not be a substantial one.

3. Trial ⇐141, 143

A motion for directed verdict for defendant can be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff, if such a verdict were given.

4. Principal and agent ⇐99

To create an "ostensible authority" a third person must believe that agent had authority, and such belief must have been generated by some act, or neglect, of the principal. Civ.Code, § 2317.

See Words and Phrases, Permanent Edition, for all other definitions of "Ostensible Authority".

5. Insurance ⇐365(1)

Where application for reinstatement of lapsed five-year, convertible, nonparticipating, term policy, and health certificate provided that in no event should the reinstatement become effective until the application and certificate was approved at insurer's home office, and that insurer was authorized to retain premium payment without prejudice to its right to disapprove application or certificate, insurance agent had no "ostensible authority" to reinstate the policy. Civ. Code, §§ 2315–2317.

6. Insurance ⇐365(1)

Where insurance agent had neither actual nor ostensible authority to reinstate lapsed five-year, convertible, nonparticipating, term policy, agent's promise to advance money for premium was not effective to reinstate the policy. Civ.Code, §§ 2315–2317.

7. Insurance ⇐365(2)

Where five-year, convertible, nonparticipating term policy provided that should policy lapse by reason of default insured might have it reinstated within five years by furnishing "evidence of insurability satisfactory to the Company", and application for reinstatement of policy and health certificate was not received by insurer until after insured's death, and was never acted on, lapsed policy was never reinstated.

Appeal from the Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Lawrence Kennedy, administrator with the will annexed of the estate of Theza Van Antwerp, deceased, and as guardian of John Alan Van Antwerp, a minor, against the Occidental Life Insurance Company, to recover on a five-year, convertible, nonparticipating, term policy of insurance issued by defendant to one who was the deceased husband of Theza Van Antwerp, deceased, and the deceased father of John Alan Van Antwerp. From a judgment in favor of the defendant after a directed verdict, the plaintiff appeals.

Judgment affirmed.

L. M. Linneman, of Dos Palos, and Lawrence Kennedy, of Fresno, for appellant.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondent.

KLETTE, Justice, pro tem.

This appeal was taken by plaintiff and appellant from a judgment entered in favor of defendant and respondent, after a directed verdict.

On April 25, 1935, Archibald Reid Van Antwerp took out a five-year, convertible, non-participating, term policy of insurance with respondent, for the sum of $5,000, payable to his wife, Theza Van Antwerp, if living, otherwise to his son, Alan Van Antwerp. The policy called for a quarterly payment of premium, amounting to $21.50 each quarter, payable on the 25th day of July, October, January and April of each year. The policy provided for a period of thirty-one days' grace before lapsing. All premiums were paid up to and including that which fell due on October 25, 1938, but the premium falling due on January 25, 1939, was not paid, or attempted to be paid, until March 31, 1939, under circumstances which will hereafter be detailed. The undisputed evidence shows that at least one notice was sent Mr. Van Antwerp from the head office of the insurance company at Los Angeles, calling attention to the fact that the final date of payment of premium was February 25, 1939, and also a letter under date of March 31, 1939, calling attention to the fact that the policy had lapsed. On March 21, 1939, Delford Hale, an insurance agent who had secured this policy for Mr. Van Antwerp, called upon

him to take steps to be reinstated. The agent at that time prepared an application and health certificate for reinstatement of the policy, but there is a conflict in the evidence as to whether it was signed by Van Antwerp on that day, or on March 31, 1939. Mr. Van Antwerp did not have the money to pay the premium, but said he would have it about April 1st, and Delford Hale agreed to advance it for him. Again there is a conflict in the evidence as to whether this understanding was reached on March 21 or March 31, 1939. On March 31, 1939, Delford Hale drew his check in favor of the respondent insurance company, covering the amount of the premium due, and left it at the Fresno office of respondent, at about 4 p. m. of that day, and it was mailed to the head office at Los Angeles between 4:30 and 5 p. m. the same day. It was received at the Los Angeles office of respondent on April 1, 1939, the exact hour not being determined.

On the morning of April 1, 1939, Van Antwerp was found dead in his bed. He was last seen alive at 8 p. m. the evening before. The body was found between 4 and 7 o'clock in the morning, according to the testimony of the witnesses. He was lying on the top of the covers, wearing house slippers and fully clothed, with the exception of his shirt, which was off. When found, he had been dead for several hours. He was survived by both beneficiaries under the policy.

Under date of April 7, 1939, respondent drew its check in favor of Theza Van Antwerp for the refund of the premium forwarded March 31, 1939, which it was stipulated was tendered her.

Mrs. Van Antwerp died August 31, 1939. Thereafter Lawrence Kennedy was appointed administrator with the will annexed, of her estate, and guardian of John Alan Van Antwerp, the son, who at the time of the trial was a minor of the age of twenty years. Kennedy thereupon instituted this suit, both as administrator and guardian.

A jury was empaneled to try the case, and at the close of the evidence, respondent moved for a directed verdict in its favor. This motion was granted, and the court directed the jury to bring in a verdict for defendant, which was done.

[1-3] Trial courts have full power, in a proper case, to direct the jury to render a verdict in favor of defendant, where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence, but if there be a conflict, it must not be a substantial one. The motion can be granted only when disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if such a verdict were given. Estate of Baldwin, 162 Cal. 471, 123 P. 267; Estate of Sharon, 179 Cal. 447, 177 P. 283; Estate of Flood, 217 Cal. 763, 21 P.2d 579; Robbiano v. Bovet, 218 Cal. 589, 24 P.2d 466; Walters v. Bank of America, etc., Ass'n, 9 Cal.2d 46, 69 P.2d 839, 110 A.L.R. 1259; Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059.

It is contended by appellant that there was substantial evidence that the policy involved in this action was reinstated by Delford Hale, the agent of respondent, and that therefore the motion for the directed verdict should not have been granted. With this contention the court cannot agree.

An agent has such authority as the principal, actually or ostensibly, confers upon him. Sec. 2315, Civ.Code. Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess. Sec. 2316, Civ. Code. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Sec. 2317, Civ.Code.

[4] There is no evidence in the case that Delford Hale had any actual authority to renew or reinstate this policy of insurance for respondent. The only evidence upon this point is his positive testimony that he did not have any such authority. To create an ostensible authority, two essential features are necessary. The third person must believe that the agent had authority, and such belief must be generated by some act, or neglect, of the person to be held. Allen v. San Francisco Wholesale Dairy Produce Exchange, 59 Cal.App. 93, 210 P. 41; Walsh v. American Trust Co., 7 Cal.App.2d 654, 47 P.2d 323. The application for reinstatement and health certificate dated

March 21, 1939, and signed by Mr. Van Antwerp, contained these statements:

"I hereby make *application* to the Occidental Life Insurance Company *for reinstatement* of above policy. * * * I hereby declare and agree that I have read the questions, statements, and answers, in this application and certificate, that they are complete and true, that they refer to the Insured under the above policy and may be relied on by the Company, and that no information acquired by any representative of the Company shall bind the Company unless it shall have been set out in writing herein. I further agree that all statements and answers in this application and certificate and in the application for the above policy shall be taken as the basis of the reinstatement, delivery, addition, change or issuance of the insurance applied for above, and that *in no event shall the same become effective unless and until this application and certificate is approved at the Home Office of the Company and the full amount due is paid during the lifetime and good health of the Insured.*

"I have paid $21.61 in connection with this application and certificate. *The Company is authorized and directed to retain this amount, depositing or cashing any check or draft, without prejudice to its right to disapprove this application or certificate.*" (Italics ours.)

[5] Could it be said that Mr. Van Antwerp believed that Delford Hale had authority to, and was reinstating him, when he knew that the document he was signing was an *application for reinstatement,* and where it stated "that *in no event shall the same become effective unless and until this application and certificate is approved at the Home Office of the Company*", and *"the Company is authorized and directed to retain this amount, depositing or cashing any check or draft, without prejudice to its right to disapprove this application or certificate"?* We think not. Again, what evidence is there in the record to show that that belief, if it did exist, was generated by any act or neglect of respondent? We find none. In addition to the statements above quoted from the application for reinstatement, the policy, which Mr. Van Antwerp held, provided that, "Premiums must be paid at the Home Office of the Company unless otherwise provided, and in any case only in exchange for an official receipt, signed by the secretary and countersigned by the person to whom payment is made." That reinstatement could be made "upon the Insured furnishing evidence of insurability, *satisfactory to the Company*". And also, "This contract cannot be varied or altered, nor its applications or conditions waived or extended in any respect, except by written agreement of the Company, signed by two of the following officers, viz: The President, a Vice President, Secretary and Actuary."

[6] The evidence shows, without conflict, that Delford Hale had no authority, either actual or ostensible, to reinstate Van Antwerp under the policy, and it therefore becomes immaterial, whether the application for reinstatement and health certificate was signed March 21, or March 31, 1939, or whether the promise of the agent to advance the amount of the premium was made on either of those two days. The promise to advance the money was a personal matter between the agent and insured, and certainly in no way bound the respondent.

We will now consider the effect of the signing and mailing of the application for reinstatement, and health certificate, with the premium, and as to whether that operated as a reinstatement of the lapsed policy, or whether there remained something to be done by respondent, before the lapsed policy became reinstated. Appellant cites a number of authorities in support of his position, that the rights of the insured to reinstatement must be governed by the original policy of insurance, and cannot be varied by the application for reinstatement. While we have heretofore discussed the provisions of the application for reinstatement, under the head of ostensible agency, in determining whether the insured believed, or had reason to believe, that the agent had power to reinstate him, we shall, in considering this phase of the case, confine ourselves solely to the provisions of the policy itself. The policy contained this provision:

"Should this policy lapse by reason of any default, it may be reinstated at any time within five years from the date of default, upon the Insured furnishing *evidence of insurability satisfactory to the Company,* and upon payment of all over-due premiums, and upon payment or reinstatement of any indebtedness under the policy at the date of default, with interest on such over-due premiums and indebtedness at a rate not to exceed six per cent. per annum from date of default." (Italics ours.)

[7] Counsel on both sides have shown great diligence and research in presenting to the court all cases which might have a bearing on the controversy here involved. But we believe the case of Greenberg v. Continental Casualty Co., 24 Cal.App.2d 506, 75 P.2d 644, 645, is decisive of the issue before us. In that case the insured sent his premium in three days after the expiration of the days of grace. This premium was returned with the statement that the policy had lapsed. The insured thereupon mailed to the company an application for reinstatement, accompanied by an affidavit of his physician, as to his good health, and tendered the defaulted premium. The application for reinstatement was rejected by the company. Action was then brought by the insured for breach of contract, to reinstate the policy. Judgment went for defendant, which judgment was affirmed by the higher court. The policy of insurance in that case contained the same identical words as the policy now before us, that, in order to be reinstated, the insured must furnish *"evidence of insurability satisfactory to the Company"*. It was there said:

"No question of public policy or valid statutory regulation is involved. The law applicable to the disputed questions is solely the law of contracts, and in that connection it is elementary that parties to a contract are entitled to have the agreement enforced according to its terms. * * * Conceding, but only for the purpose of analysis, that the meaning of the word 'insurability' is uncertain, nevertheless the contracting parties agreed, as the memorandum of their agreement clearly and unequivocally reveals, that the evidence of such 'insurability' must be 'satisfactory to the company.' By agreement of the parties to the contract the right and responsibility of determining the question as to whether the 'evidence of insurability' was satisfactory, was imposed upon and vested in one of the parties to the agreement. * * * The contract in question clearly provides, as above stated, that what shall constitute 'satisfactory evidence' is a question for the company to determine. It is purely a private matter addressed to the discretion of those officers of the company charged with the responsibility of determining such question, and is in no sense that judicial discretion which appellate courts have the authority to review. In the final analysis, whatever the word 'insurability' means, the contract provides that the evidence thereof must be 'satisfactory to the company.' That question having been determined by virtue of and according to the clear and unequivocal terms of the agreement, there is nothing, under the circumstances presented herein, for judicial determination."

The case of Broughton v. Equitable Life Assurance Society, 5 Cir., 71 F.2d 821, 823, is almost identical with the one now before us. The policy in that case contained the same identical wording excepting that the word "Society" was used instead of "Company". It was there said: "After the policy lapsed, the insured was not entitled to have it reinstated by merely executing a health certificate, although on a form sent him for that purpose, and tendering the premium. The contract plainly provided that the evidence of good health should be satisfactory to the company. Until evidence of insurability was furnished and accepted the policy was not reinstated."

In the case before us the application for reinstatement and the health certificate was not received by the company until after the death of the insured, was never acted upon, and the lapsed policy was never reinstated.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



42 Cal.App.2d 704

SHNELL v. GLOBE INDEMNITY CO.

Civ. 12067.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1941.

1. Insurance ⇐665(3)

Evidence *held* to establish that when executing application for automobile liability policy warranting that there had been no previous insurance or cancellations, applicant knew that such statement was not true, and hence could not recover on the policy for expenses of defending suit and judgment rendered against applicant.

2. Insurance ⇐136(2)

Where automobile liability insurers sent policy to their agent for delivery to insured, but before actual delivery notified agent that they would require indorsement suspending coverage whenever automobiles should be operated by insured's son, and insured refused to sign rider thus restricting coverage, there was "constructive delivery" of the policy, and liability attached under the policy when it was forwarded from home office.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Delivery".

3. Insurance ⇐285½

Where there was constructive delivery of automobile liability policy, making liability attach when policy was forwarded from home office, but insurers subsequently demanded indorsement suspending coverage when the automobiles should be operated by insured's son, and insured refused to sign the rider and policy was returned to insurers and marked "cancelled," there was a "cancellation" of the policy, precluding insured from recovering on policy subsequently obtained from another insurer pursuant to application warranting that there had been no previous insurance or cancellations.

See Words and Phrases, Permanent Edition, for all other definitions of "Cancellation".

4. Trial ⇐139(1)

A directed verdict is proper unless there is substantial evidence tending to prove, in favor of party against whom direction is given, all the controverted facts necessary to establish his case.

Appeal from the Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by J. W. Shnell against the Globe Indemnity Company, to recover expense of defending suit for damages arising out of an automobile accident, and amount of judgment rendered against plaintiff in such suit. From a judgment on a directed verdict for defendant, plaintiff appeals.

Affirmed.

Murchison & Clopton, Mort L. Clopton, and Bruce Murchison, all of Los Angeles, for appellant.

Eugene S. Ives, of Los Angeles (Harold L. Watt and Carol G. Wynn, both of Los Angeles, of counsel), for respondent.

YORK, Presiding Justice.

Appellant herein, the "named insured" in a policy of automobile liability insurance issued by respondent, brought the instant action to recover the expense incurred by him in defending a suit for damages arising out of an automobile accident as well as the amount of a judgment rendered against him in such suit. At the conclusion of the trial, the court directed the jury to return a verdict for respondent. From the judgment entered pursuant thereto, this appeal is prosecuted.

Viewing the facts in the light most favorable to appellant, it appears that on January 8, 1936, appellant visited the office of Mr. Evans, an agent of Fidelity and Casualty Company of New York and the Niagara Fire Insurance Company of New York, and ordered a policy of insurance upon a Ford automobile, as well as upon a Packard automobile owned by him. About January 15, the policies were prepared and forwarded to the agent, Mr. Evans, for delivery to appellant, but before delivery had been made, the insurance companies on or about February 26th, notified Mr. Evans that they would require on both policies, and also on a policy previously issued covering an Oldsmobile owned by appellant's daughter, endorsements suspending coverage whenever such automobiles should be operated by appellant's son, Rex Shnell. Upon being informed of this action by the companies, appellant agreed to such endorsement as to the Oldsmobile and the Packard, but declined the Ford policy on such terms. The Ford policy was never delivered to appellant, but was returned by the agent to the companies and marked "cancelled". No premium was ever collected therefor, nor was the policy ever countersigned by the agent.

On March 21, 1936, appellant visited the Santa Monica office of E. Broox Randall & Sons, Inc., a general agent of respondent Globe Indemnity Company, and discussed the subject of insurance upon the Ford automobile with Henry T. Brantly, a "soliciting agent" of respondent company.

For the purposes of this appeal, based as it is on a directed verdict, it must be assumed that appellant (as he testified) made a full disclosure to Mr. Brantly of the facts concerning his previous application to the Fidelity and Niagara companies, and their refusal to insure appellant's cars while they were being operated by his son

Rex. At any rate, the outcome of this conversation was that Mr. Brantly filled out and appellant signed an application for insurance to become effective at noon of that day, the pertinent portion of such application being as follows:

"I warrant the following statements concerning my car and base this order thereon. * * *

"Previous carrier None

"Any previous cancellations? No. * *"

On March 27, 1936, appellant's Ford automobile while being operated by his son, Rex Shnell, was involved in a collision resulting in the death of Rex and injury to the occupants of the other car. Respondent refused to defend the action brought against appellant, served notice of rescission and tendered him the amount of the premium, which appellant refused to accept.

The policy issued pursuant to the application contained among others the following provision:

"In consideration of the premium specified and the statements contained in the Schedule of Statements made part hereof, *and warranted by the insured to be true,* the Company agrees. * * *

"Schedule of Statements. * * *

"11. No company has cancelled any automobile policy of the Named Insured, or refused to issue automobile insurance to the Named Insured during the past year." (Italics added.)

[1] There was no error on the part of the trial court in directing a verdict for respondent. While it must be assumed that appellant in his conversations with the agent Brantly made full disclosure of the facts concerning his previous application to the Fidelity and Niagara Companies, the conceded facts are that when he executed an application for insurance whereby he warranted there had been no previous cancellations, he knew that such statement was not true. This is revealed by appellant's own testimony on cross-examination, when, after testifying concerning his procurement of two other policies on his Packard and Oldsmobile automobiles, he testified:

"Q. By Mr. Kidd: And on or about the same time, you were offered a policy by these same two insurers through E. J. Evans, covering this same Ford automobile with an endorsement on the policy to the same effect, that is, that that policy would not cover you or anyone else while that Ford automobile was operated by Rex Shnell, isn't that true? A. Mr. Evans advised me that the policy was written that way.

"Q. And you said what? A. I told him to return it; I couldn't use it.

"Q. Why did you tell him that? A. I didn't want that kind of a policy.

"Q. You wanted one to cover Rex Shnell while he was driving the car? A. I wanted it to cover anyone.

"Q. Including your son? A. Yes.

"Q. And counsel has agreed that your son did drive that Ford automobile? A. Yes, at times.

"Q. Yes, at times. And at that time you refused that policy, did you? A. Yes. I told Mr. Evans to return the Ford policy. I couldn't use it. I didn't want that kind of a policy. I wanted it to cover anyone, including my son Rex Shnell. My son did drive that Ford automobile at times. At that time I refused that Ford policy. By that time I mean that my recollection is that the Ford policy was taken up some time before March 10th, but I am not sure. I am not sure of the date of the discussion with Mr. Evans on said notification from him about the Ford policy. I am speaking of the Ford policy. Whenever in my testimony I refer to the Ford automobile, I am referring to the same car that was later insured with the Globe Indemnity Company.

"Q. And you think you had a discussion with Mr. Evans prior to March 10, 1936— A. I had a notification—

"Q. Please wait until the question is finished. With reference to this Ford policy which had been issued by the Fidelity and Casualty Company and the Niagara Fire Insurance Company—A. I was notified that that was the case.

"Q. That notification is in writing? A. No, sir. * * * I didn't like to sign the rider on the Packard policy * * * limiting the policy so that it wouldn't cover Rex Shnell, but I took it. I signed the endorsement myself. I can't recall about the Oldsmobile. I never told the Globe Indemnity Company about that transaction, about the Oldsmobile policy and that the coverage on same had been amended so as not to apply to my son. I never discussed that with

them. I never told the Globe Indemnity Company about that transaction, the Packard policy I am referring to, and that the coverage on the same had been amended so as not to apply to my son. I never saw any endorsement on the Ford policy. I never saw the policy at all. To my knowledge I never wrote a check in which the amount of premium on the policy on the Ford car was included in some other amount.

"Q. By Mr. Kidd: Did you tell the Globe Indemnity Company anything with reference to the driver's license of your son Rex Shnell having been revoked for one year or any other period. * * * Did you ever tell Mr. Brantly about any of these matters I have been asking you about, to-wit: that the Fidelity and Casualty Company had put a rider on your Oldsmobile policy, and the same kind of a rider on the Packard policy, to-wit: that the policy would protect neither of them while being driven by Rex Shnell? A. Not about the Oldsmobile, but in talking about the prior coverage, I told him something about the other.

"Q. Did you tell Mr. Brantly anything about your son's driver's license being revoked for a year or a year and a half? A. Yes, I discussed it with him. * * *

"Q. And you told him about what? A. He asked about prior coverage on the car and I told him that I had gone to another insurance company, another insurance agency, and they wanted to restrict the policy and I refused to take it and told them to return it."

With reference to appellant's contention that the policy ordered from the Fidelity and Casualty Company by him for the Ford automobile (which is relied upon by respondent to show previous insurance) never became effective because it was never delivered to him and was never countersigned, it should not be overlooked that appellant was thoroughly conversant with the insurance business, having been formerly engaged in that line for some thirty years, fifteen of which were spent in southern California. That he considered the policy of the Fidelity and Casualty Company effective is confirmed by his statement, to-wit: "On or about January 8 of 1936 I obtained insurance on this Ford automobile, and this insurance was cancelled about a month later without cause and without listing any cause for the cancellation. I had had no other insurance and had made no other application for insurance upon this car."

The Fidelity and Casualty Company of New York and the Niagara Fire Insurance Company also recognized an outstanding liability under this policy from the date of its issuance on January 8, 1936, until the date of its cancellation on March 9, 1936, which is evidenced by a letter from Mr. McKeegan, manager of the automobile department of such carriers, addressed to his Los Angeles office under date of February 26, 1936, to-wit: "There has now come to our attention another policy for J. W. Shnell, number CA213055 effective January 8, 1936, covering a 1930 Ford Coupe. The investigation which the Fidelity and Casualty Company made indicates very clearly this Ford is the automobile which Rex Shnell operates. How this policy could have been sent to our office with the knowledge that the agent had of the objection raised by the Fidelity and Casualty Company is something we cannot understand. Clearly, if this Ford Coupe is still operated by Rex Shnell, the policy will have to be returned for cancellation."

[2, 3] In this case it must be held that the policy of insurance originally issued upon the Ford automobile, and in connection with which appellant refused to sign the rider, was both delivered and in effect up to the time of its cancellation after appellant declined to accept a rider thereto. Certainly there was constructive delivery, because the insurance carriers in sending the policy to their agent did not intend that he should keep it for them, but on the contrary he held it for the insured. This being the case, liability attached under the policy when it was forwarded from the home office. Hill v. Industrial Acc. Com., 10 Cal.App.2d 178, at pages 183, 184, 185, 51 P.2d 1126, and cases therein cited.

[4] It is well established that a directed verdict is proper, unless there is substantial evidence tending to prove, in favor of the party against whom the direction is given, all the controverted facts necessary to establish his case. 24 Cal. Jur., 913, 914, and authorities there cited. A review of the record herein results in the conclusion that there is no evidence of sufficient substantiality to support a verdict in favor of appellant, if such a verdict were rendered.

We find no merit in appellant's contention that the trial court erred in receiving in evidence respondent's exhibits G, L, O and P.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: DORAN, J.; WHITE, J.



FREIRE v. MATSON NAV. CO. et al.*

Civ. 11373.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1941.

Hearing Granted March 31, 1941.

1. Workmen's compensation ⇐1087

The Industrial Accident Commission has exclusive jurisdiction to determine the compensation benefits to employees injured in the course of their employment, but the findings of the commission are reviewable by the courts. St.1937, p. 269, § 3600.

2. Courts ⇐39

The defense of lack of jurisdiction, the test of which is found in the nature of the action and the relief sought, may not be determined by a jury but is purely a legal matter that must be passed on by the court.

3. Workmen's compensation ⇐2138

Where there was no dispute on the facts in employee's personal injury action against his employer, the question of jurisdiction was a "question of law" for the sole determination of the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

4. Courts ⇐39

Where jurisdiction of subject-matter depends on a fact, it is the duty of the court to determine that fact on the evidence pro or con.

5. Workmen's compensation ⇐644

Unless the duties of employment require in their performance the use of a public road by an employee, an injury received by him thereon does not occur "in the course of employment" and does not "arise out of employment", but that rule does not prohibit benefits to an employee who finds it necessary to cross public property used by the public but in fact dominantly used by the employer, servient to its purposes, and intimately associated with its plant as a part of its necessary establishment.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise out of Employment" and "In the Course of Employment".

6. Workmen's compensation ⇐606

To show that an injury "arose out of employment" and occurred "in the course of employment", it is sufficient if a substantial causal connection is established between the employment and the injury to the employee, though it need not be the sole or proximate cause.

7. Workmen's compensation ⇐756, 2084

Where steamship janitor whose time for commencing work was 8 A. M. arrived at waterfront at about 7:45 A. M. in a taxicab and while alighting on congested bulkhead, which at times was predominantly used by his employer and was supervised by employer's private police, had his foot caught between taxicab door and door sill when an automobile owned by employer and operated by another employee in the course and scope of his employment backed into taxicab, janitor's injury "arose out of and in the course of employment" and was within the exclusive jurisdiction of the Industrial Accident Commission. St.1937, p. 269, § 3600.

8. Workmen's compensation ⇐750

Where portion of a public thoroughfare adjoining an employer's premises is necessarily used by an employee in reaching his work, and that portion is rendered hazardous by carrying on employer's business, an injury suffered by employee through that hazard is one received within the zone of his employment and "arises out of and in the course of employment".

Appeal from Superior Court, City and County of San Francisco, I. M. Golden, Judge.

Action by John Freire against the Matson Navigation Company and others for personal injuries. From a judgment en-

* Subsequent opinion 109 P.2d 1022.

tered on a directed verdict in favor of the named defendant, plaintiff appeals.

Affirmed.

Philander B. Beadle and Carl W. Wynkoop, both of San Francisco, for appellant.

Hoge, Pelton & Gunther, of San Francisco (A. Dal. Thomson, of San Francisco, of counsel), for respondent.

WARD, Justice.

This is an appeal by plaintiff, an employee of defendant company, from a judgment in favor of the latter entered upon a directed verdict. The trial court held that an accident which resulted in personal injuries to plaintiff was within the exclusive jurisdiction of the industrial accident commission.

At the time of the injury, plaintiff was employed as a janitor on one of the steamships owned and operated by defendant company, this ship being at that time moored at pier 32, which, together with the adjacent pier 30, had been assigned to defendant company by the state board of harbor commissioners in consideration of the payment of rent. The portion assigned did not include premises beyond the boundary of the pier or wharf, that is, beyond the interior enclosed by doors, which separate those premises from outside territory. The pier entrances face on a strip of pavement approximately 60 feet in width known as the bulkhead. When the piers or wharves are congested, this bulkhead is commonly used to facilitate the handling of incoming and outgoing cargoes. It is likewise used by trucks, drays, cabs and private vehicles of persons having business with the defendant company in approaching and leaving the piers. Stevedores, seamen, passengers and visitors are permitted to park on the bulkhead, which is also used by pedestrians. Adjoining the bulkhead to the west, and running parallel thereto, is the main thoroughfare or public street called the Embarcadero, which is about 200 feet in width and which takes care of the ordinary everyday commerce of the community. On the Embarcadero, also, are tracks for the operation of trains. Separating the bulkhead from the Embarcadero is a low curb except at spaces about 36 feet in width provided as entrances to the piers, at which places the Embarcadero and the bulkhead are practically on a level. It is by crossing the bulkhead at these points that access from the Embarcadero to the various piers is gained. A large number of special officers are employed by defendant company on the piers, part of their duties being to direct and control traffic on the bulkhead, keep the entrances to the piers free from interference, and generally to see that the movement of vehicles in this area proceeds smoothly. On occasions there is a double line of such unbroken traffic along the bulkhead for a half mile.

On the morning of the accident there does not seem to have been any great congestion of vehicular traffic. However, the bulkhead was crowded with stevedores on their way to work. Plaintiff arrived at the waterfront at about 7:45 A. M. in a taxicab. His time for commencing work was 8 A. M. The taxicab came to a stop on the bulkhead almost immediately in front of the entrance to pier 32, and plaintiff started to alight. He had one foot outside the taxicab when a car owned by defendant company, and being operated by another of its employees in the course and scope of his employment, backed into the taxicab, and plaintiff's foot was caught between the door of the cab and the door sill, and injured.

[1] It was stipulated that defendant company had qualified as a self-insurer of its employees under the terms of the workmen's compensation and safety act. The question involved, raised in the answer of defendant company, is whether the injury may be said to have occurred on the premises of the employer, thus bringing it within the class of injuries compensable exclusively under such act, or whether plaintiff has a cause of action in a civil suit against the employer. Subject only to exceptions not pertinent to the present appeal, the industrial accident commission has exclusive jurisdiction to determine the compensation benefits to employees injured in the course of their employment. The findings of the commission are, however, reviewable by the courts. Labor Code, § 3600, St.1937, p. 269; Alaska Packers' Ass'n v. Industrial Acc. Comm., 200 Cal. 579, 253 P. 926; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398; San Francisco S. Co. v. Pillsbury, 170 Cal. 321, 149 P. 586; Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, 60 P.2d 276; Scott v. Industrial Acc. Comm., 9 Cal.2d 315, 70 P.2d

940; Benguet Con. M. Co. v. Industrial Acc. Comm., 36 Cal.App.2d 158, 97 P.2d 267; McLain v. Llewellyn Iron Works, 56 Cal.App. 58, 204 P. 869; Burton v. Union Oil Co., 129 Cal.App. 438, 19 P.2d 9

[2, 3] This question of jurisdiction, the test of which is found in the nature of the action and the relief sought (Silverman v. Greenberg, 12 Cal.2d 252, 83 P.2d 293), is a matter that must be passed upon by the court. It has been suggested that in this case, depending as it does upon factual matters and not entirely upon allegations in the pleadings, the question of fact should have been submitted to the jury, and upon its finding thereon the court should have ruled accordingly.

The defense of lack of jurisdiction may not be determined by a jury; it is purely a legal matter. To submit to a jury facts tending to prove or disprove jurisdiction, would inevitably lead to a lack of uniformity of remedy. However, in this case there is no dispute as to the facts. In such case the question of jurisdiction is one of law for the sole determination of the court. In Re Application of Tassey, 81 Cal.App. 287, 290, 291, 253 P. 948, 949, the court said: "There is some confusion in discussing jurisdiction on account of the fact that there are cases in which the jurisdiction of the court depends upon the existence of certain facts. In that case the court has jurisdiction to determine those facts, even though the determination of those facts in a certain manner ousts it of further jurisdiction to proceed in the case." In Gill v. Sovereign Camp, W. O. W., 209 Mo.App. 63, 236 S.W. 1073, 1076, it was said: "It was proper for the court to refuse defendant's instruction No. 4, because it is for the court, and not the jury, to determine the question of jurisdiction." In Murphy v. Campbell Soup Co., D.C., 44 F.2d 214, 215, the court said: "Whether the necessary jurisdictional facts exist is a question which certainly ought to be triable by the court; and this is the practice in analogous matters. In the federal courts jurisdiction often depends on a particular state of facts being shown. * * * Such questions are uniformly determined by the court." Tomson v. Iowa State Traveling Men's Ass'n, 88 Neb. 399, 129 N.W. 529; State v. Coleman, 58 R. I. 6, 190 A. 791, 109 A.L.R. 787; Estate of Paulsen, 179 Cal. 528, 178 P. 143.

[4] In Dolese Bros. v. Tollett, 162 Okl. 158, 19 P.2d 570, appellant contended that the jurisdiction of the action was in the state industrial commission and not with the trial court. At page 571 of 19 P. 2d the court said: "A trial court is required to determine the legal question of whether or not it has jurisdiction of the subject-matter of an action presented to it for determination. * * * It is neither authorized nor required to submit to a jury the question of whether or not it has jurisdiction of the subject-matter of an action." The suggestion that the jury should have been permitted to pass upon the undisputed facts or to draw inferences therefrom—which would in effect have been a determination of the jurisdiction of the court—is untenable. When jurisdiction of a subject-matter depends upon a fact, it is the duty of the court to determine that fact upon the evidence pro or con.

We will now consider whether appellant was injured as the result of an accident arising out of and in the course of his employment by defendant company. Attention has been called to two outstanding California cases, Ocean Accident, etc., Co. v. Industrial Acc. Comm., 173 Cal. 313, 159 P. 1041, L.R.A.1917B, 336 and Judson Mfg. Co. v. Industrial Acc. Comm., 181 Cal. 300, 184 P. 1.

In the Ocean Accident Company case, the deceased employee was an engineer on a fishing tug. During a storm the tug had been moved from its usual docking position and placed temporarily alongside a schooner. In turn, the schooner lay next to a steamer moored to the dock. To go ashore from the tug it was necessary to pass over both vessels. The employee adopted this means of going ashore, and the accident occurred at about four o'clock in the morning while he was attempting to return to the tug by the same route. While he was on shore, however, the tug had been moved to its usual berth, of which fact the employee was unaware. He had already crossed the steamer and the schooner when he discovered that the tug had been moved, and, in retracing his steps in order to return to the wharf, he fell between the schooner and the steamer and was drowned. The commission's award of death benefits was reversed.

In the Judson case an employee proceeding from his home to a factory by

way of a path crossing a railroad right of way, which path constituted the sole means of ingress and egress to his place of employment, was struck and killed by an engine. The accident occurred within a reasonable time of his commencing work; that is, about five minutes before the employee was to start his regular shift; he was approaching by the usual path leading directly to the only entrance used by employees. An award by the commission was affirmed.

The employee in the Ocean Accident Company case was overdue in reporting for work. He did not investigate whether the tug was moored at its proper berth, but sought to reach it, where he evidently thought it was, by crossing the vessel and the schooner. In the parlance of the sea, he was "off his course". It was upon his return trip to the wharf after he had learned of the removal of the tug from the side of the schooner, that the employee fell between the vessels and was drowned. The court commented upon the fact that the employee knew the location of the tug's regular berth, and that, without special instructions, it was his duty to report there at the usual time.

The holding in the Ocean Accident Company case is in effect that until an employee is about to use an instrumentality specifically connected with his place of work, an accident befalling him does not arise out of and in the course of his employment. The fall between the schooner and the vessel was not directly related to the means of approach to the tug, such as a gangplank or ladder connecting the wharf with the vessel, nor was it a path or entrance constituting the only means of access to his place of employment. It was held that the employee must proceed "to use some instrumentality provided, by means of which he immediately places himself in a position to perform his tasks". [173 Cal. 313, 159 P. 1044, L.R.A.1917B, 336.] The decision uses this language: "* * * going to or returning from his work, and it matters not in this respect whether his journey takes him over public roads or private ways."

In the Judson case, decided three years later, referring to the Ocean Accident Company case, the court at page 303 of 181 Cal., at page 2 of 184 P. said: "In the case last cited we find a statement to the effect that all those accidental injuries which occur while the employe is going to or returning from his work are excluded from the benefits of the act. This sweeping dictum was not necessary to the decision of the case. The accident there considered occurred, it is true, while the deceased was attempting to reach his place of employment; but the mode of ingress which he undertook to use was not one provided and required by his employer, it was in no sense a part of the premises where his work was to be performed, and, finally, it was not in fact a mode of ingress to his work at all." The court also said: "The right to compensation is by no means restricted to those cases where the injury occurs while the employe is actually presently manipulating the tools of his calling. It would be unnecessary to the decision of this case to attempt to formulate a precise and comprehensive definition of the term 'service,' as used in the statute now under consideration. It seems to us, however, that when an employe has arrived at the premises of his employer, and is thereon for the purpose of immediately commencing his actual work, he is performing service incidental to his employment. The facts stated above show that as between the employer and his employes the path across the Southern Pacific Company's right of way was in fact a part of the employer's plant, and that at the time of his death Gallia was there solely in the line of his duty as an employe. It would be a harsh and indefensible rule that would withhold compensation from an employe engaged in traversing a dangerous pathway in his employer's building on his way to his own particular place of work therein, on the ground that he had not yet entered upon the real work of his employment. We can perceive no difference in principle between such a case and the case at bar." In the matter of the entrance to the place of employment, and in the time of arrival for duty, the facts of the Judson case are similar to those of the instant case.

In the Judson case, as in the instant one, the employee was outside the actual area of his place of work. In both, the employee was within reasonable distance of its actual and only place of ingress and egress. The only difference between the facts of that case and this is that in the former, the approach by the employee was along a so-called private path, while in the present, it was across or over a public way, which at various times

was predominantly used by the defendant company, and during such times was under the supervision of the company's private police. We use the term "private police" in accordance with the evidence, which shows that a special agent of defendant company commanded and directed "fourteen special officers" "on * * * and outside of the piers" in the "regula- on of traffic".

On the morning of the accident, automobiles were parked on the bulkhead to the north and south of the entrance to piers 30 and 32, and vehicles of persons having business on the wharf, as well as stevedores and other employees of defendant company, were in or near the driveway and upon the bulkhead awaiting admittance to the pier at 8 o'clock. The special agent stood at the entrance watching traffic on and off the wharf. He did not see the accident, but was at the scene thereof about ten seconds afterward and observed the position of the two automobiles. He at once took charge of the injured plaintiff directed his removal to the wharf to be put under the care of one of the defendant company's doctors, and investigated generally the circumstances of the accident.

[5] Unless the duties of employment require in their performance the use of a public road by an employee, an injury received by him thereon may not be said to have occurred in the course of or arising out of his employment. In coming to work, this rule applies, but it is not so harsh as to prohibit benefits to an employee who finds it necessary to cross public property used by the public but in fact "dominant as to user in the employer, servient to its purposes, and intimately associated with its plant as a part of its necessary establishment". Judson Mfg. Co. v. Industrial Acc. Comm., supra. It is true that the language just noted is taken from a case wherein the road was private; the property of a third party. What difference could there be between such a private road, and a public road over which an employer exercised dominion at the time of the accident? As an employee of defendant company, plaintiff herein had business on the driveway or runway. He was there to report for work through the only entrance provided for employees at that hour. The presence of vehicles and pedestrians near the entrance was a danger and a hazard created by defendant company. It was the rule of the company that ordinary delivery trucks and employees should await the hour of 8 o'clock before entering the wharf. It is true that the accident occurred before actual working hours, but it was necessary that appellant should await that hour. Whether he was standing on the bulkhead or seated in an automobile, or, as in this case, was partly within and partly without a taxicab, makes no difference in so far as the creation of the hazard by the defendant company is concerned.

[6, 7] In Jimeson v. Industrial Acc. Comm., 23 Cal.App.2d 634, 638, 639, 73 P.2d 1238, 1240, the court said: "* * * the rule is well settled that an employee, in going to work, comes under the protection of the act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are not wholly under the employer's control or management." This and similar cases must be decided upon the peculiar facts of each case. It is sufficient if a substantial causal connection be established between the employment and the injury to the employee, though it need not be the sole or proximate cause. Cudahy Packing Co. v. Parramore, 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 366, 30 A.L.R. 532. The test in this case is whether appellant, through the hazard created by defendant, was injured as any ordinary member of the public, or whether his injury was due to his employment by defendant company. If the latter, the Workmen's Compensation Act, St.1917, p. 831, is applicable. The facts of this case answer the question. Appellant's appearance on the bulkhead was due solely to his employment; he was obliged to be there. The time of his arrival would not necessarily indicate that his purpose was to loiter, or that he was there for pleasure. The injury was caused by a risk arising from the condition of the entrance to the place of his employment. In the Cudahy case, supra, 263 U.S. at page 424, 44 S.Ct. at page 154, 68 L.Ed. 366, 30 A.L.R. 532, the court said: "The fact that the accident happens upon a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by

reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree" The injury herein was not received as the result of an ordinary street risk of an employee on the way to work. The cause of the injury emanated immediately from the hazard of plaintiff's employment and not from some independent danger caused by a third party. Lumbermen's M. C. Co. v. Industrial Acc. Comm., 134 Cal.App. 131, 25 P.2d 22.

State ex rel. v. Clearwater Timber Co., 47 Idaho 295, 274 P. 802, 66 A.L.R. 1396, relied upon by appellant, is not in point. In that case the employer had no control over the means of travel, or of the public crossing whereon an employee was killed. The affirmance of the judgment in this case will not cause a conflict with the holding in McGrew v. Industrial Acc. Comm., 18 I.A.C. 137. In the McGrew case, the applicant for compensation slipped on a wet and slippery sidewalk in front of a public school. Applicant's employer had assumed some control over the sidewalk, but it was in the form of a prohibition against vending, smoking and advertising, which had nothing to do with the accident. In addition, the slippery sidewalk was not a hazard created by the employer. Neither will the case of Moore v. Sefton Mfg. Corporation, 82 Ind.App. 89, 144 N. E. 476, relative to an employee's injury during the noon hour on his way to a restaurant, be in conflict. The opinion in that case, page 477 of 144 N.E., sets forth the well recognized rule in the following language: "This is not a case where the employe was injured in going to or returning from his work upon the employer's premises, or on the only way available for that purpose, or where he was injured during an interval of leisure which occurred in the course of his employment." In Balboa A. P. Co. v. Industrial Acc. Comm., 35 Cal.App. 793, 171 P. 108, the employee was loitering on a street and assumed a risk common to all passing the crossing.

[8] If a portion of a public thoroughfare adjoining an employer's premises is necessarily used by an employee in reaching his work, and this portion is rendered hazardous by the carrying on of the business of the employer—here a traffic congestion on the bulkhead adjoining the defendant company's place of business caused by the arrival and congregation of numerous persons, passenger vehicles and merchandise trucks awaiting admittance to the piers—an injury suffered by the employee through that hazard may be properly characterized as one received within the zone of his employment, and arising out of and in the course of such employment. Industrial Commission of Ohio v. Barber, 117 Ohio St. 373, 159 N. E. 363; Cudahy Packing Co. v. Parramore, supra; De Constantin v. Public Service Commission, 75 W.Va. 32, 83 S. E. 88, L.R.A.1916A, 329; Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221, 72 L.Ed. 507, 66 A.L.R. 1402; Starr Piano Co. v. Industrial Acc. Comm., 181 Cal. 433, 184 P. 860; Pacific Elec. Ry. Co. v. Industrial Acc. Comm., 137 Cal.App. 245, 30 P.2d 444; Black v. Herman, 297 Pa. 230, 146 A. 550; LeBlanc v. The Ohio Oil Co., 7 La.App. 721; Globe Indemnity Co. v. Industrial Acc. Comm., 208 Cal. 715, 284 P. 661.

In this case the testimony is sufficient to warrant the directed verdict and the judgment entered.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.



42 Cal.App.2d 761

ANDERSON et al. v. STUMP.

Civ. 6297.

District Court of Appeal, Third District, California.

Feb. 6, 1941.

Hearing Denied April 5, 1941.

1. Trial ⇐165

A "motion for nonsuit" is in effect a "demurrer to the evidence" and court must assume that all evidence received in plaintiff's favor relevant to issues is true.

See Words and Phrases, Permanent Edition, for all other definitions of "Demurrer to the Evidence" and "Motion for Nonsuit".

2. Trial ⇐165

On motion for nonsuit, all presumptions, inferences, and doubtful questions must be

construed most favorably to plaintiff's case, and conflicting evidence must be disregarded.

3. Physicians and surgeons ⇐18(9)

Where defendant physician pursuant to statute was called as an adverse witness in malpractice action and his testimony was material on motion for nonsuit, plaintiff was entitled to the benefit of any favorable testimony given by physician irrespective of whether it involved expert testimony or that only of a layman. Code Civ.Proc. § 2055.

4. Physicians and surgeons ⇐18(9)

In malpractice action where it was alleged that physician in making vaginal examination of plaintiff failed to take proper precautions, as result of which plaintiff suffered severe streptococcic infection, whether glove used by physician in making a vaginal examination was sterilized, and whether physician wore a sterilized gown or made examination clothed only in street clothes, was for the jury, and granting of a nonsuit was error.

Appeal from Superior Court, Del Norte County; Albert F. Ross, Judge.

Action for malpractice by Sidney Anderson and others against Francis M. Stump. From a judgment of dismissal entered by the trial court after granting a motion for nonsuit, plaintiffs appeal.

Reversed and remanded.

T. F. Peterson, of Eureka, and H. L. Preston, of Ukiah, for appellants.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, and Paul A. Brunk, of Crescent City, for respondent.

MONCUR, Justice pro tem.

Plaintiffs have appealed from a judgment of dismissal entered by the trial court after granting a motion for nonsuit. Plaintiffs' complaint was in three counts, alleging negligence on the part of the defendant physician in his treatment of plaintiff Doris Anderson. The complaint sets forth the usual allegations as to the plaintiffs engaging the defendant to attend Mrs. Anderson; that she was pregnant and shortly to be delivered of a child; and that she placed herself under the care of the defendant in the Knapp Hospital in Crescent City.

In the first cause of action it is alleged in general terms that the defendant, through his carelessness and through his want of skill, caused her to suffer from a serious streptococcic infection, and that her mental suffering was aggravated by defendant's claim that she was suffering from a pre-existing gonorrhoeal infection.

In the second cause of action it was alleged that Mrs. Anderson was placed in an unsterile bed and her pelvic regions were not sterilized. The complaint alleged that when defendant arrived at the hospital, he made a vaginal examination of Mrs. Anderson, without proper or any precautions; that as a result she suffered a severe streptococcic infection, and that her condition was aggravated by defendant's false claim that she was suffering from a pre-existing gonorrhoeal infection.

In the third cause of action it is alleged that plaintiff wife placed herself entirely under defendant's care and direction; that the result stated above followed, and that the result was such as did not occur when a physician used proper care.

Defendant answered, admitting his professional capacity, and denying all of the other allegations of the complaint.

The trial was had before a jury, and at the conclusion of plaintiffs' case in chief, the trial court granted a nonsuit as to all three causes of action, upon the ground that no negligence proximately causing Mrs. Anderson's injuries was proven against the defendant.

The testimony adduced on behalf of plaintiffs tended to prove the situation as follows: In July, 1934, defendant attended Mrs. Anderson at the birth of her first child, a daughter, who was four and one-half years old at the time of trial. No untoward results were experienced in her accouchement at that time, except that she developed hemorrhoids, and was operated upon for that condition by defendant early in 1935. That she has always been in good health, and was a vigorous, athletic young woman. She consulted defendant on February 22, 1936, with regard to her pregnancy, and made arrangements with him to attend her at her confinement. Mrs. Mary Haskill, Mrs. Anderson's mother, came from her home in Camas, Washington, to stay with her daughter. During the period of about ten days immediately before her confinement, Mrs. Anderson was in close touch with defendant, and was examined by him on several occasions. That up to that time her condition was reported as satisfactory in all respects by defendant,

and he told Mrs. Haskill there was nothing to worry about. She went to the hospital about ten o'clock on the night of July 4, 1936, was undressed and put to bed, given a routine enema and the pubic hairs shaved. Defendant arrived some two hours later and made a vaginal examination with a gloved hand. He was wearing his street clothing. The bed linen was neither changed nor sterilized, and no other precautions were taken. Mrs. Anderson was not washed or scrubbed. She was taken to the delivery room immediately thereafter, and in about an hour and a half her baby was born, without untoward event.

On the evening of July seventh she became violently ill, and by nightfall was in a serious condition. Defendant gave her a foreign protein injection of serum, which raised her temperature, then caused a severe chill. In about a week an abscess on the right side of the pelvic region developed. She was treated for this condition at the hospital for nearly three weeks and then allowed to return to the apartment where she had been staying in Crescent City, and where she remained for ten days longer.

Later when she was ready to leave the apartment with the intention of going to Camas, Washington, she learned from her husband that the defendant contended she had been suffering from gonorrhoea. On going to defendant's office, and inquiring about the gonorrhoea infection, this conversation occurred:

"Q. What was the conversation you had with Dr. Stump? A. I asked him if gonorrhoea was the cause of my having this infection. He says 'Oh, just forget about it; you have not got it now and I would not want to break up your home'."

[1, 2] The foregoing is not a statement of all of the evidence. Under the well-established rule relative to the granting of nonsuits we have stated the evidence most favorable to plaintiffs and disregarded conflicting evidence, as it was the duty of the trial court to do. "A motion for a nonsuit is in effect a demurrer to the evidence, and the court must assume that all the evidence received in favor of the plaintiff relevant to the issues is true. All presumptions, inferences, and doubtful questions must be construed most favorably to the plaintiff's case. The rule is so well settled that it is not necessary to enlarge upon it." Richardes v. Richardes, 211 Cal. 392, at page 394, 295 P. 816, at page 817.

It is the contention of defendant that there was no testimony of experts establishing the proximate cause of the infection which resulted from any action upon the part of Dr. Stump in connection with the birth of the child. Appellant contends that under the authorities of this state such expert testimony, under the circumstances shown herein, was not necessary, or if it was, it was established through the testimony of Dr. Stump by plaintiff under section 2055 of the Code of Civil Procedure of this state.

Appellants cite in support of their contention the cases of Barham v. Widing, 210 Cal. 206, 291 P. 173, and Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905. The case of Barham v. Widing, supra, was an action for damages for malpractice, wherein the defendant, a dentist, was charged with negligence in extracting a tooth, and in the use of the hypodermic needle which was employed in that operation an infection of the jawbone resulted. In that case both the defendant dentist and his nurse testified they sterilized the hypodermic needle and the plaintiff's gum. Plaintiff stated he did not remember their doing so; the infection developed at the site of the injection.

In that case [210 Cal. 206, 291 P. 177], the Supreme Court quoted with approval the following statement of Mr. Justice Thompson in the original decision in the District Court of Appeal, Third Appellate District, 288 P. 716: "It was not necessary for any dentist or physician to state that the conduct of the defendant was negligent or in conflict with the usual established practice of the profession in that vicinity to administer a local anesthetic for the purpose of extracting a tooth without sterilizing the needle, or the flesh into which it is inserted. The court will take judicial knowledge of the necessity to use ordinary care to procure sterilization under such circumstances. This case was tried upon the theory that everyone concerned recognized this duty. We are, therefore, of the opinion that the evidence will support the judgment in this regard." Barham v. Widing, supra.

In the case of Inderbitzen v. Lane Hospital, supra [124 Cal.App. 462, 12 P.2d 747], it is said: "While it is the general rule that the propriety or impropriety of particular medical treatment can only be established by expert medical testimony, this rule is subject to the exception that, if the partic-

ular matter is one of general knowledge, expert evidence is not necessary." Also it is said in that case: "We will likewise take judicial knowledge of the danger of infection to a woman about to give birth to a child from a vaginal examination performed with unsterilized hands."

[3] Defendant was called by plaintiff, as we hereinbefore stated, under section 2055 of the Code of Civil Procedure. During the trial the question arose as to whether, upon a motion for nonsuit, plaintiffs were entitled to the benefit of everything favorable to them gained from examining defendant under that section. Having in mind the fact that Dr. Stump was a practicing physician and was engaged by Mrs. Anderson for the specific purposes of her confinement, it is obvious that he became a material witness in the case. Therefore, it appears clear that under the very circumstances of his employment plaintiffs would be entitled to the benefit of any favorable testimony given by him in the case irrespective of whether it involved expert testimony or that only of a layman. In the case of Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825, 826, it is said: "While evidence of the defendant under section 2055, Code of Civil Procedure, is not binding on the plaintiff, nevertheless it is evidence in the case, to be considered together with any other evidence in the light most favorable to plaintiff when the court is determining a motion for nonsuit."

Considered in the light of the decision in the Barham v. Widing case, supra, a portion of which we have hereinbefore quoted, the question as to whether, at the time the vaginal examination was made of Mrs. Anderson, the glove worn by Dr. Stump was or was not sterilized, is quite material, as is also that as to whether the doctor wore a sterilized gown or made the examination clothed only in his street clothes. The following is the defendant's testimony in that respect:

"Q. When you gave her this examination you spoke of, how did you proceed? A. I usually just take off my coat, scrub up my hands, put on a gown, ward gown—

"Q. I am not asking what you usually do, I am asking you what you did on this occasion? A. That is what I did on this occasion.

"Q. Tell us again: You scrubbed your hands, is that right? A. Scrubbed my hands, and removed my coat and vest—scrubbed my hands, slipped on a ward gown, they call it—and then scrubbed up and sterilized my hands.

"Q. You never had on gloves? A. Not before my hands were sterilized. I did at the examination.

"Q. Where did you get these gloves? A. The nurse gave them to me.

"Q. In the room where the lady was in or in the wash room? A. I am not positive about that. They give them to you occasionally in the room and occasionally in front of the room.

"Q. In front of the room? A. Yes.

"Q. What do you mean by that? A. The room is just across the hall from the scrub-up room. She sometimes meets you at the scrub-up room as you come out; sometimes at the door; and sometimes in the room.

"Q. Which one of those places did she give you the glove or gloves on this occasion? A. Well, I have no record of that and I can't say.

"Q. You have no record and no memory, is that right? A. I don't remember those things; it is three years—

"Q. I am asking you do you remember? A. I told you I don't remember.

"Q. Isn't it a fact you only had one glove on? A. That's all you put on.

"Q. All you put on? A. All we ever use at such a time.

"Q. What hand did you have the glove on? A. My right—I am right-handed.

"Q. Did you put the glove on your hand or did the nurse put it on? A. I usually put them on.

"Q. Is that the recognized practice in Del Norte county among physicians—that the doctor himself puts the gloves on? A. Yes.

"Q. That is the practice, is it? A. Yes.

"Q. Isn't it the practice that the nurse brings the gloves to the bedside, sterilized, and puts them on the doctor's hands? A. No, sir.

"Q. That never happens? A. It does at times.

"Q. If you don't know where you put the gloves on, how are you so positive she didn't put them on? A. The thing I do not remember—and I think probable—I was waiting for her, and while I was waiting I was getting ready—and I put them on myself in cases of that kind.

"Q. You put them on yourself? A. I frequently do.

"Q. Where did you get the gloves? A. They have a supply of them in the sterilized dressing room.

"Q. I am asking you where you got the gloves? A. I got it out of the supplies supplied by the hospital.

"Q. Are you positive of that? A. Positive.

"Q. You put it on before you came into the room? A. I may have; I would not say I did or not.

"Q. What is your best judgment on it? A. We do it either way.

"Q. In this particular case. It is three years ago as you say. Have you any better recollection as to whether inside or outside? A. I can't say; I might put it on outside or not.

"Q. Are you positive you put it on yourself? A. Yes.

"Q. Walked out of the sterilization room, or whatever you call it, into where this lady was? A. Yes.

"Q. Went through the door? A. Yes.

"Q. How did you open the door? A. Usually back in and push the door open.

"Q. Which did you do in this case? A. Backed in and pushed the door open.

"Q. Are you positive of that? A. Positive.

"Q. You are positive you backed in the door? A. Yes.

"Q. Where did you get the smock or gown you call it? A. Out of the hospital supply.

"Q. Same place you got the glove? A. Yes.

"Q. When did you put that on? A. Before scrubbing.

"Q. Before scrubbing? A. Yes.

"Q. When you came into the room did you have this smock and glove on—both on? A. Yes. * * *

"Q. Now, doctor, if you went into that room and examined that lady with your street clothes on and only one glove on, would that be the recognized practice in such cases in Del Norte County? A. No, sir. * * *

"Q. And where was this glove that you made this vaginal examination with—where did you sterilize that? A. They have this auto-clave. That is sterilized under steam pressure.

"Q. Did you see it sterilized? A. I know it was.

"Mr. Preston: I move that go out as not responsive to the question.

"Witness: No, I didn't watch them sterilize them; I know it was sterilized.

"Q. Did the nurse give it to you or did you get it from the place where it stays? A. I presume I got it.

"Q. You got it? A. I think I answered that before. * * *

"Mr. Preston: It is a fact, isn't it, that at this stage or condition of Mrs. Anderson, just before or after childbirth, she is much more susceptible to infection than otherwise? A. Yes.

"Q. Your answer is yes? A. Yes, sir.

"Q. Great care should be exercised at that time to prevent infection? A. Yes."

[4] The foregoing quoted testimony particularly considered in connection with the question as to whether the glove used was or was not sterilized, and with all of the other circumstances shown by the evidence and especially the circumstance that the infection developed within the vagina, the question as to whether the glove used was properly sterilized, or was sterilized at all, became one peculiarly within the province of the jury to determine, as did also that as to whether defendant wore a sterilized gown or his street clothes.

In support of the order granting the motion for nonsuit, defendant cites the cases of Ewing v. Goode, C.C., 78 F. 442; Louden v. Scott, 58 Mont. 645, 194 P. 488; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; McGraw v. Kerr, 23 Colo.App. 163, 128 P. 870, 873, these citations being cited particularly in connection with the contention that nowhere in the record is there any evidence that any act or omission of the doctor caused the streptococcic infection disclosed by the evidence. However, the contentions in this respect we deem completely answered in the cases of Barham v. Widing, supra, and Inderbitzen v. Lane Hospital, supra. A further discussion of said cases cited by respondent is not considered necessary for the purpose of this opinion.

The complaint, as stated, is in three counts, all relating to the same transaction or event, and the evidence applies to all three counts. We are of the opinion that the evidence, together with the reasonable inferences to be drawn therefrom, present-

ed a case for the determination of the jury. It is our conclusion that the motion for a nonsuit should have been denied upon all three counts of the complaint.

The judgment is therefore reversed, and the cause remanded for further proceedings.

We concur: THOMPSON, Acting P. J. TUTTLE, J.



HICKS v. OCEAN SHORE R. R., Inc., et al.*

Civ. 10883.

District Court of Appeal, First District, Division 2, California.

Feb. 6, 1941.

As Modified on Denial of Rehearing March 8, 1941.

Hearing Granted April 5, 1941.

1. Workmen's compensation ⇐2134

Under Workmen's Compensation Act providing that where employer fails to secure payment of compensation injured employee may bring action at law for damages, and that in such action it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and that burden of proof is upon employer to rebut presumption of negligence, statutory presumption is sufficient to support verdict for employee because that presumption is itself "evidence". St.1937, p. 271 et seq., §§ 3706–3709.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

2. Workmen's compensation ⇐2134, 2141

Under Workmen's Compensation Act provision that if an employer fails to secure payment of compensation injured employee may bring action for damages, and that in such action employer is presumed to be negligent, and that burden of proof is upon employer to rebut such presumption, statute in effect declares that such presumption is "substantial and satisfactory evidence" of fact in issue and, though it is permitted to rebut the presumption, this merely creates a conflict for the jury to determine and leaves no debatable question for the appellate court on appeal from judgment for employee. St. 1937, p. 271 et seq., §§ 3706–3709.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial and Satisfactory Evidence".

3. Evidence ⇐15, 23(1)

It is common knowledge that a person only 13 years of age is not permitted to enlist in the navy, and that a person only 16 years of age is not permitted to marry in California without his parents' consent.

4. Workmen's compensation ⇐2122

In action by employee for damages resulting from negligent injury against an employer who had failed to secure compensation, proof that since plaintiff's discharge from the navy he had used 11 different names and aliases and that he had sued under a name different from those which he used when he had enlisted in the navy, when he was married and when he had been employed, excused an earlier discovery of plaintiff's true age and showed proper diligence on part of defendants who moved for a new trial on ground of excessive damages resulting from plaintiff's misrepresentation of his age. St.1937, p. 271 et seq., §§ 3706–3709.

5. Trial ⇐114

When counsel for either party states as a fact a matter presumably within his knowledge, but not within the knowledge of his adversary, the latter may assume that the fact is correctly stated.

6. Stipulations ⇐7

Where counsel for plaintiff stated that plaintiff was 20 years of age at a certain time and procured a stipulation from opposing counsel to that effect, plaintiff who knew that he was older should in fairness to court and his own counsel have corrected the error and under the circumstances the stipulation was not binding upon opposing counsel. St.1937, p. 271 et seq., §§ 3706–3709.

7. Workmen's compensation ⇐2136

In action by employee for damages against employer who had failed to secure compensation, evidence showed that plaintiff throughout the trial misrepresented to the jury his earnings, his earning capacity, both before and after the injury, and the extent and nature of his injury, as well as a deliberate and continued endeavor to aggravate and exaggerate the injury. St.1937, p. 271 et seq., §§ 3706–3709; pp. 278, 283, §§ 4451, 4660.

* Subsequent opinion 117 P.2d 850.

8. Workmen's compensation ⇐2135

In action by injured employee against employer who had failed to secure compensation, where throughout the trial impression was given that defendants had deliberately refused to secure compensation in order that they might escape liability to any injured workman, exclusion of evidence to show that defendants had been covered by insurance until 4:00 p. m. of the day before the accident and had been assured by their broker that they would be fully covered by a new policy was error. St.1937, p. 271 et seq., §§ 3706–3709; pp. 278, 283, §§ 4451, 4660.

9. Evidence ⇐155(1)

When counsel states to the jury facts as facts presumably within his own knowledge and these facts are highly prejudicial to the other side, he cannot fairly object to proof that those facts are not true on the sole ground that such facts are not material.

10. Workmen's compensation ⇐2121

In action by injured employee against employer who had failed to secure compensation, verdict for $8,500, plus $1,700 as attorney's fees was required to be set aside as excessive and as resulting from prejudice of jury and willful and deliberate misrepresentations of material facts by plaintiff. St.1937, p. 271 et seq., §§ 3706–3709; pp. 278, 283, §§ 4451, 4660.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by James P. Hicks against the Ocean Shore Railroad, Incorporated, and others, for damages for injuries under special provisions of St. 1937, p. 271 et seq., §§ 3706–3709, providing for action by employee where employer has failed to secure compensation. From a judgment for plaintiff for $8,500, and $1,700 attorney's fees, the defendants appeal.

Judgment reversed, with directions for a new trial on the matter of damages alone.

Keyes & Erskine, Anthony S. Devoto, and A. P. Black, all of San Francisco, for appellants.

Gardiner Johnson, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for damages for injuries incurred during the course of his employment with defendants. Compensation for such injuries had been awarded and paid, but the suit was maintained under the special provisions of the Workmen's Compensation Act (later incorporated into sections 3706-3709 of the Labor Code, St. 1937, p. 271 et seq.), where the employer had failed to carry compensation insurance. The trial was by jury, which returned a verdict of $15,000. Upon a premature motion for a new trial the verdict was ordered reduced to $10,000. Upon a second and proper motion for a new trial the verdict was ordered reduced to $8,500, and, in addition thereto, the plaintiff was awarded $1,700 as attorney's fees. The appeal is taken from this judgment, and from the order denying defendants' motion for a new trial. It is presented on four volumes of typewritten transcripts of 2233 pages, with five volumes of printed briefs covering more than 3700 pages.

Plaintiff had been employed by the Adams Construction Company in the operation of a power shovel under a contract with defendants for operations leading to clearing away rock and dirt from the face of a tunnel on the railroad right of way which had been out of operation for many years. On June 24, 1936, the contract with the Adams Company was terminated, and on the following day the defendants took over the operations with the same equipment and employees. On June 30th the plaintiff was injured when his right hand became enmeshed in the unguarded gears of the shovel. The plaintiff gave different versions of how the accident occurred—first, that he left his seat in the front part of the machine, intending to go to the rear to look at the carburetor; second, that, as he had his head out one of the windows watching a rock slide, he was struck on the head by a falling rock, knocked unconscious, and then fell inside the cabin and regained consciousness when his hand struck the gears. Some 2,000 pages of the reporter's transcript is filled with testimony relating to the physical conditions of the territory in which the work was being done and particularly with the danger, known to both employer and employee, from slides due to the loose rock on the banks under which the work was being done. We do not state the facts of this phase of the case because, as will be seen, they are not material to the issues of this appeal. The plaintiff offered evidence that he was thirty-two years

of age at the time of the injury, was married and had a daughter fourteen years old at the time of the trial; that both wife and daughter were dependent upon him for support. He offered evidence of his physical injuries and of his earning capacity prior and subsequent to the accident. The defendants offered to prove that their failure to secure compensation insurance prior to the accident was not deliberate or wilful, but was an oversight. This offer was denied by the trial court. Upon the motion for a new trial the defendants offered evidence disclosing that the plaintiff had testified falsely as to his age, employment, and earnings. On this appeal he insists that his admitted perjury is beyond the cognizance of either the trial or the appellate courts.

The unusual character of the case is emphasized by these facts: The plaintiff appeared in the usual manner before the industrial accident commission and was awarded compensation for his injuries, all medical treatment, and hospitalization. This award called for a weekly payment to plaintiff of $27.50 during his disability, and he states that $2,114.50 had been paid by the defendants under this award, but, whether this was the amount paid at the time the complaint was filed, at the time of the trial, or when his brief was filed, he does not state. He does say that the award of the commission was "paid in full". In any event the award was made by the commission on the basis of the injuries suffered and upon the uniform standard for all such injuries. Then, because the defendants had failed to take out insurance, the plaintiff was permitted under the statute to sue for damages the same "as if this division (of the act) did not apply." By the terms of the act the "compensation" theretofore awarded and paid is to be deducted from the final judgment and the cause of action for damages is to be heard without regard to the provisions of the Labor Code. In the trial of the action special rules of pleading and practice are specified which are pertinent to the issues on this appeal.

Section 3706 of the Labor Code reads: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition, may bring an action at law against such employer for damages, as if this division did not apply." Section 3708 reads: "In such action it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant. * * *"

Section 3709 reads: "If, as a result of such action for damages, a judgment is obtained against the employer in excess of the compensation awarded under this division, the compensation awarded by the commission, if paid, or security is given for its payment and is approved by the court, shall be credited upon such judgment."

[1, 2] Plaintiff grounded his charge of negligence upon three specific acts—digging into the base of a high bank of material which had a known tendency to slip; failure to maintain lookouts to warn the operator of sliding or falling rocks; maintaining unguarded gears in the cab adjacent to the operator's seat. By the terms of the statute the defendants are presumed to have been negligent in all these particulars, as well as in any other which might support the verdict. With the burden upon defendants to rebut these presumptions it is apparent that there is no field for discussion of the evidence upon an appeal from the verdict. The only answer that can be made is that defendants were negligent because of the presumption. There is no question of reasonableness of the presumption, substantiality of the evidence offered, or fairness to the employer. He is presumed negligent, even though the injury was caused by the wilful and deliberate act of the employee contrary to all instructions of his employer and in the face of the utmost care on the part of the employer. We emphasize this feature because of the extended arguments of counsel on the issues of negligence, contributory negligence and assumption of risk. It is important also in relation to the insistence of the defendants that in many particulars the plaintiff testified falsely in relating the circumstances of the accident. All these questions are beyond the consideration of the court. All the testimony offered by plaintiff may be untrue, nevertheless, the presumption of

negligence is all that is necessary to support the verdict, because that presumption is itself evidence. And when the statute declares that an issuable fact shall be presumed, it in effect declares that such presumption is substantial and satisfactory evidence of the fact in issue, and, though it is permitted to rebut the presumption, this merely creates a conflict for the jury to determine and leaves no debatable question for the appellate court. To illustrate the point—plaintiff claimed negligence because defendants failed to provide a safe place for him to work since the embankment was composed of loose material given to frequent slides. Defendants countered that the embankment was not dangerous and that its condition was well known to the employee and was perfectly safe when proper care was exercised by the operator of the shovel. But assumption of risk and contributory negligence are both barred as defenses to such an action, and the negligence of the defendants is presumed. The plaintiff claimed that defendants were negligent in failing to maintain lookouts to warn him when rocks were falling His second explanation of the accident was that, while he had his head out of the window watching a slide of rocks, one hit him on the head, rendering him unconscious. Hence, though the asserted negligence in failing to maintain lookouts had no proximate relation to the accident, the defendants are, nevertheless, presumed to have been negligent. His third charge of negligence is the failure to cover or guard the gears under the floor of the cab. Defendants countered with proof that the gears and the cab were maintained in the usual and approved manner, and that plaintiff had been warned specifically always to turn off the motor before leaving his seat in the cab. But contributory negligence is not a defense in such an action, hence the presumption of negligence still holds.

For the reasons given it would serve no purpose to analyze the mass of testimony offered by both parties on these various issues, or to discuss the attacks made upon the veracity of the plaintiff in his descriptions of the circumstances of the accident. And it would serve no useful purpose to discuss those cases where the reverse of this situation appears—where the verdict of the jury is against the presumption, and the question arises whether the evidence offered to rebut the presumption is sufficient and substantial. It is sufficient here that, under the express terms of the statute, the defendants are presumed to have been negligent, and that such presumption is sufficient to support the verdict as to this liability.

[3,4] The serious question relates to the amount of the verdict. The defendants assert that it is excessive and that the excess was procured by the false testimony and prejudicial misconduct of the plaintiff. The facts bearing upon this phase of the case are these: Plaintiff alleged in his complaint that he was thirty-three years of age and testified that he had a wife and a fourteen-year-old daughter dependent upon him for support. When defendants questioned him as to when and where he was born the trial court sustained his objections to the inquiry. Mortality tables were given the jury showing the life expectancy of the plaintiff; evidence was offered showing that he could have done the same class of work in which he was engaged until he reached the age of fifty, and throughout the trial emphasis was given to his loss of earning power because of having been deprived of the ability to carry on such work for the period of seventeen years. On further detail of his loss of earning power the plaintiff testified that he had sought employment with the Associated Oil Company after the accident and had been refused because of his injured hand. In all of these instances the plaintiff was shown to have testified falsely when the true facts were discovered and presented to the court upon defendants' motion for a new trial. If plaintiff were thirty-three as he testified during the trial which was held in 1937 he would have been born in the year 1904. In the year 1917 he enlisted in the United States Navy under the name Prescott John Hicks. He would then have been but thirteen years of age. He was dishonorably discharged from the navy and was married in 1920 in the city of Fresno under the name of Jack P. Hicks, giving his age at that time as twenty-two years. If he had been born in 1904, as his testimony at the trial disclosed, he would have been but sixteen at the time of his marriage in 1920. It is a matter of common knowledge that he would not have been permitted to enlist in the navy at the age of thirteen, and would not have been permitted to marry in this state at the age of sixteen without his parents' consent. He may have misrepresented his age in both instances, but in this case he

does not say so. He makes no denial of any of this evidence, insists that the court should disregard it though true in every detail, and argues that the affidavits showing these matters were technically insufficient because the affidavits did not affirmatively state that defendants had used due diligence in an endeavor to discover the evidence prior to the trial. The defendants showed that, since plaintiff's discharge from the navy, he had used eleven different names and aliases, and that he had sued under a name different from those which he used when he had enlisted in the navy, when he was married, and when he had been employed by the Associated Oil Company. These facts alone excused an earlier discovery and showed proper diligence on the part of the defendants. It was not necessary to repeat them in each of the affidavits filed. The defendants refer to numerous passages in the record where the age of the plaintiff and his prospect of earning eight dollars a day for seventeen years were impressed upon the jury. The instructions which directed the jury to take these factors into consideration leave no doubt as to the prejudice arising, and this alone may account for the excessive verdict.

[5, 6] We are not impressed with the argument of plaintiff that the defendants are bound by their stipulation as to plaintiff's age. The circumstances upon which this claim is based are not unusual. Counsel for defendants was examining the plaintiff as to his employment and earning capacity prior to the accident when the following colloquy occurred:

"Q. So, from July, 1924, until you went to work for Adams in September, 1935, you were in the employ either as the operator of a gasoline station or as a truck salesman for the Associated Oil Company, weren't you? A. Yes.

"Q. Now, you received as a salary, as Class C operator, when you were first employed in the Associated Oil Company, of $130, didn't you, approximately? A. I don't know.

"Mr. Johnson: Before counsel asks any such questions, inasmuch as he is doing the testifying now and not the witness, I think it would be fair for him to tell us the dates.

"The Court: Yes, I think so.

"Mr. Erskine: All right, I will say the date from July 10, 1924, until—

"Mr. Johnson: Some thirteen years ago, since the man was twenty years old.

"Mr. Erskine: That was on July 10, 1924—

"Mr. Johnson: Will you stipulate he was twenty years old—

"Mr. Erskine: All right, we will stipulate he was twenty years old."

When counsel for either party states as a fact a matter presumably within his knowledge, but not within the knowledge of his adversary, the latter may assume that the fact is correctly stated. In this instance it was the duty of plaintiff, in fairness to the court and his own counsel, to correct the error.

[7] The defendants assign as prejudicial and leading to the excessive verdict the frequent references to plaintiff's employment as a shovel operator at a daily wage of eight dollars. The jury was told that he had an actual annual income of $2,500, based on an uninterrupted employment for 312 days of the year. The only credible evidence was that his employment for many years was that of a truck driver at four dollars a day, and that he had been employed at the higher wage by a member of his family for a few weeks prior to the accident. The evidence discloses that throughout the trial the plaintiff misrepresented to the jury his earnings, his earning capacity, both before and after the injury, and the extent and nature of his injury. It also discloses a deliberate and continued endeavor to aggravate and exaggerate the injury.

[8, 9] Defendants argue that they suffered serious prejudice in the minds of the jurors in the ruling of the trial court denying them the privilege of meeting the charge that their failure to carry compensation insurance was deliberate and wilful. In the opening statement to the jury, and throughout the trial, plaintiff endeavored to prejudice the minds of the jury by references to the operations of the railroad company designed to escape liability "so that any workman or anyone else who might be injured would never be able to collect", and that this was done with full knowledge of the defendants that they were not insured. To offset the prejudice thus created the defendants attempted to prove that they were covered by insurance until 4:00 p.m. of the day before the accident and had been assured by their broker that

they would be fully covered by a new policy. In sustaining the plaintiff's objection the trial court erred. Of course, the evidence was not admissible as an excuse for non-insurance, or as a bar to the action. The statute permits the action whenever an employer "fails to secure the payment of compensation". It does not require that such failure shall be wilful or deliberate, or designed to prevent recovery by an employee. But, being a penalty, intention is an essential element. And when the jury is asked to supplement the damages for personal injuries by a verdict in the nature of a penalty for wilful and deliberate misconduct—a verdict for punitive damages so to speak—the intention and good faith of the defendants become material. To the precise point presented here the answer is that, when counsel states to the jury facts as facts presumably within his own knowledge, and these facts are highly prejudicial to the other side, he cannot fairly object to proof that those facts are not true on the sole ground that such facts are not material to the case.

[10] From our review of the voluminous record the conclusion follows that the verdict is excessive and that it resulted both from the prejudice of the jury as hereinbefore indicated, and by the wilful and deliberate misrepresentations of material facts by the plaintiff. We are not unmindful of the cases cited by plaintiff, holding that the question of false swearing is one for the jury alone. We do not need to approve or disapprove the reasoning of those cases. The ruling here needs no authority to support it. When a party deliberately and wilfully misrepresents material facts, and such misrepresentations result in an excessive verdict in his favor, and, when confronted by the truth, he does not deny, a court would be impotent if it should agree with him that no remedy could be found.

For the reasons given, a new trial should not be had on the question of defendants' liability for damages. The new trial should be confined to the question of damages alone. Each party should bear its own costs of this appeal.

The judgment is reversed with directions for a new trial on the matter of damages alone.

I concur: STURTEVANT, J.

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17 Cal.2d 375

ANDERSON v. STATE BAR.

L. A. 17689.

Supreme Court of California.

Feb. 17, 1941.

1. Attorney and client ⇐58

Suspension from practice of law for one year was proper punishment for attorney who retained and used clients' funds, and was not unreasonable because of extenuating circumstances, comprising illness of attorney's mother and straitened financial circumstances of attorney and repayment of money with interest. St.1939, p. 357, § 6101.

2. Attorney and client ⇐44(2)

Attorney's conversion of client's money to his own use is a serious charge, which ordinarily would merit disbarment. St.1939, p. 357, § 6101.

CARTER and HOUSER, JJ., dissenting.

Disciplinary proceedings in the matter of Stuart D. Anderson, an attorney, wherein the State Bar recommended that attorney be suspended from the practice of law for one year.

Order in accordance with recommendation.

Fred O. Reed, of Los Angeles, for petitioner.

Claude Minard, of San Francisco, for respondent.

PER CURIAM.

Petitioner herein seeks a statutory "review" by this court of a disciplinary proceeding which was instituted against him as a practicing attorney at law in this state, and which resulted in a recommendation by the State Bar to this court to the effect that petitioner be suspended from the practice of the law for a period of one year. More particularly, the sole question that is presented herein relates to whether the said recommendation should be approved; or, in the event of its rejection,—by order of this court,— to what discipline petitioner should be subjected. The facts are not the subject of dispute by the interested parties. In substance and effect they are as follows:

Petitioner, who was admitted to practice in California in August, 1923, and who has practiced continuously since that date in the city of Los Angeles, was employed on July 26, 1934, by Jennie Coburn, Lois Coburn and Roy Coburn as their attorney in a condemnation action. He was paid the sum of $100 and, additionally, as compensation for his services he was to receive 25 per cent of any sum in excess of $908 which might be collected for his clients in the said condemnation proceedings. On December 11, 1936, he received a warrant from the county of Los Angeles in the sum of $908 and a warrant from the city of Long Beach in the sum of $204, in settlement of his clients' interest in the action. At about the time petitioner received the said warrants, his mother was taken seriously ill and required extensive medical care and treatment. Petitioner was without cash resources of his own with which to meet the entire cost of such treatment, and he thereupon cashed the warrants received on behalf of his clients and used the money to procure necessary medical care and attention for his mother. At that time petitioner was enjoying a good law practice and he expected to be able to replace the money so used by him. However, he did not notify his clients that he had received the warrants.

In February, 1940, Jennie Coburn learned of the fact that the said warrants previously had been delivered to petitioner and thereupon demanded payment from him. Shortly before that time, petitioner had been injured in an automobile accident, and on her demand that he pay her the money he explained that he could not make immediate restitution, but that he would make repayment of the entire sum, with interest, over a period of time. Un-

willing to accept that arrangement, Jennie Coburn filed a complaint in that connection with the State Bar, and thereafter that body instituted the instant proceedings against petitioner. A short time later he borrowed sufficient money and repaid his clients the total amount of the said warrants, together with seven per cent interest thereon,— and making no deduction for the percentage on the $204 to which, as hereinbefore stated, he was entitled as attorney's fee.

At the hearing before the local administrative committee, petitioner frankly admitted his misconduct and expressed his regret at its occurrence. The said committee recommended a private reprimand; but by the board of governors of the State Bar it was recommended to this court that petitioner be suspended from the practice of law for a period of one year.

Notwithstanding the fact that petitioner does not dispute the facts disclosed by the record, but admits the truth of the very serious charge which was filed against him,—misappropriation of his clients' funds,—he seeks a review by this court upon the ground that the said recommendation of the board of governors is arbitrary and unreasonable.

[1] In support of that contention petitioner cites five cases, in each of which was involved a proceeding of a nature similar to that here under consideration, and wherein this court ordered a reduction of the degree of discipline which in each instance had been recommended by the board of governors of the State Bar: Mills v. State Bar, 211 Cal. 579, 296 P. 280, 297 P. 19; Herron v. State Bar, 212 Cal. 196, 298 P. 474; Peck v. State Bar, 217 Cal. 47, 17 P.2d 112; Egan v. State Bar, 10 Cal.2d 458, 75 P.2d 67 and Barbee v. State Bar, 213 Cal. 296, 2 P.2d 353. However, in each of the first four of the cited cases the discipline which was imposed by this court was the suspension of the petitioner from practice of the law for one year,—which is the identical measure of discipline recommended in the instant case by the board of governors. In other words, in the present proceeding the board of governors merely recommended the same discipline which this court had imposed in other proceedings for similar offenses. We are satisfied that in making the recommendation which was made herein the said board was mindful of the extenuating circumstances of the illness of petitioner's mother and of his straitened financial circumstances at that time, and that because of those factors it refrained from recommending the disbarment of petitioner.

[2] The charge which was made against petitioner—that of converting his clients' money to his own use—is a very serious one and ordinarily would merit the drastic measure of disbarment. Mills v. State Bar, 211 Cal. 579, 296 P. 280, 297 P. 19; Brown v. State Bar, 2 Cal.2d 533, 42 P.2d 306; Dalzell v. State Bar, 6 Cal.2d 433, 57 P.2d 1300; Padgham v. State Bar, 6 Cal.2d 504, 58 P.2d 633; Laney v. State Bar, 7 Cal.2d 419, 60 P.2d 845; Maggart v. State Bar, 7 Cal.2d 495, 61 P.2d 451; Glover v. State Bar, 13 Cal.2d 229, 89 P.2d 922 and Kennedy v. State Bar, 13 Cal.2d 236, 88 P.2d 920. Petitioner might legally have been charged with embezzlement and, in such event, admittedly having converted his clients' money to his own use, it is unlikely that he would have escaped conviction; and had he been convicted, under the provisions of section 6101 of the State Bar Act, St.1939, p. 357, he automatically and necessarily would have been subject to disbarment.

The good record previously held by petitioner together with the fact that he repaid, with interest, the entire sum due his clients, and the assumed fact that the pressure occasioned by his mother's illness was considerable, all justified the conclusion of the board of governors that —commensurate with the gravity of the admitted misconduct of petitioner—in determining the discipline to be imposed it should be as lenient as the circumstances would permit.

This court is satisfied that the recommendation which was made by the board of governors of the State Bar was proper. It therefore is ordered that petitioner be suspended from the practice of the law for one year commencing with the date of filing this decision.

CARTER, Justice (dissenting).

I dissent.

It is well established that in determining the question of what discipline should be imposed upon an erring or offending attorney, mitigating circumstances should be given great consideration,—such as the motives and purposes which actuated his asserted misconduct, his previous good

record, his characteristics and nature, also testimonials with respect to his good character and reputation. Marsh v. State Bar, 2 Cal.2d 75, cases cited at page 79, 39 P.2d 403. It also is well settled that the discipline of an attorney, as contemplated by the provisions of the State Bar Act, is not punitive in character. Its primary object is the reformation rather than the punishment of the offender. A disciplinary proceeding is designed to effect that end and —for the protection of the courts, the legal profession and the public—to consider and determine whether the said offender may be deemed fit to continue as a practitioner of the law and as an officer of the court. Marsh v. State Bar, supra, and cases there cited.

Although in the present case the gravity of petitioner's offense cannot be minimized, it also appears that he has suffered greatly. The tarnishment of his record, the mental torture which must have followed from his inability to re-establish his practice while laboring under the burden of his practiced deceit, his anxiety for his mother, and his own physical injuries, together with the added stigma of the disciplinary proceeding, have apparently combined to drive him to the acute realization that no circumstance, however necessitous, will justify an act of dishonesty or breach of trust. If—as is believed to be the fact—his lesson has been sufficiently severe to effect a permanent strengthening of his moral fiber, the imposition of a period of suspension from practice would serve no good purpose and might jeopardize his present and future livelihood as well as the safety of the one dependent upon him.

It would seem clear that the punishment which petitioner has already received, with the additional rebuke of a public reprimand, will suffice to deter him henceforth from yielding to any temptation, even under pressure of dire distress, again to wander from the path of moral rectitude.

In determining the degree of discipline which should be administered or prescribed in proceedings of this character, this court may be guided by the peculiar facts and circumstances of the individual case. Under such circumstances,—viewed in the light of the primary purpose to be effected by such discipline, as hereinbefore outlined,—it becomes unnecessary to discuss the question whether the degree of discipline here fixed conforms to that imposed in cases cited in the briefs as similar in point of fact to this case.

In my opinion, a public reprimand administered to petitioner should constitute sufficient discipline.

I concur: HOUSER, J.



17 Cal.2d 332

FORBES v. BOARD OF MISSIONS OF METHODIST EPISCOPAL CHURCH, SOUTH et al.

L. A. 16488.

Supreme Court of California.

Feb. 17, 1941.

Rehearing Denied March 17, 1941.

1. Husband and wife ⇐14(3)

Where husband and wife conveyed realty owned in joint tenancy to church mission board, reserving a life estate to themselves or the survivor, and at same time an agreement was executed wherein mission board agreed to educate a relative of grantors for the ministry should grantors die before his education was completed, deed to mission board was not a strict "deed of gift" but was a conveyance to the board in part, at least, in "consideration" of board's agreement to supervise and, under certain contingencies to finance education of grantor's relative, and grantors received some benefit from grant and their promise was, therefore, presumed to be a "joint and several obligation". Civ.Code, § 1659.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration", "Deed of Gift" and "Joint and Several Obligation".

2. Husband and wife ⇐14(3)

In absence of evidence that offer by husband and wife to convey property owned in joint tenancy to church mission board, in part consideration for board's agreement to supervise education of relative if grantors should die before relative's education was completed, was a joint offer, presumption was that it was "joint and several". Civ. Code, § 1659.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint and Several".

3. Husband and wife ⇐14(3)

Even if offer of husband and wife to convey realty owned by them in joint tenancy to church mission board, partly as a gift and partly for a "consideration" from which they derived a benefit, was a joint offer, the death of husband before offer was accepted by board did not release wife in whom, on husband's death, title to the whole property became vested. Civ.Code, § 1543.

4. Husband and wife ⇐14(3)

Where husband and wife offered to convey realty owned in joint tenancy to church mission board, reserving life estate to themselves or the survivor, and also executed an agreement wherein board agreed to educate a relative of grantors for the ministry if grantors should die before his education was completed, evidence *held* insufficient to sustain finding that offer was contingent on its acceptance and execution of proposed agreement by board before death of either husband or wife.

5. Appeal and error ⇐1008(1)

The question as to what was a reasonable time for church mission board to accept offer of husband and wife to convey jointly owned realty to board, partly for certain consideration and partly as gift, was a question of fact to be determined by trial court.

6. Husband and wife ⇐14(3)

Where husband and wife who conveyed realty owned in joint tenancy to church mission board reserving a life estate to themselves or survivor, and at same time executed an agreement requiring board to educate their young relative for the ministry should they die before his education was completed, *held* that even if agreement was required to be accepted by board within reasonable time so that wife, after husband's death could have declined to accept the agreement because of delay, where wife made no objection to the delay, received the agreement, and gave her written receipt therefor, she thereby "waived" any right to complain of the delay.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

7. Husband and wife ⇐14(3)

In action to set aside a grant deed, evidence *held* not to support finding that wife who could not speak English and who was one of two grantors of property owned in joint tenancy conveyed to church mission board was ignorant of, and was misled and deceived as to, her rights after husband's death and, therefore, was not barred or "estopped" by laches, limitations or otherwise, from seeking to obtain cancellation of conveyance.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

8. Husband and wife ⇐14(3)

In action to set aside grant deed and to quiet title to land conveyed by husband and wife and owned in joint tenancy to church mission board reserving life estate to themselves, finding that wife, who could not speak English, was prevented, after husband's death, from consulting other persons in regard to her rights under the agreement, was not sustained by evidence.

9. Husband and wife ⇐14(3)

In suit to set aside deed of property, jointly owned by grantors, to church mission board reserving a life estate to grantors or the survivor, evidence *held* to establish that wife, who survived husband and who did not speak English and understood it very little, thoroughly understood the purpose and effect of the deed and assented to the transaction with full knowledge.

10. Husband and wife ⇐14(3)

Where wife, who could not speak English and could not readily understand it, with full knowledge of what she was doing joined husband in executing deed conveying jointly owned realty to church mission board, reserving a life estate to grantors or to the survivor, and also executed agreement requiring board to educate a young relative for the ministry should they die before his education was completed, wife had no legal right to complain of the conveyance to the board or to ask that it be returned to her after husband's death. Civ.Code, § 1659.

11. Husband and wife ⇐14(3)

Where husband and wife conveyed realty owned in joint tenancy to church mission board, reserving a life estate to themselves or to the survivor, and at same time an agreement was executed which provided that if it became necessary for grantors to sell the property or any portion thereof for purpose of purchasing necessaries of life, board would execute quitclaim deed conveying property so sold to purchaser, there was no obligation on board, even if a purchaser had been found and a demand had been made by wife after husband's death, to execute a quitclaim deed to purchaser or to give the

property back, in absence of evidence that wife was in need of necessaries of life.

12. Husband and wife ⇐14(3)

Where husband and wife conveyed realty owned in joint tenancy to church mission board, reserving life estate, and at same time an agreement was executed requiring board to educate their relative for the ministry should they die before his education was completed, and providing that if it should become necessary for grantors to sell the property or any portion thereof for purpose of purchasing necessaries of life, board would execute quitclaim deed to purchaser, the fact that after husband's death wife became ill in hospital and that relative gave up his education toward ministry, did not justify a demand for a reconveyance.

13. Husband and wife ⇐14(3)

An agreement executed by husband and wife, who conveyed jointly owned realty to church mission board, reserving a life estate to themselves or the survivor, requiring board to educate grantors' relative for ministry if they should die before his education was completed, could not be set aside in action by wife's executor on ground of fraud, undue influence, or on any theory of haste as a deathbed transaction, where, though husband died less than two months after its execution, the agreement was a consummation of a desire first expressed by husband over two years before and frequently repeated, and was the result of long negotiations.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Charles Forbes, as executor of the will of Erolinda Moreno Zapata, deceased, against the Board of Missions of the Methodist Episcopal Church, South, and another, to set aside a grant deed, to quiet title to realty, and for an accounting. Judgment for plaintiff and defendants appeal.

Reversed.

For prior opinion see 104 P.2d 111.

Newby & Newby and Dee Holder, all of Los Angeles, for appellants.

Bachtell & Clanton, Constance Leitch, S. N. Bachtell, and Caryl Warner, all of Los Angeles, for respondent.

CURTIS, Justice.

This action is one to set aside a grant deed, to quiet title to the real property described therein, and for an accounting of the rents, issues and profits derived from said real property during the time the defendants were in the possession thereof.

The deed was executed by Apolonio Bailon Zapata and Erolinda Moreno Zapata, husband and wife, as grantors in favor of the Board of Missions of the Methodist Episcopal Church, South, and bore date April 23, 1932. The grantors were members of the Homer Toberman Mission in Los Angeles, a religious organization under the jurisdiction of the Methodist Episcopal Church, South. They were much interested in the work of the local church. Mr. Zapata had been for several years president of the board of stewards, the local governing board of said church. Both Mr. and Mrs. Zapata were of Spanish descent. Mr. Zapata spoke and wrote English and followed the profession of teacher of Spanish. Mrs. Zapata did not speak English and understood the language only to a very limited extent. They had no children, and no relatives in whom they were particularly interested.

They were the owners as joint tenants of two pieces of improved real property in Los Angeles, which brought them in a substantial income. Some two years prior to the execution of said deed Mr. Zapata had spoken to Mr. Rameriz, the pastor of the local church, and stated that he and his wife had been thinking for some time about turning their property over to the church when they died. Mr. Rameriz told Mr. Zapata that he knew nothing about such matters, but would speak to Mr. Reynolds, the presiding elder of the church, concerning the matter. He mentioned to Mr. Reynolds the conversation he had with Mr. Zapata, but nothing was done in regard to the matter for some considerable time, when Mr. Zapata again spoke to Mr. Rameriz and inquired if he had done anything about having the property conveyed to the church. Mr. Rameriz replied that he had spoken to Mr. Reynolds and that was all he could do. Mr. Zapata then saw Mr. Reynolds and they had several conversations, in which Mr. Zapata said that he desired his wife to be the beneficiary of his property and to have all income therefrom during her lifetime, and that upon her death he wanted the church, the Board of Missions, to have the property. He said they desired to make a deed to that effect and asked Mr. Reynolds to secure an attorney to draw the necessary papers. As a result of this conversation Mr. Nathan Newby

was consulted and engaged to prepare the legal papers required for the transfer of the property.

Prior to this time Mr. Zapata had frequently talked with Mr. Fitzgerald, a former pastor of the local church, in regard to conveying the property to the church, but Mr. Fitzgerald had said nothing about the matter to anyone. Mr. Fitzgerald had been a former pastor of the Homer Toberman Mission and an old acquaintance of both Mr. and Mrs. Zapata, but had retired from the pastorate in 1920, and since that time had no official connection either with the local church or the Board of Missions.

Mr. Zapata was greatly interested in a young boy who was then residing in his family by the name of Antonio Alberto Zapata. Mr. and Mrs. Zapata desired to assist in his education, provided he decided to study for the ministry, and to provide means for his education out of the proceeds of their property in case he had not finished his education before the death of both Mr. and Mrs. Zapata.

From the information furnished him by Mr. Zapata and Mr. Reynolds, Mr. Newby prepared three documents for the purpose of carrying out the wishes of Mr. and Mrs. Zapata to transfer their property to the Board of Missions. These documents were a grant deed, an agreement and a letter to Mr. Fitzgerald. The grant deed was to be executed by Mr. and Mrs. Zapata in favor of the Board of Missions, by which they conveyed their property to said board, reserving to themselves and to the survivor a life estate in said real property and the rents, issues and profits thereof. The agreement was between the Zapatas and the Board of Missions, whereby the latter agreed to supervise the education of Antonio Alberto Zapata, provided his education was not finished before the death of the survivor of Mr. and Mrs. Zapata, if he should desire to become a minister, and to devote one-half of the proceeds of the property conveyed to the board for the education of said Antonio Alberto Zapata. The letter to Mr. Fitzgerald was signed by Mr. and Mrs. Zapata, and directed him to hold the grant deed until the agreement was properly executed by the Board of Missions, and then to deliver the agreement to the Zapatas and file the deed for recording. The Board of Missions was a corporation organized and having its principal place of business at Nashville, Tennessee, and it was necessary to send the agreement to the board at Nashville, Tennessee, for its execution by said board.

After these papers were drawn, they were taken to the Zapata home on April 23, 1932, by Mr. Newby. Accompanying Mr. Newby were Mr. Reynolds, Mr. Fitzgerald and Mr. Dee Holder, the latter a notary public. Mr. Fitzgerald, who understood and spoke Spanish, read the papers and interpreted them from English to Spanish for Mrs. Zapata's benefit. Mrs. Zapata asked that a change be made in the agreement, so that it would provide that in case it should ever be necessary to sell the property, or any portion of it, for the purpose of purchasing necessaries of life for herself, the Board of Missions would join in a quitclaim deed to the purchaser. Due to this change in the agreement the papers were not signed on that date, but were returned to the office of the attorney. There the addition to the agreement asked for by Mrs. Zapata (being subdivision [4] hereinafter set out) was made, and on May 14, 1932, three weeks after the first visit, the papers were again taken to the Zapatas and submitted to Mr. and Mrs. Zapata. There were present at this meeting besides Mr. and Mrs. Zapata, Mr. Reynolds, Mr. Fitzgerald and Mr. E. B. Hughes, a notary public. The papers were again read to Mr. and Mrs. Zapata, translated by Mr. Fitzgerald as before, and were signed and executed, and the deed and agreement acknowledged before the notary by Mr. and Mrs. Zapata. They were then delivered to Mr. Fitzgerald, who, in accordance with said letter of instructions, was to hold the deed and send the agreement to the Board of Missions. On July 7, 1932, Mr. Zapata died. On December 8, 1932, the Board of Missions executed and acknowledged the agreement, and it was returned to Mr. Fitzgerald, who delivered it to Mrs. Zapata on January 3, 1933, the deed having been recorded on December 31, 1932. On November 14, 1935, Mrs. Zapata died and this action was instituted a short time thereafter by the executor of her last will and testament. The trial court made findings and rendered judgment in favor of the plaintiff, and the defendants, the Board of Missions and J. H. Fitzgerald, have appealed.

In support of the judgment it is first contended by the respondent that Mr. and Mrs. Zapata made a joint offer or proposal, which was intended to be accepted, if at all, during their joint lives, and that as the offer was not accepted until after the death of Mr. Za-

pata, the acceptance was ineffectual for any purpose.

[1] The deed executed by the Zapatas in favor of the Board of Missions was not a strict deed of gift, but on the other hand it was a conveyance to the board in part at least in consideration of the board's agreement to supervise and, under certain contingencies, to finance the education for the ministry of the youth Antonio. The agreement of May 14, 1932, after reciting the fact that the Zapatas had conveyed the real property to the Board of Missions, continues:

"Whereas, the parties of the second part (the Zapatas) desire that Antonio Alberto Zapata (born July 19, 1925, and a relative of the grantors) should be properly educated for the ministry in the event he is called, and when he arrives at the age of discretion desires to prepare himself for said calling; and

"Whereas, the parties of the second part desire the party of the first part (the Board of Missions) to supervise said education in the event they should die before said education shall have been completed,

"Now Therefore, It Is Agreed by and between the parties, as follows:

"(1) That during the life of the parties of the second part, or the survivor of them, the entire obligation for the education of said Antonio Alberto Zapata shall rest upon the parties of the second part, exclusively.

"(2) In the event the parties of the second part should die before the education of the said Antonio Alberto Zapata shall have been completed, the party of the first part agrees to supervise the ministerial education of the said Antonio Alberto Zapata, if he should desire to become a minister, and will expend at least fifty per cent of the net income derived from the property herein described and this day conveyed to the party of the first part, but shall not be compelled to expend upon the education of said Antonio Alberto Zapata any sum in excess of fifty per cent of the net income derived from said property, and the party of the first part shall be the sole judge of the school or schools in which the said Antonio Alberto Zapata shall be educated, and the amount that shall be expended upon his education.

"(3) In the event the said Antonio Alberto Zapata shall have reached the age of maturity, or his education shall have been completed prior to the death of the survivor of the parties of the second part, the said party of the first part shall be under no obligation to expend any sum on the education of the said Antonio Alberto Zapata, or for any other purpose, and may use the entire income for its own purposes.

"(4) In the event it shall become necessary for the parties of the second part, or the survivor of them, to sell said property or any portion of it for the purpose of purchasing the necessaries of life, but not otherwise, the party of the first part agrees to consent to said sale and to join in the execution of a quitclaim deed conveying said property so sold to the purchaser; provided, however, in the event of such sale, the party of the first part reserves the option to cancel this agreement upon conveying by quitclaim deed to the parties of the second part, or the survivor of them, the remainder of said property, if any."

Evidently each of the Zapatas was interested in the education of the youth Antonio, and the offer they made to convey said real property was at least in part consideration of the promise of the board to supervise his education. They each therefore received some benefit from the consideration under said grant deed.

"Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." Civil Code § 1659.

[2] There is not one word of evidence in this case that the offer of the Zapatas to convey their property was a joint offer. In the absence of such evidence, the presumption stated in the above section must control. Gummer v. Mairs, 140 Cal. 535, 537, 74 P. 26; County of Los Angeles v. Luscher, 58 Cal.App. 632, 634, 209 P. 899.

[3] But even if it were a joint offer, it is well settled in this state that the death or release of one joint obligor does not release the other. Civil Code § 1543; Bee v. Cooper, 217 Cal. 96, 101, 17 P.2d 740; Harrier v. Bassford, 145 Cal. 529, 533, 78 P. 1038; Elizalde v. Murphy, 146 Cal. 168, 171, 79 P. 866. This rule is peculiarly applicable in this case where the property was held in joint tenancy, and upon the death of Mr. Zapata, the title to the whole of the property became vested in Mrs. Zapata.

[4] Further reliance is placed by respondent in support of said judgment upon

the finding of the trial court that the offer or proposal of the Zapatas "was contingent upon the same being accepted and the said proposed agreement executed by the defendant church in any event prior to the death of either the said Zapata or his said wife."

We fail to find any evidence in the record before us in support of this finding. The matter was not discussed by any of the parties present on the occasion when the papers were executed by the Zapatas, or on the prior occasion when the papers were presented to them, or on any other occasion when the question of said conveyance was being discussed. The evidence does show that Mr. Zapata made frequent mention to different members of the church of the wish of himself and wife to deed the property to the church, but on none of these occasions was any reference made to the matters embraced within the finding above quoted.

[5, 6] The court further found that the lapse of over six months between the offer or proposal and the date of the assumed acceptance thereof was unreasonable and therefore "said offer or proposal on behalf of said Zapata and wife, and each of them, was prior to the 8th day of December, 1932, (the date the Board of Missions executed and acknowledged the agreement) revoked * * * by the lapse of a reasonable time without communication of acceptance or acceptance of said offer or proposal by defendant church". Conceding that the question as to what was a reasonable time was a question of fact to be determined by the trial court, the delay of the Board of Missions in accepting the offer of the Zapatas might have furnished legal grounds for Mrs. Zapata to have declined to accept the written agreement of the board. However, she made no objection to the delay, received the agreement and gave to Mr. Fitzgerald her written receipt for the same. She thereby waived the right to complain of said delay. Parry v. Campbell, 72 Cal.App. 748, 753, 238 P. 127. The Zapatas knew that the deed would have to be sent to the Board of Missions at Nashville, Tennessee, and that the board would have to be satisfied with the character of the property conveyed to it before it would sign the agreement and accept the deed. There is absolutely no showing that Mrs. Zapata suffered any damage by the delay or that she expressed any dissatisfaction that the agreement was not delivered to her at an earlier date than that on which she received it.

[7] The court further found that after the death of Mr. Zapata "Mrs. Zapata was ignorant of her rights in connection with said transaction and repeatedly demanded of and from defendant Fitzgerald the return to her of the said proposed deed and agreement and information concerning her said rights, but to return the same or to truthfully inform her concerning her said rights, said defendant did not, but to the contrary, upon defendant church assuming to execute said proposed agreement, did assume to deliver said purported deed to defendant church and the same was recorded, as hereinbefore set forth, and during the remainder of the life of said Erolinda Moreno Zapata, and until her death on the 14th of November, 1935, the defendant Fitzgerald, as agent for defendant church corporation, and with the full knowledge, acquiescence and/or ratification of defendant church, and well knowing of her said ignorance in respect to her rights in connection with the matter and of her hereinbefore mentioned inability to read or write or converse in the English language, did designedly deceive and mislead her concerning her right of ownership of said real property free and clear from the effect of said purported deed and purported agreement and did designedly deceive and mislead her concerning her rights in connection with said transaction and the meaning of the language used in the said purported agreement and/or the effect on said transaction of the death of said Zapata and/or lapse of time intervening between said offer and attempted acceptance thereof by said church and did designedly prevent her from consulting any other person in regard to said foregoing matters, and as a result thereof, the court finds that the said Erolinda Moreno Zapata was misled and deceived thereby and never knew her rights in connection with said transaction and by reason thereof, during her lifetime, was prevented from taking any legal action for the protection and/or enforcement of her rights in connection with said transaction and/or said real property, and by reason thereof the court finds that the said Erolinda Moreno Zapata was not barred or estopped during her lifetime either by laches or the Statutes of Limitations or otherwise or at all from taking or commencing any appropriate legal action for

the protection of her rights therein, and obtaining cancellation of said purported agreement and purported deed and/or obtaining a reconveyance of said real property to her."

We have searched the record in this case from one end to the other for the evidence to support this finding or some portion thereof, and as a result of our efforts we are compelled to say that there is a complete dearth of any evidence which directly or indirectly supports this finding, or any statement therein contained. When Mr. Fitzgerald received the agreement after its execution and acknowledgment by the Board of Missions, he gave it to Mrs. Zapata and recorded the deed in accordance with the written instructions given him at the time the deed was executed by Mr. and Mrs. Zapata. No question was raised at that time by Mrs. Zapata or by any other person as to the effect of the death of her husband, or the lapse of time between the execution of the deed and the return of the agreement by the Board of Missions. Mr. Fitzgerald was not a lawyer, and no claim is made that he had any misgivings as to the legal effect of the death of Mr. Zapata or the lapse of time upon the delivery of the deed and agreement. The matter was not discussed between him and Mrs. Zapata in any shape, form or manner. She accepted the agreement and signed a receipt therefor without a word of protest, and was perfectly satisfied with the whole transaction at that time. There was no attempt to deceive nor was there any deception, for neither Mrs. Zapata nor Mr. Fitzgerald had any thought that either the death of Mr. Zapata or the delay in the execution and delivery of the agreement would have any effect upon the validity of the deed.

[8] The same positive statement may be made in regard to the finding that Mr. Fitzgerald prevented Mrs. Zapata from consulting any other persons in regard to these matters. Mrs. Zapata had a copy of the agreement defining her rights in this transaction. She was free to submit this agreement to any person whom she might choose to consult. She had her friends. She attended church regularly and associated with her friends and acquaintances both inside and outside the church, and had ample opportunity to seek advice where and when and from whom she wished. Furthermore, there is not one word of evidence in this whole record that Mr. Fitzgerald ever directly or indirectly asked, or even suggested to her, that she should not consult others or seek advice from them respecting this or any other business matter in which she was interested. On one occasion when she was worrying about her property, a friend said to her, "Get the papers and I will have my friend read them and take them to an attorney and see what it is". This friend, who was a Spanish teacher, was called in and told Mrs. Zapata "what he would do." But instead of submitting the matter to an attorney, as she was entirely free to do, she called Mr. Fitzgerald, with the result that the matter was dropped.

Mrs. Zapata was apparently entirely satisfied with the conveyance she and her husband had made to the Board of Missions, at the time she received the agreement from Mr. Fitzgerald and for some considerable time thereafter. She subsequently, however, for some reason not clearly appearing from the evidence, began to worry about her property. Whether she was dissatisfied with the original transfer of the property to the board or whether she wished her property returned to her for other reasons, we are unable to determine. That she wanted her property back is clear, but the reason on which she based her demand is not clear.

[9, 10] As to the conveyance which she and her husband executed to the Board of Missions, we have already stated the circumstances surrounding and leading up to said transaction. That she thoroughly understood the purpose and effect of the deed by herself and husband to the Board of Missions is shown by the undisputed testimony of those present on that occasion. Both Mr. Fitzgerald and Mr. Reynolds, the latter then presiding elder of the church, understood and spoke the Spanish language, and they each testified that the contents of the deed, the agreement and the letter to Mr. Fitzgerald were correctly translated and explained to Mrs. Zapata before she executed them. That Mr. Fitzgerald's translation and explanation of the papers was honest and correct is further shown, we think, by the execution of these papers by Mr. Zapata. He was a Spanish teacher and was thoroughly familiar with both the Spanish and English languages, and was present during the entire time when the papers were being interpreted and explained to Mrs. Zapata. Without the assistance of an interpreter, he knew the

contents of the documents before signing them. He, of course, above all others was interested in having his wife protected in this transaction, and it is unbelievable that he would have executed the papers if any misrepresentation had been made by Mr. Fitzgerald to Mrs. Zapata as to the contents and meaning of the documents she was to sign. She therefore assented to the transaction with full knowledge of what she was doing, and consequently had no legal right thereafter to complain of the conveyance of the property to the Board of Missions, or to ask that it be returned to her.

[11] Under subdivision (4) of the agreement it was provided that in case it became necessary for her to sell the property conveyed by her and her husband, or any portion thereof, for the purpose of purchasing the necessaries of life, the Board of Missions agreed to execute a quitclaim deed conveying the property so sold to the purchaser. Under this provision of the agreement she would have been entitled to a quitclaim deed in favor of a purchaser in case it was necessary for her to sell any portion of the property in order to provide her with the necessaries of life. It may have been and probably was under this right reserved in her favor, that she "wanted her property back". Aside from the fact that she found no purchaser for any part of the property, and therefore it was impossible for the Board of Missions to execute a quitclaim deed, as provided in said agreement, even if any had been demanded, there is no substantial showing that she was at any appreciable length of time in need of the necessaries of life. She on one occasion went "to the relief station to get help" and "secured something". Mr. Fitzgerald at her request went with her for the purpose of interpreting for her. Just how long she received help from the relief station is not shown; neither does it appear when she made this application for help, nor is it shown anywhere that she was in actual need of help at that or at any other time. When she was taken to the hospital in September, 1935, some two months before her death, she had $50 in money on her person, $185 in the savings bank account, and she had been receiving the rentals from the property ever since the death of her husband, which the plaintiff in this case testified were $125 per month. The evidence further shows that she paid no taxes on the property for a year before her death, so that she had practically the entire income from the rentals. The only condition under which she was entitled to a quitclaim deed to the purchaser in case she sold the property, or any part thereof, was that she should be in need of the necessaries of life; and as there is no evidence that she was in that state, there was no obligation upon the part of the Board of Missions, even if a purchaser had been found and demand had been made, to execute a quitclaim deed to said purchaser, or to have her property given back.

[12] A short time prior to her death Mrs. Zapata secured the services of a firm of attorneys. She was then in the hospital, but in full possession of mental faculties. These attorneys prepared a will in which the plaintiff herein was appointed as her executor. She evidently laid before her attorneys her grievances against the Board of Missions and the reason why she wanted her property back. As a result of this conference between her and her attorneys, the latter prepared a draft of a grant deed by the Board of Missions to Mrs. Zapata of the property which she and her husband had conveyed to the board. This draft of the deed was forwarded to the Board of Missions at its principal place of business at Nashville, Tennessee, accompanied by a letter containing the following statement:

"Mrs. Zapata is ill on her back in the hospital greatly in need of funds and inasmuch as the purpose of this agreement, i. e., providing for the education of the boy as a Protestant Minister, has failed, the boy having returned to his Catholic father, we are asking that you execute the enclosed deed conveying the properties to Mrs. Zapata in order that she may raise sufficient money to properly care for and maintain herself. Please send the deed to me when it has been executed."

From this letter we might rightly infer that the burden of Mrs. Zapata's claim for wanting her property back was that the "purpose of this agreement i. e., providing for the education of the boy as a Protestant Minister, has failed." No claim was then made that any unfair or fraudulent advantage had been taken of her by anyone in the procuring of the deed, or that she did not understand the contents of the papers when she signed them, or that she was then so greatly in need of the "necessaries of life" as to be entitled to a quitclaim deed to the property in favor of any purchaser.

It is true that the letter states that Mrs. Zapata was greatly in need of funds, but the demand for the deed was not placed on that ground, evidently for the reason that she then had $185 in the bank and was receiving the rentals from the property.

The material parts of the agreement, and particularly those parts referring to the education of the boy Antonio, are set forth above. A mere reading of these paragraphs of the agreement shows that they contain nothing which would justify the demand for a reconveyance of the property on the ground expressed in said letter. It might be well to state here, although the matter is of slight importance, that the boy Antonio was living with Mr. and Mrs. Zapata at the time the deed and other papers were executed. He was then about nine years old. At the time of the trial, December, 1936, he was being educated, with the consent of his father, under the direction of the Board of Missions in the Lydia Patterson Institute at El Paso, Texas. Evidently, the Board of Missions was carrying out its agreement in respect to the boy's education.

[13] Although the complaint alleged fraud on the part of the appellants in inducing the execution of the agreement, deed and letter of instructions to Mr. Fitzgerald, the court made no finding to that effect, and our review of the record convinces us that there was no evidence which would have supported such a finding. While the documents were executed less than two months before the death of Mr. Zapata, their execution was in no sense a deathbed transaction. On the other hand, it was the consummation of a desire first expressed by Mr. Zapata two years before, and frequently repeated by him to various persons, until finally Mr. Reynolds at Mr. Zapata's urgent solicitation, took the matter in hand and had the necessary papers prepared. It cannot be claimed that there was any undue haste on the part of any of the parties interested in the transfer of the property to the Board of Missions. It was the Zapatas, and not the Board of Missions, that insisted on the transaction being closed. A further circumstance evidencing the fact that the transaction was not a case where overzealous persons wrung from a dying man on his deathbed, as contended by respondent, a conveyance of his property, is that when the papers were first taken to the Zapata home and due to a suggestion of Mrs. Zapata, a correction was to be made in the terms of the agreement, they were not again taken to the Zapatas until three weeks after the first occasion.

The entire transaction from the beginning to the end was marked with due deliberation and every opportunity was given to Mr. and Mrs. Zapata to exercise their independent judgment before acting in the matter. The record is free from any evidence that any fraud or undue influence was practiced upon them or either of them to induce them to make the conveyance of their property to the Board of Missions. The findings leading to a contrary conclusion are unsupported by the evidence. For this reason the judgment should be and is reversed.

We concur: GIBSON, C. J.; SHENK, J.; CARTER, J.; EDMONDS, J.; TRAYNOR, J.



17 Cal.2d 393

MARLOW et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Sac. 5429.

Supreme Court of California.

Feb. 17, 1941.

1. Descent and distribution ⇐40

Where deceased left neither issue, spouse, parent, brother, sister nor descendant of deceased brother or sister, first cousins of deceased were entitled to take his estate to the exclusion of the children of the cousins' deceased sister. Probate Code, §§ 226, 253.

2. Certiorari ⇐60

Where even if all of petitioners' allegations were true, they had no beneficial interest in deceased's estate, motion to dismiss petition for writ of certiorari to set aside default entered against petitioners in heirship proceeding was granted. Probate Code, §§ 226, 253; Code Civ.Proc. § 1069.

Certiorari proceedings by Charles Donald Marlow and others against the Superior Court of the State of California in and for the County of Los Angeles to have set aside a default entered against the peti-

tioners by the Superior Court in the heirship proceeding in the estate of Michael F. O'Dea, deceased. On motion to dismiss.

Motion granted and certiorari proceeding dismissed.

Harry N. Dyke, of Rio Vista, for petitioners.

J. H. O'Connor, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel (Salisbury, Robinson & Himrod, Faries & McDowell, Bailie, Turner & Lake, Freston & Files, Wayne R. Hackett, and Charles A. Loring, all of Los Angeles, of counsel), for respondent.

CARTER, Justice.

A writ of certiorari was granted by this court to consider another problem arising out of the heirship proceeding in the estate of Michael F. O'Dea, deceased. Respondent demurred to the petition and moved to dismiss the writ. The facts regarding the estate and the heirship proceeding generally are fully set out in Estate of O'Dea, Cal.Sup., 104 P.2d 368, and Henry J. O'Day and Genevieve O'Day Jensen v. Superior Court et al., Cal.Sup., 108 P.2d 889 (rehearing granted) and need not be related in any detail here.

The pertinent facts necessary to reach a decision in the instant case are as follows: The petitioners here filed a statement of heirship on March 21, 1940. Previous to this date, viz., on July 25, 1939, the superior court, in the estate of O'Dea, had made an order of default against "* * * all claimants who have not at this date appeared or entered petitions to determine heirship. * * *" On April 15, 1940, a motion to strike petitioners' statement of heirship was granted. On July 22, 1940, petitioners' motion to set aside the default above referred to and for permission to file a petition to determine heirship was denied by the superior court. Petitioners now, on writ of certiorari, ask this court to set aside the default entered against them.

[1] The petitioners' statement of heirship, as disclosed by the record herein, shows that they are claiming as children of one Elizabeth O'Day Marlow, deceased, who, in turn, was the daughter of one Michael O'Day, deceased. This Michael O'Day was the uncle of Michael F. O'Day, deceased, whose estate is now being administered in Los Angeles County. It is also shown on the face of petitioners' statement of heirship that two children of Michael O'Day (the grandfather of petitioners'), viz., Henry J. O'Day and Genevieve O'Day Jensen, are still living. From the "Genealogical Tree" attached to the petition or statement of heirship it is also shown that Michael F. O'Dea, deceased, left neither issue, spouse, parent, brother, sister nor descendant of a deceased brother or sister. Therefore, any claim of heirship made by petitioners, if their allegations are true, would necessarily fall under section 226 of the Probate Code. That section provides, in part, that "* * * the estate goes to the next of kin in equal degree, excepting that, when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote." But under the phrase "next of kin in equal degree, * * *" as defined by section 253 of the Probate Code and as interpreted by the cases of Estate of Nigro, 172 Cal. 474, 156 P. 1019, and Estate of Moore, 162 Cal. 324, 122 P. 844, Henry J. O'Day and Genevieve O'Day Jensen, as first cousins of Michael F. O'Dea, deceased, would take to the exclusion of petitioners. It is true that the above-cited cases interpreted subdivision 5 of Civil Code section 1386, which has since been re-enacted as Probate Code section 226 and the phrase "nor descendant of a deceased brother or sister, * * *" has been added. But that addition does not affect the interpretation as applied to the instant case because there are no descendants of deceased brother or sister involved here. The situation here is identical with Estate of Moore, supra, which held that a cousin was excluded by living nephews and nieces, with the exception that here the relationship of all parties is more remote.

[2] Section 1069 of the Code of Civil Procedure provides that only a person beneficially interested may petition for a writ of certiorari. From the above discussion it may be seen that, even if all petitioners' allegations are true, they have no beneficial interest in the Estate of Michael F. O'Dea, deceased. This being true the motion to dismiss this petition for writ of certiorari must be granted. Ashe v. Board of Supervisors, 71 Cal. 236, 16 P. 783.

The motion to dismiss is granted and the proceeding dismissed.

We concur: GIBSON, C. J.; CURTIS, J.; SHENK, J.; EDMONDS, J.; TRAYNOR, J.

17 Cal.2d 213

AMES et al. v. EMPIRE STAR MINES CO., Ltd., et al.

Sac. 5246.

Supreme Court of California.

Jan. 31, 1941.

As Modified Feb. 6, 1941.

Rehearing Denied Feb. 27, 1941.

1. Mines and minerals ⇐15, 31(1)

Congress intended by the Mining Act of July 26, 1866, to recognize and give legal validity to all existing mining claims in accordance with local rules, customs, and regulations, including extralateral rights in those lands to which the rules and regulations applied. Act Cong. July 26, 1866, 14 Stat. 251.

2. Mines and minerals ⇐31(1)

Where mine owners located and mined vein running extralaterally under plaintiffs' land before passage of the Mining Act of July 26, 1866, they acquired legal title to those extralateral rights, provided the rights had not been previously conveyed away by the government, since the Mining Act could not operate to divest private owners of existing vested rights. Act Cong. July 26, 1866, 14 Stat. 251.

3. Public lands ⇐78

Under the Railroad Grant Act of July 25, 1866, which specifically excepted from its operation all mineral lands, Congress did not intend to vest in a grantee railroad title to any mineral lands of the United States. Act Cong. July 25, 1866, 14 Stat. 239.

4. Mines and minerals ⇐31(1)
Public lands ⇐78

The mineral subsurface of plaintiffs' land could not pass under the terms of the Railroad Grant Act of July 25, 1866, which specifically excepted all mineral lands from its operation, but it remained in the government, and mine owners who located and mined vein running extralaterally under plaintiffs' land before passage of the Mining Act of July 26, 1866, received full extralateral rights to mine therein by virtue of that act. Act Cong. July 25, 1866, 14 Stat. 239; Act Cong. July 26, 1866, 14 Stat. 251.

5. Public lands ⇐78

The Railroad Grant Act of July 25, 1866, when it excepted mineral lands from its operation meant that title to all mineral lands should remain in the United States and that no rights to such lands could in any way pass to the grantee railroad, and that act alone cannot be the source of title to any mineral lands. Act Cong. July 25, 1866, 14 Stat. 239.

6. Public lands ⇐114(2)

A patent issued to railroad in 1880 by virtue of the Railroad Grant Act of July 25, 1866, could legally affect only nonmineral lands, and the theory which relates title back to the date of the act could not extend to all mineral lands excepted from the act in express terms, and hence title to such mineral lands could be acquired as against railroad after enactment of the act and at any time up to the date of the patent. Act Cong. July 25, 1866, 14 Stat. 239.

7. Public lands ⇐114(2)

The government cannot convey away lands which it no longer owns, and a patent cannot cut off previously existing vested rights in the patented property.

8. Public lands ⇐114(2)

Where patent secured by railroad in 1880 was issued under authority of the Railroad Grant Act of July 25, 1866, it could in no way apply to mineral land, title to which had been previously vested in others, and any authority it might acquire in the passage of time with respect to the nature of the land despite the limitations of the act could operate only against subsequently located claims. Act Cong. July 25, 1866, 14 Stat. 239.

9. Public lands ⇐114(2)

Where patent secured by railroad in 1880 and issued under authority of the Railroad Grant Act of July 25, 1866, which specifically excepted from its operation all mineral lands, determined that plaintiffs' land was agricultural land, patent applied only to surface of land and to that portion of the subsurface not already subject to existing extralateral rights, and whatever claims plaintiffs advanced to subsurface mineral lands would have to date from issuance of patent and not from date of act, and hence extralateral rights of mine owners who located and mined vein running extralaterally under plaintiffs' land before passage of the Mining Act of July 25, 1866, had already fully vested by virtue of that act when patent was issued. Act Cong. July 25, 1866, 14 Stat. 239; Act Cong. July 26, 1866, 14 Stat. 251.

10. Public lands ⇐52

Where land in question was still unsurveyed and sections of land to be granted

still undetermined when 1853 federal act expressly excepting all mineral lands made a grant of certain sections of each township to the state for school purposes, no title could pass from the United States to the state to land determined to be mineral following survey in 1867, and mineral subsurface then subject to vested extralateral rights of adjoining mines could not pass to the state under the terms of the grant. Act Cong. March 3, 1853, 10 Stat. 244.

11. Public lands ⇐106(4)

Even if certification by the registrar of the United States Land Office on March 7, 1871, that there was no claim or filing on school land other than that of the state had the effect of a patent establishing the complete title of the state, its determination could be effective only against subsequently located mining claims and not against existing vested extralateral rights therein. Act Cong. March 3, 1853, 10 Stat. 244.

12. Mines and minerals ⇐31(1)

A mining patent issued in 1880 pursuant to the Mining Act of July 26, 1866, on the basis of an earlier location could not be limited by the Mining Act of 1872 which restricted future mining claims asserting extralateral rights to a maximum of 1,500 feet along the vein. Act Cong. July 26, 1866, 14 Stat. 251; 30 U.S.C.A. § 23.

13. Mines and minerals ⇐44

Where an additional length of mining claim asserting extralateral rights results from the consolidation of several original claims, the lines of the original claims need not be shown to establish the validity of an existing patent to the consolidated claim on collateral attack.

14. Mines and minerals ⇐55(7)

Where deed to plaintiffs from their immediate predecessor in title specifically reserved to predecessor, his successors, and assigns the right to follow a particular vein beneath plaintiffs' land and to mine therefrom, and by mesne conveyances defendants succeeded to predecessor's rights under that reservation, defendants had the right to follow the vein beneath the surface of plaintiffs' land.

15. Mines and minerals ⇐23(5)

Title to a mining claim does not terminate upon failure to perform manual labor, but the intervention of a third party and a relocation of the ground must occur before any forfeiture can take place.

16. Mines and minerals ⇐26

Where deed to plaintiffs from their immediate predecessor in title specifically reserved to predecessor, his successors, and assigns the right to follow a vein beneath plaintiffs' land and to mine therefrom, and by mesne conveyances defendants succeeded to predecessor's rights under that reservation, plaintiffs were precluded from taking advantage of any forfeiture and subsequent relocation of that claim.

17. Boundaries ⇐35(2)

The original location of a mine, particularly on government land, is within the scope of the exception to the hearsay rule that evidence of common reputation existing previous to the controversy may be introduced to prove the existence of boundaries and facts of a public or general interest more than 30 years old. Code Civ.Proc. § 1870.

18. Evidence ⇐333(1), 372(10)

Recitals in ancient deeds and statements in official documents kept as part of the regular function of the office by some department of the government or authorized by the legislature are admissible in evidence under an exception to the hearsay rule. Code Civ. Proc. §§ 1920, 1924.

19. Evidence ⇐333(7)

Patent records containing abstracts of title to mining claims, recitals concerning location of claims in ancient deeds, verified statements concerning location and possession of mines, copy of articles of incorporation of early mining corporation, certified copy of minutes of meetings of miners, descriptions of claims by metes and bounds, registrar's final certificate of entry of patent, and field notes of survey and report of United States deputy mineral surveyor were "records kept in the usual course of business" by the General Land Office and were admissible as "official documents" to prove proper location and existence of mining claims. Code Civ.Proc. §§ 1920, 1924.

See Words and Phrases, Permanent Edition, for all other definitions of "Official Documents" and "Records Kept in the Usual Course of Business".

20. Evidence ⇐325

The official report of mineral resources of the public domain of the west published under the direct authority of Congress as an official report to the Secretary of the Treasury was an "official document" the contents of which were admissible to show the location and working of mines in pursuance to

miners' rules and regulations then in existence. Code Civ.Proc. §§ 1870, 1920, 1924.

21. Boundaries ⇐35(2)
Evidence ⇐361

Locations of mining claims could be proven by evidence of general reputation previous to the controversy, and hence defendants could introduce the History of Yuba County by Chamberlain and Wells (1879) for that purpose. Code Civ.Proc. §§ 1870, 1936.

CARTER, J., dissenting.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Suit by Worthington Ames and another against Empire Star Mines Company, Limited, and others, for an injunction to prevent defendants from following and mining a certain vein beneath the surface of plaintiffs' land and for an accounting of minerals previously extracted. From a judgment for defendants, plaintiffs appeal.

Affirmed.

For prior opinion see 93 P.2d 635.

Rehearing denied; CARTER, J., dissenting.

Simeon E. Sheffey, of San Francisco, and Richard Belcher, of Marysville, for appellants.

Robert M. Searls, of San Francisco, Jones & Finnegan, of Nevada City, and Wm. E. Colby, of San Francisco, for respondents.

TRAYNOR, Justice.

This controversy is between the owners of mining property, known as the Pennsylvania and Jefferson mines, upon whose land there is the outcropping of a gold-bearing quartz vein, and the owners of non-mineral surface land, known as the Ames tract, beneath the surface of which this vein dips. The latter, as plaintiffs, brought suit for an injunction to prevent defendants, the owners of the Pennsylvania and Jefferson mines, from following and mining this vein some 500 to 1,000 feet beneath the surface of the plaintiffs' land, and for an accounting of minerals previously extracted. Plaintiffs appeal from a judgment of the superior court in favor of defendants.

The controversy turns upon the priority of title to the subsurface of the plaintiffs' land. Defendant mine owners claim the right to mine extralaterally beneath the plaintiffs' land by virtue of the Mining Act of Congress of July 26, 1866, 14 U.S.Stat. A.L. 251, which recognized and legalized the right of miners, in accordance with existing miners' rules and regulations, to follow a vein which had its apex upon the surface of their land as it dipped down extralaterally beneath the surface of adjoining government land. Plaintiffs trace their title back to the Railroad Grant Act of July 25, 1866, 14 U.S.Stat.A.L. 239, by which congress provided for land grants to the California and Oregon Railroad, later the Central Pacific Railroad, but expressly excepted mineral lands from the terms of the act. Plaintiffs contend that since this act was passed one day earlier than the Mining Act, the railroad received a fee simple title to the entire tract, surface and subsurface, so that the Mining Act passed the next day could in no way operate to confer upon the owners of adjoining mines the right to mine extralaterally beneath the land granted to the railroad.

On June 14, 1880, the Central Pacific Railroad, pursuant to its legislative grant, secured a patent to the Ames tract which transformed it from a "float" to an established title by the definite location of the railroad line. The patent stated that the Ames tract was agricultural land, and plaintiffs contend that this patent conclusively determined the character of the land as nonmineral, and related the title back to the date of the Railroad Grant Act of July 25, 1866. A patent to the Pennsylvania claim was secured by the defendants' predecessors in interest on August 18, 1880, pursuant to the Mining Act of July 26, 1866. In 1872, congress passed another act relating to mines which provided that a mining claim, to secure extralateral rights, could equal but not exceed 1,500 feet along the vein or lode. 17 Stat. 91, § 2, 30 U.S.C.A. § 23. Plaintiffs assert that since the defendants' patent was secured subsequent to the passage of this act, it is subject to the provisions thereof, and therefore that the owners of the Pennsylvania claim, which is 1,540 feet along the vein or lode, are precluded from claiming any extralateral rights. No patent was ever secured to the Jefferson claim, which was apparently located at the same time as the Pennsylvania claim, abandoned, and subsequently relocated. The defendants show that they now in effect have full title to it. They also present in evidence the deed of the Ames tract to the plaintiffs from one Ebert, the immediate predecessor

in title, which contains a reservation by him, as grantor, of the right to follow the Jefferson vein beneath the surface of the Ames tract and to mine therefrom. This right was subsequently conveyed by Ebert to the defendants.

Between the Ames tract and the Pennsylvania and Jefferson mines there is a narrow strip of school land granted to the state of California under the Act of Congress of March 3, 1853, 10 U.S.Stats.A.L. 244, and this grant also excepted mineral lands from its terms. Subsequent to its final survey in 1867, part of this land was conveyed to the defendants, the residue remaining in the hands of the state as school land. Plaintiffs contend that the state acquired a fee simple in this land, including the subsurface, so that defendants could have no extralateral rights therein and were thus effectively cut off from the Ames tract.

Defendants have presented evidence in the form of testimony of old settlers, abstracts of title, patent records, deeds, and government reports and surveys to prove the original location of both the Pennsylvania and Jefferson claims in accordance with the miners' rules and regulations prior to 1863; the working of these claims, including the subsurface of the Ames tract, prior to 1866; the securing of a patent to the Pennsylvania mine in 1880, with a continuous chain of title to this mine culminating in the present defendants; and the securing of full rights by defendants as against all existing claims on the Jefferson mine.

Plaintiffs contend, however, that defendants have not properly established the original location of the Pennsylvania and Jefferson claims, nor compliance by their predecessors in title with the miners' rules and regulations necessary to secure extralateral rights, nor what the rules and regulations were, maintaining that most of the evidence introduced by the defendants in these regards is inadmissible as hearsay.

[1, 2] It is clear that congress intended by the Mining Act of July 26, 1866, to recognize and give legal validity to all existing mining claims in accordance with local rules, customs, and regulations, including extralateral rights in those lands to which said rules and regulations applied. Lindley Mines, 3d Ed., §§ 40–46; Jennison v. Kirk, 98 U.S. 453, 25 L.Ed. 240; St. Louis Smelting Company v. Kemp, 104 U.S. 636, 26 L.Ed. 875; Morton v. Solambo C. M. Co., 26 Cal. 527. According to defendants' evidence the Pennsylvania and Jefferson mines clearly fall within the compass of the act, for prior to its passage their owners located and mined the vein running extralaterally under the Ames land. Under the act they acquired legal title to such extralateral rights provided such rights had not been previously conveyed away by the government, for the Mining Act could not, of course, operate to divest private owners of existing vested rights. Lindley, Mines, 3d Ed., § 611; Amador Medean Gold M. Co. v. South Spring Hill Gold M. Co., C.C., 36 F. 668; Davis v. Weibbold, 139 U.S. 507, 11 S.Ct. 628, 35 L.Ed. 238.

The plaintiffs contend that the government had previously conveyed away such rights. They cite the Railroad Grant Act of July 25, 1866, enacted one day earlier than the Mining Act, which conferred upon the California and Oregon Railroad, later the Central Pacific Railroad, title to land over which the railroad agreed to construct a line in the future. They argue that since in pursuance to this act the Central Pacific Railroad did locate on certain land, including the Ames tract, and secure a patent thereto, the full title in fee simple passed to the railroad as of July 25, 1866, and they regard the legal title as having accrued from that date. Wisconsin Central R. R. Co. v. Price County, 133 U.S. 496, 10 S.Ct. 341, 33 L.Ed. 687; Deseret Salt Co. v. Tarpey, 142 U.S. 241, 12 S.Ct. 158, 35 L. Ed. 999; Jatunn v. Smith, 95 Cal. 154, 30 P. 200. It is their contention that the full title to the Ames tract was conveyed away prior to the passage of the Mining Act of July 26, 1866, so that the latter could in no way confer upon the adjoining mines extralateral rights in the Ames tract.

[3, 4] This argument might seem persuasive except for one vital factor. The Railroad Grant Act of July 25, 1866, upon which the plaintiffs rely for their original title, specifically excepted from its operation all mineral lands. The terms of the act make it clear that congress did not intend to vest in the railroad title to any mineral lands of the United States. Barden v. Northern Pacific R. R. Co., 154 U.S. 288, 14 S.Ct. 1030, 38 L.Ed. 992; United States v. Sweet, 245 U.S. 563, 38 S.Ct. 193, 62 L. Ed. 473; Broder v. Natoma Water Co., 101 U.S. 274, 25 L.Ed. 790; Northern Pacific R. R. Co. v. Sanders, 166 U.S. 620, 17 S.Ct. 671, 41 L.Ed. 1139; McClintock v. Bryden et al., 5 Cal. 97, 63 Am.Dec. 87. The subsurface of the Ames tract being

clearly mineral could not pass under the terms of the act but remained in the government, and the Pennsylvania and Jefferson mines received full extralateral rights to mine therein by virtue of the Mining Act of July 26, 1866. (Ibid.)

Plaintiffs cite Davis v. Weibbold, supra, and Amador-Medean Gold Mining Company v. South Spring Hill Gold Mining Co., supra, to uphold their proposition that the Railroad Grant Act of July 25, 1866, passed full title to the railroad at that time as against any subsequently accruing mining claims. These cases, however, hold only that at the time of final and definite location of agricultural or townsite land full title therein passes to the grantee as against any mineral rights not then known to exist but coming into being at a later time. In the present case there was no final and definite location of the Ames tract by the railroad until the securing of the patent in 1880. Under the act of July 25, 1866, it had merely a "floating grant" whereby it might secure title to land on which it subsequently located. When the Ames tract was finally and definitely located in 1880 its subsurface not only was known to be mineral but was subject to the vested extralateral rights of the adjoining mines. The holdings of the Amador-Medean and Davis cases thus clearly have no application here.

[5, 6] The patent which definitely located and established the railroad's claim stated that the Ames tract was agricultural land. Plaintiffs reason that this statement is conclusive as to the nature of the land since the time for coming in and attacking the patent has long since expired, and conclude that since the title to the land secured by the patent relates back to the date of the Railroad Grant Act, the full legal title to the Ames tract had vested in the railroad before the conferring of extralateral rights upon the mines. The act alone, however, cannot be the source of title to any mineral lands. As Justice Fields stated in Barden v. Northern Pacific R. R. Co., supra [154 U.S. 288, 14 S.Ct. 1031, 38 L.Ed. 992], the Railroad Grant Act of July 25, 1866, when it excepted mineral lands meant that title to all mineral lands was to remain in the United States, and no rights to such lands could in any way pass to the railroad. The patent issued to the railroad by virtue of the act can legally affect only nonmineral land, and the theory which relates the title back to the date of the act cannot extend to "all mineral lands" excepted from the act in express terms. It follows that title to such mineral lands could be acquired as against the railroad subsequent to the enactment of the Railroad Grant Act, and at any time up to the date of the patent. Barden v. Northern Pacific R. R. Co., supra; Northern Pacific R. R. Co. v. Sanders, supra.

[7] Hence, the contentions advanced by plaintiffs can be resolved into the theory that the patent to the railroad is conclusive as to the agricultural character of the land. In support thereof they cite Burke v. Southern Pacific R. R. Co., 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527; West v. Standard Oil Co., 278 U.S. 200, 49 S.Ct. 138, 73 L.Ed. 265; Davis v. Weibbold, supra. These cases, however, concern the rights of a mining claim coming into existence after the securing of the agricultural patent. They stand for the proposition that the patent is conclusive as to the character of the land as against mining claims subsequently located. Such a patent, however, issued merely on the basis of an ex parte hearing on behalf of the claimant to the land can in no way abrogate the existing vested extralateral rights of parties who had nothing to do with the proceedings. Lawson v. United States Mining Co., 207 U.S. 1, 16, 28 S.Ct. 15, 52 L.Ed. 65; United States Mining Co. v. Lawson, 8 Cir., 134 F. 769, 775, 776; Clark-Montana Co. v. Butte Co., D.C., 233 F. 547, 556; Butte Co. v. Clark-Montana Co., 9 Cir., 248 F. 609, 615; Lindley, Mines, 3d Ed., § 730, p. 1785. It is well established that the government cannot convey away land which it no longer owns and that a patent cannot cut off previously existing vested rights in the patented property. Reynolds v. Iron Silver Mining Company, 116 U.S. 687, 6 S.Ct. 601, 29 L.Ed. 774; Noyes v. Mantle, 127 U.S. 348, 353, 354, 8 S.Ct. 1132, 32 L.Ed. 168; Wright v. Roseberry, 121 U.S. 488, 518–520, 7 S.Ct. 985, 30 L.Ed. 1039; Leavenworth, Lawrence & Galveston R. R. Co. v. United States, 92 U.S. 733, 23 L.Ed. 634; St. Louis Smelting Co. v. Kemp, 104 U.S. 636, 641, 26 L.Ed. 875; Davis v. Weibbold, 139 U.S. 507, 518, 519, 11 S.Ct. 628, 35 L. Ed. 238. This principle is further supported by the California cases (Van Ness v. Rooney, 160 Cal. 131, 116 P. 392; Chicago Quartz M. Co. v. Oliver, 75 Cal. 194, 16 P. 780, 7 Am.St.Rep. 143; Brown v. Luddy, 121 Cal.App. 494, 9 P.2d 326) and by cases in other jurisdictions. Butte City Smokehouse Lode Cases, 6 Mont. 397, 401, 12 P.

858; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378, 415, 5 P. 570; Talbott v. King, 6 Mont. 76, 9 P. 434; Kansas City Mining & Milling Co. v. Clay, 3 Ariz. 326, 29 P. 9; Loney v. Scott, 57 Or. 378, 112 P. 173, 32 L.R.A.,N.S., 466.

[8, 9] The patent secured by the railroad in 1880 was issued under the authority of the Railroad Grant Act of July 25, 1866, and could in no way apply to mineral land title to which had been previously vested in others. Any authority it might acquire in the passage of time as to the nature of the land, despite the limitations of the act, could operate only against subsequently located claims. Van Ness v. Rooney, supra; Brown v. Luddy, supra. Thus, the patent which determined that the Ames tract was agricultural applied only to the surface of the land and to that portion of the subsurface not already subject to existing extralateral rights. Lindley, Mines, 3d Ed., § 613, p. 1462. Whatever claims plaintiffs advance to the subsurface mineral land of the Ames tract would have to date from the issuance of the patent and not from the date of the Railroad Grant Act, and by the time of the issuance of the patent the extralateral rights of the Pennsylvania and Jefferson mines in the Ames tract had already fully vested by virtue of the Mining Act of July 26, 1866. There can be no objection to having the title to the surface in one person and the title to the subsurface in another, a practice recognized at common law and widely followed today. Lindley, Mines, 3d Ed., § 812.

[10] For the same reasons the state did not, as plaintiffs contend, acquire a fee simple to both the surface and subsurface of the strip of school land intervening between the Ames tract and the mining properties cutting off any extralateral rights the latter might claim in the former. When the act of March 3, 1853, (10 U.S.Stats.A.L. 244) made a grant of certain sections of each township to the state for school purposes, it expressly excepted all mineral lands. The land in question was still unsurveyed and the sections of land to be granted therefore still undetermined. Following the survey in 1867, no title could pass from the United States to the state to land determined to be mineral. West v. Standard Oil Co., 278 U.S. 200, 49 S.Ct. 138, 73 L.Ed. 265; United States v. Sweet, supra; Barden v. Northern Pacific R. R. Co., supra; Northern Pacific R. R. Co. v. Sanders, supra; Ivanhoe M. Co. v. Keystone M. Co., 102 U.S. 167, 175, 26 L.Ed. 126. The mineral subsurface, then subject to the vested extralateral rights of the adjoining mines, could therefore not pass to the state under the terms of the grant.

[11] Even if, as plaintiffs contend, the certification by the Registrar of the United States Land Office on March 7, 1871, that there was no claim or filing on this land other than that of the state had the effect of a patent establishing the complete title of the state, its determination could be effective only against subsequently located mining claims and not against existing vested extralateral rights therein. Saunders v. La Purisima, etc., Co., 125 Cal. 159, 57 P. 656, cited by plaintiffs concerned not only a subsequent claim but one with respect to the surface of the land. In contrast West v. Standard Oil Co., 278 U.S. 200, 49 S.Ct. 138, 73 L.Ed. 265, indicates that these certificates issued by the registrars of local land offices were unauthorized and of no binding effect.

[12, 13] Plaintiffs argue further that the Mining Act of 1872, by restricting future mining claims asserting extralateral rights to a maximum of 1,500 feet along the vein, precludes the patent to the Pennsylvania mine, secured at a later date, from encompassing extralateral rights based upon a greater length. The mining patent cannot thus be limited by that act, however, when issued in pursuance to the earlier act of July 26, 1866, on the basis of an earlier location. Lawson v. United States Min. Co., 207 U.S. 1, 28 S.Ct. 15, 52 L.Ed. 65; Carson City Min. Co. v. North Star Min. Co., C.C., 73 F. 597, affirmed 9 Cir., 83 F. 658; Pennsylvania Min. Co. v. Grass Valley Co., C.C., 117 F. 509. The plaintiffs themselves declare that a patent properly issued and in conformance with the provisions of an act of congress relates the title back to the date of that act. Furthermore, the additional length of the claim resulted from the consolidation of three original claims, the lines of which need not be shown to establish the validity of an existing patent to the consolidated claim on collateral attack. St. Louis Smelting Co. v. Kemp, 104 U.S. 636, 26 L.Ed. 875; Tucker v. Masser, 113 U.S. 203, 5 S.Ct. 420, 28 L.Ed. 979; Peabody Gold Min. Co. v. Gold Hill Min. Co., 9 Cir., 111 F. 817.

[14] Defendants can establish their extralateral rights in the Ames tract as owners of the Jefferson mine as well as of the

Pennsylvania mine. While the Jefferson mine was never patented and was subsequently abandoned and relocated so that it might be said to constitute a mining claim coming into existence after the issuance of the patent to the Central Pacific Railroad for the Ames tract (Burke v. Southern Pacific R. R. Co., supra), the deed of the Ames land to the present plaintiffs from Ebert, their immediate predecessory in title, specifically reserved to Ebert, his successors and assigns, the right to follow the Jefferson vein beneath the Ames land and to mine therefrom. By mesne conveyances, defendants succeeded to the rights of Ebert under this reservation, by virtue of which they clearly have the right to follow the vein of the Jefferson mine beneath the surface of the plaintiffs' land.

[15, 16] As for plaintiffs' contention that regular performance of annual labor is necessary to maintain a good title, it is well established that title to a mining claim does not terminate upon a failure to perform annual labor. The intervention of a third party and a relocation of the ground must occur before any forfeiture can take place. Lindley, Mines, § 651; Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445; Belcher Consol. Gold Min. Co. v. Deferrari, 62 Cal. 160, 163; Emerson v. McWhirter, 133 Cal. 510, 65 P. 1036. Hence there are no grounds for attacking the validity of the Pennsylvania claim on this basis. The plaintiffs are precluded from taking advantage of any forfeiture and subsequent relocation of the Jefferson claim because of the reservation of mining rights in their deed to the Ames tract from Ebert.

It remains to consider plaintiffs' contention that the defendants have failed to prove the original location of the mining claims, their continued existence, compliance with the miners' rules and regulations, or what these rules and regulations were. The trial court found that the defendants' evidence established all these things; the question here turns on whether such evidence is hearsay as plaintiffs contend. Defendants introduced properly authenticated copies of deeds and other instruments now of record in the county recorder's office in Yuba county, patent records on file in the official records in the General Land Office in Washington, D. C., printed official reports of the "Mineral Resources" of the public domain of the west, published under authority of congress, and other historical material. This evidence was supplemented by the oral testimony of two old settlers that both the Pennsylvania and the Jefferson mines were in operation on the present location in the early 1860's. The case of Kent v. Snyder et al., 1866, 30 Cal. 666, which mentions in its statement of facts the location of the Jefferson claim by its original owners corroborates the existence of this claim prior to 1866.

[17, 18] It is a well established exception to the hearsay rule that evidence of common reputation existing previous to the controversy may be introduced to prove the existence of boundaries and facts of a public or general interest more than thirty years old. Code Civ.Proc. § 1870. The original location of a mine, particularly on government land, is within the scope of this exception (Muller v. Southern Pacific Branch Ry. Co., 83 Cal. 240, 23 P. 265; Simons v. Inyo Cerro Gordo, etc., Co., 48 Cal.App. 524, 192 P. 144.) Recitals in ancient deeds (Wilson v. Snow, 228 U.S. 217, 33 S.Ct. 487, 57 L.Ed. 807, 50 L.R.A., N.S., 604; Gabarino v. Noce, 181 Cal. 125, 183 P. 532, 6 A.L.R. 1433), and statements in official documents kept as part of the regular function of the office by some department of the government or authorized by the legislature are likewise recognized exceptions to the hearsay rule. Code Civ. Proc. §§ 1920, 1924; Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889.

[19-21] The evidence introduced by the defendants is admissible to prove the proper location and existence of the mining claims under these exceptions to the hearsay rule. The patent records containing abstracts of title to the mining claims, recitals as to the location of these claims in several ancient deeds, verified statements as to the location and possession of the mines, a copy of the articles of incorporation of the early Pennsylvania mining corporation, a certified copy of the minutes of meetings of the Quartz Miners of Brown's valley, descriptions of the claims by metes and bounds, the registrar's final certificate of entry of the patent, and the field notes of survey and report of the United States deputy mineral surveyor on the Pennsylvania mine are clearly records kept in the usual course of business by the General Land Office and thus admissible as official documents. Culver v. Uthe, 133 U.S. 655, 10 S.Ct. 415, 33 L.Ed. 776; Galt v. Galloway, 29 U.S. 332, 4 Pet. 332, 7 L.Ed. 876;

People v. Hagar, 52 Cal. 171. So too, the official report of the mineral resources of the public domain of the west being published under the direct authority of congress as an official report to the secretary of the treasury falls into the category of an official document, the contents of which are admissible to show the location and working of the mines in pursuance to the miners' rules and regulations then in existence. In addition, since these locations may be proven by evidence of general reputation previous to the controversy there is no reason why the defendants cannot introduce the History of Yuba County by Chamberlain and Wells (1879) for such a purpose. Code Civ.Proc. § 1936. Thus, the finding by the trial court that a valid location was made is a legitimate finding of fact supported by admissible evidence. Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 P. 1047; Gruwell v. Rocca, 141 Cal. 417, 74 P. 1028; Harris v. Kellogg, 117 Cal. 484, 49 P. 708; Colman v. Clements, 23 Cal. 245; Adams v. Crawford, 116 Cal. 495, 48 P. 488.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; WARD, J. pro tem.; PETERS, J. pro tem.

CARTER, Justice (dissenting).

I dissent.

The majority opinion in this case is so lacking in logical reasoning and unsupported by authority that it can truthfully be said that it is basically unsound.

While my past experience as a practical miner and natural leaning toward the mining industry should cause me to favor the conclusion reached in the majority opinion. I am persuaded by considerations of both reason and authority that such conclusion is contrary to settled principles of law, sound reasoning, and every consideration of equity and natural justice.

The conclusion reached in the majority opinion not only renders insecure and subject to collateral attack every railroad patent in this State, but it places the same cloud upon every agricultural patent which has been issued within the last seventy-five years.

The gist of the majority opinion in this case is that the railroad company by its patent obtained title to the surface of the Ames tract only, and that the predecessors in interest of the mining company obtained title to the subsurface of said tract. In my opinion this view is palpably erroneous for the reason that it is the settled rule, and the authorities are uniform in holding, that a patent to a railroad company issued pursuant to the so-called Railroad Grant Acts conveys thereby a common law fee in non-mineral land. Lawson v. United States Mining Company, 207 U.S. 1, 28 S.Ct. 15, 52 L.Ed. 65; Amador Medean Gold Mining Co. v. South Spring Hill Gold Mining Co., C.C., 36 F. 668.

Section 829 of our Civil Code provides: "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it".

No attempt is made in the majority opinion to define the limits of the so-called surface and subsurface ownerships. Nothing is said therein to indicate whether or not it is meant that the owner of the surface may penetrate into the subsurface to any extent, or if so, to what extent; in other words, under this announced new doctrine, may the owner of the surface dig a post hole, a cellar, or sink a well? If he may do these things, how much further may he go?

The effect of the holding of the majority opinion is to grant to the owner of the Pennsylvania and Jefferson claims all of the mineral deposits which may be under the surface of the Ames tract whether or not the same constitute the extralateral dip of veins apexing on said claims; in other words, by holding that the railroad company got no title to the mineral deposited in the Ames tract because by its patent it simply got title to the surface of said tract, and that the predecessor in interest of the defendant got title to the subsurface of said tract, the plaintiffs in this action are deprived of the right to extract mineral deposits from said tract even though they have no connection or relation to the veins apexing on the Pennsylvania and Jefferson claims.

The majority opinion grants to the defendant much broader rights than those claimed by the defendant itself, as the right claimed by the defendant in this case is based exclusively upon the extralateral right doctrine and not otherwise.

The rights flowing from the extralateral right doctrine have many restrictions and limitations and certainly do not include the entire subsurface of the land into which

veins may dip. First, some of those limitations are expressed in the law establishing and confirming such rights. In 30 U. S.C.A. § 26, it is provided in part: "The locators * * * shall have the exclusive right of possession * * * of all the surface included *within the lines of their locations,* and of all veins, lodes, and ledges throughout their entire depth, the *top or apex of which* lies *inside* of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their *course downward* as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges *shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations,* so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Second, it is elementary that to have extralateral rights in a vein, the apex thereof must be on the location. Costigan Mining Law, p. 409, et seq.; 30 U.S.C.A. § 26.

Third, the identity and continuity of the vein must be established and it must have an apex and a dip. As stated in Costigan on Mining Law, p. 410:

"The identity and substantial continuity of the vein from its apex down is essential to the existence of extralateral rights on the vein, and there are no extralateral rights unless the vein has an apex and a dip." And in this connection the presumption is that no dip exists. Costigan on Mining Law, p. 411; Lindley on Mines, 3d Ed., § 615.

Fourth, extralateral rights do not extend to secondary veins which cross the principal vein at right angles. Costigan on Mining Law, p. 440.

To say that the subsurface rights were acquired by the mining patentees is manifestly unsound. The most that they can claim are the extralateral rights and certainly such rights do not embrace all of the subsurface rights nor all of the right to all of the mineral under the surface of the Ames tract. This is forcefully illustrated by the rule that extralateral rights only extend along the *dip* of the vein, that is, continue only as long as the vein runs *downward* in its lateral extension. If it at any time runs parallel or upward then the extralateral rights cease. It is said in 40 Cal. Jur. 819: "An extralateral right applies to the vein *only on its downward course* or dip, outside the side lines, and does not authorize a locator to follow the vein on its course or strike outside the boundaries of the claim, as where it becomes flattened and extends from thence horizontally in a departure from the general plane of the vein, or for any considerable distance takes an upward trend."

In Tom Reed Gold Mines Co. v. United Eastern Mining Co., 24 Ariz. 269, 209 P. 283, 287, it is said:

"The authorities construing this section hold (1) that the vein to which this extralateral right is claimed must be followed on its 'course downward'; and (2) that the right attaches only to the identical vein which has its apex within the location, and not to another and different vein lying outside the vertical boundaries of the claim. Both these conditions must exist, and are independently essential to the right of extralateral possession and enjoyment. We treat of them in order:

"(1) The vein must be pursued on its course downward.

"In Steward M. Co. v. Ontario M. Co., 23 Idaho 724, 132 P. 787, it was said:

" 'Sometimes it may happen that the "downward course" of a vein will be perpendicular, and the vein will form a vertifical plane, but, as a rule, there is a deflection in the downward course of these mineral veins from the perpendicular, and we call this their dip; but still the course of the dip is always "downward," and, when the plane of the vein reaches the horizontal, then we have a blanket vein or lode, *and on such a vein a locator has no extralateral right.* * * * The Supreme Court always qualifies its holdings in this respect by the condition of the statute that the course between those vertical planes must be downward.'

"In Southern Nevada G. & S. M. Co. v. Holmes M. Co., 27 Nev. 107, 73 P. 759, 103 Am.St.Rep. 759, it was held:

" 'If the defendant entered upon a ledge having its apex within the exterior boundaries of plaintiff's location, and extracted ore therefrom between the planes drawn

vertically downward through the end lines of said location, the right of the plaintiff to recover damages for such acts would not be affected by proof merely that the place from which such ore was extracted could be reached by going continuously through ledge matter from a ledge having its apex within the exterior boundaries of a prior location belonging to the defendant, but it must further appear that such passage from the apex of defendant's ledge is made continuously downward on the dip of that ledge, and if any portion of such passage must necessarily be made either upward, or laterally along the strike, then the plaintiff's right to recover is not affected.'

"See Lindley on Mines, (3d Ed.) §§ 319 and 589, and St. Louis M. Co. v. Montana M. Co. [9 Cir.,], 113 F. 900, 51 C.C.A. 530, 64 L.R.A. 207; Id., 194 U.S. 235, 24 S.Ct. 654, 48 L.Ed. 953.

"While the authorities which have passed upon the question are but few in number, there would seem to be no reason to doubt that the excerpts we have quoted state the true rule, which is that no extralateral right exists to a vein, lode, or ledge beyond the point where in its course outside the claim of apex it becomes flattened and extends from thence horizontally in a departure from the approximate general plane of the vein in its downward course, or for any considerable distance takes an upward trend."

Sixth, the holder of such rights has no general exploratory rights under another's land, and he cannot tunnel through the other's land to reach his vein, or as it is said in St. Louis Min. & Mill Co. v. Montana Min. Co., 9 Cir., 113 F. 900 at page 902, 64 L.R.R. 207 (affirmed: 194 U.S. 235, 24 S.Ct. 654, 48 L.Ed. 953):

"They are given the right of possession of the surface and of everything within their own claim, except the veins or lodes therein, which may have their apices in the surface of another claim, so as to give the owner of the latter extralateral rights, and they are given the right to follow outside of their side lines and into adjoining claims all veins or lodes which have their apices in their own claims, so as to confer extralateral rights. *This is their right, and no more. There is no warrant for saying that they have any general right of exploration within land of an adjoining patented claim, whether upon or below the surface.* The right of exploration is given for the purpose of making discovery of mineral. Of what avail would be the right of exploration if no benefit could be obtained from discovery made thereby? The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they were *seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself.*"

It is a matter of common knowledge among persons familiar with mineral deposits, and I know from my own experience, that two or more distinct mineral deposits may exist in such close proximity that they may be covered by a single mineral location; hence, it is possible that there are mineral veins underlying the surface of the Ames tract which may or may not be subject to the extralateral right of mining claims located on adjacent land. By holding that the railroad company got title to the surface of the Ames tract only, the plaintiffs would be barred from extracting the mineral from said deposits under the rule announced in the majority opinion.

This doctrine of surface and sub-surface ownerships finds no support in the decided cases in this or any other country where the common law prevails. The only authority for it cited in the majority opinion is Lindley on Mines, 3d Ed., § 812. While the language used by this author in connection with this particular subject matter is very vague, he frankly states that it is a *"radical doctrine"*.

I feel then that I am justified in saying that the majority opinion stands alone in the enunciation of this unsound and unsupported doctrine. In this respect it may be said that said opinion is a hybrid, and like the quadruped noted for its stubbornness, it is "without pride of ancestry or hope of posterity".

The specific question which we are called upon to determine in this case is whether the defendant has the right to follow a vein of gold-bearing quartz apexing on its mining claim which dips extralaterally from defendant's mining claim into plaintiffs' land, the eastern boundary of which is parallel with, but 200 feet west of the western boundary of said mining claim, where plaintiffs' title originated by virtue of the Railroad Grant Act of July 25, 1866, was confirmed by a patent issued to the Central Pacific Railway Company on June 14, 1880,

and by mesne conveyances vested in plaintiffs.

No claim is made by defendant that either the railroad company or any of the government officials had any knowledge whatever that the Ames land contained a mineral deposit or that it was other than nonmineral land at the time the patent was issued. Said land was duly classified as nonmineral by the United States Land Office, and a patent therefor was duly and regularly issued pursuant to said Railroad Grant Act. The railroad company thereafter conveyed a fee title to said land to the predecessor in interest of plaintiffs, and this title was ultimately conveyed to plaintiffs.

The United States Supreme Court has uniformly held that there must be a time at which title to land must be settled, and has determined that said time shall be at the date of issuance of patent.

Since mineral lands are excluded from the grants in aid of railroads, before patent can issue to railroad lands, there must be a determination as to whether or not the land is mineral or nonmineral in character, that is, whether it is more valuable for mining or agricultural purposes.

The duty of making such a decision devolves upon the General Land Office, whose decision is in the nature of a quasi-judicial determination, and conclusive thereafter as against collateral attack.

As the majority opinion does not contain either a complete or correct statement of the facts of this case, I will make a statement of the essential facts before proceeding with a discussion of the legal principles applicable thereto.

This is an appeal from a judgment for defendant in an action in ejectment. Although plaintiffs asked for an injunction and accounting in the same action, it was agreed by stipulation of the parties that trial of the issue of damages should be held in abeyance until the question of title had been determined on appeal. Therefore, that question only is now before this court.

The action arose out of a dispute over the title to a vein of gold-bearing quartz which extends extralaterally under the land of the plaintiffs from an apex on mining claims in the possession of the defendant.

Defendant admittedly has been extracting the ore from said vein, and maintains its right to do so by virtue of its ownership of the apex of said vein within said mining claims.

The land belonging to the plaintiffs hereinafter called "the Ames tract", is described by legal subdivision as the S.W. ¼ of sec. 15, T. 16 N., R. 5 E., M. D. B. & M., situated in Yuba county, California. The inception of the Ames title is an act of Congress, effective July 25, 1866, 14 U.S. Stat.A.L. 239, granting to the California and Oregon Railway Company certain lands "to aid in the construction of a railroad". Mineral lands were excepted from this grant. Upon completion of the railroad, a map showing its location was filed in the United States Land Office, July 27, 1870. Thereafter, the Central Pacific Railroad Company succeeded to the rights of the California and Oregon Railway Company and received a United States patent for lands, including the Ames land, on June 14, 1880. Plaintiffs acquired title to the Ames tract through a deed from J. E. Ebert, who had succeeded to the railroad title.

The defendant's land is located in the S.E. ¼ of sec. 16, T. 16 N., R. 5 E., M. D. B. & M., which adjoins said sec. 15 on the west. It consists of two quartz mining claims, known as the Pennsylvania and Jefferson claims, which defendant holds under lease and option from the owners. These claims and the Ames tract are not adjacent, for a strip of school land two hundred feet in width lies between them. The claims, both four hundred feet in width, are located contiguously on a north and south vein of gold-bearing quartz, and have side lines substantially parallel with the section line between said sections 15 and 16. The Jefferson claim extends seven hundred fifty feet north from the south line of section 16. The Pennsylvania claim joins the Jefferson claim at its north boundary and continues northward for a distance of one thousand five hundred forty feet. The vein which extends throughout the length of these two claims dips extralaterally under the narrow strip of school land and continues into the Ames property.

The act of Congress under which defendant asserts its title to the Pennsylvania and Jefferson claims authorized the disposal of mineral lands from the public domain and became effective July 26, 1866, 14 U.S.Stat.A.L. 251. Complying with the provisions of this statute, one of defend-

ant's predecessors secured a patent to the Pennsylvania mining claim. The first application for said patent was made in January, 1874, but because of adverse proceedings and a technical defect, this application was denied with leave to renew. The renewal was made January 22, 1880. Thereafter, on May 31, 1880, the local land office receiver at Marysville issued his receipt for money paid by applicant, and the register of said office issued his final certificate of entry. Patent to the Pennsylvania claim was issued by the United States government on August 18, 1880, to the Pennsylvania Mining Company, which company was incorporated in 1863.

The Jefferson claim is unpatented but held by location. Although the earliest recorded location of this claim apparently was made in 1891, defendant claims its predecessors have worked both the Pennsylvania and Jefferson claims since the early days of California.

The strip of school land which separates the mining claims from the Ames tract was granted to the state of California under the act of Congress dated March 3, 1853, 10 U.S.Stat.A.L. 244, which granted the sixteenth and thirty-sixth sections of each township for school purposes. The grant of these sections also was subject to the reservation of mineral lands. The lands were then unsurveyed, the survey of them being completed August 6, 1867. On May 22, 1882, the eastern one-half of the southeast quarter of section 16, in which were located the two mining claims, was conveyed by patents of the state of California to certain grantees, I. S. Belcher and W. C. Belcher, who later conveyed their titles under the state patents to the Pennsylvania Mining Company, a predecessor of the defendant.

In its statement of facts the majority opinion says: "On June 14, 1880, the Central Pacific Railroad, pursuant to its legislative grant, secured a *patent* to the Ames tract which transformed it from a 'float' to an established title by the definite location of the railroad line." Again later the statement is made that "In the present case there was no final and definite location of the Ames tract by the railroad until the securing of the patent in 1880;" and further that "The patent which *definitely located* and established the railroad's claim stated that the Ames tract was agricultural land." The first of these statements is to say the least ambiguous and the other two indicate a complete lack of understanding as to the time of the vesting of title to railroad land.

The securing of a patent has nothing to do with the actual vesting of title to railroad land. It is merely a confirmation of a title which has already vested. It is too well settled to admit of argument that grants in aid of railroads are grants made in presenti, and that where the line of such roads is not located the grant remains a float, but that when the route of the road is definitely fixed, the sections granted become susceptible of identification, and the title attaches to them and took effect as of the date of the grant cutting off all intervening claims. Wisconsin Central Railroad Co. v. Price County, 133 U.S. 496, 509, 10 S.Ct. 341, 33 L.Ed. 687; Deseret Salt Co. v. Tarpey, 142 U.S. 241, 12 S.Ct. 158, 35 L.Ed. 999; Jatunn v. Smith, 95 Cal. 154, 30 P. 200. Confirmation of this title by patent also relates back to the date of the original grant, thereby cutting off all intervening rights.

The majority opinion states as a contention of the plaintiffs "that the full title to the Ames tract was conveyed away prior to the passage of the Mining Act of July 26, 1866, so that the latter could in no way confer upon the adjoining mines extralateral rights in the Ames tract." Then continues with "This argument might seem persuasive except for one vital factor. The Railroad Grant Act of July 25, 1866, upon which the plaintiffs rely for their original title, specifically excepted from its operation all mineral lands. The terms of the act make it clear that congress did not intend to vest in the railroad title to any mineral lands of the United States. Barden v. Northern Pacific R. R. Co., 154 U.S. 288, 14 S.Ct. 1030, 38 L.Ed. 992; United States v. Sweet, 245 U.S. 563, 38 S.Ct. 193, 62 L.Ed. 473; Broder v. Natoma Water Co., 101 U.S. 274, 25 L.Ed. 790; Northern Pacific R. R. Co. v. Sanders, 166 U.S. 620, 17 S.Ct. 671, 41 L.Ed. 1139; McClintock v. Bryden et al., 5 Cal. 97." This much of the opinion's statement is true—that the Railroad Grant Act excepted mineral lands, and that congress did not *intend* thereby to vest in the railroad title to any mineral lands in the United States. But the next statement in the opinion is completely false and unsupported by the cases cited in its favor,—namely, that *"The subsurface of the Ames tract being clearly mineral could not pass under the terms of the act but re-*

mained in the government, and the Pennsylvania and Jefferson mines received full extralateral rights to mine therein by virtue of the Mining Act of July 26, 1866."

In the Barden case, supra, the Northern Pacific Railroad Company claimed title to lands admittedly mineral in character not by virtue of a patent thereto, but on the ground that the lands were not known to be mineral until after the filing of its map showing the location of its road, and that therefore they passed to the railroad company at said time. The court held, and correctly so, that the time for final determination of the character of the land was not the date of the filing of the map of definite location, but the date of the issuance of patent thereto. In the present case, however, the railroad company secured a patent to the land in question. The Barden case, supra [154 U.S. 288, 14 S.Ct. 1038, 38 L.Ed. 992], stating that the plaintiffs therein had no cause for apprehending that its decision would lead to uncertainty of titles, proceeded to discuss the results which would obtain if a patent were issued:

"We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the interior department, and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of the public lands of the United States, and the adjustment of private claims to them under the legislation of congress. It can hear contestants, and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon, and determine, the character of lands to which different parties assert a right; and when the controversy before it is fully considered, and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed; and as the grant excludes mineral lands, in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance.

"It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake its determination is conclusive against collateral attack." (Italics added.)

The cases cited in the majority opinion as authority for the statement that "the terms of the act make it clear that congress did not intend to vest in the railroad title to any mineral lands of the United States", support this statement with which I am in full accord. However, none of them is authority for the statement which follows to the effect that the *subsurface* of the Ames tract being clearly mineral could not pass under the terms of the act and remained in the government.

The case of United States v. Sweet, supra, involved a question as to whether 40 acres of land known to be valuable for coal before Utah became a State, passed to the State by a school land grant which neither expressly included nor excluded mineral lands. The court held that the grant was to be read in the light of the mining laws, the school land indemnity law providing for lieu selections where sections 16 and 36 were mineral, and the settled policy of congress respecting mineral lands, and concluded that the sections known to be mineral when the grant took effect did not pass under the grant.

In the case of Broder v. Natoma Water Co., supra, defendant's right to maintain a canal over the lands of the plaintiff was upheld although it was constructed over lands subsequently granted to a railroad company, by reason of the fact that congress had previous to the Railroad Grant act enacted a statute conferring on owners of such canals a pre-existing right. It does not appear, however, from a reading of the case that the railroad company's lands were ever patented to it.

The case of Northern Pacific R. R. Co. v. Sanders, supra, does not involve a case in which the railroad company ever obtained a patent to the lands in controversy. The question decided therein was merely that

where, at the time of the definite location of plaintiff's road, applications of record were pending to purchase said lands, said applications were "claims" within the meaning of the granting act, which excluded therefrom lands "not free from pre-emption 'or other claims or rights,' at the time the line of the road was definitely fixed." [166 U. S. 620, 17 S.Ct. 673, 41 L.Ed. 1139].

McClintock v. Bryden et al., supra, is an early decision of this court holding that where a person settles on any of the mining lands of this State, he settles on there subject to the rights of miners, who may proceed in good faith to extract valuable minerals therefrom in the most practicable manner in which they can be extracted, with least injury to the occupying claimant, according to the express statutes of this State, even though the agricultural settler settled on the lands prior to said statute.

As can be readily seen none of these cases has any direct bearing on the case at bar. They are authority for the general propositions that mineral lands were excluded from a granting act and do not pass thereby to the grantee, but they in no wise militate against the decision in the Barden case, supra, *that, when a determination has been made by the General Land Office that lands to which application for patent has been made are nonmineral in character, and has issued a patent pursuant to said decision, that said determination is conclusive, and that regardless of the fact that the lands may thereafter appear to contain mineral in paying quantities, a common law fee conveying title to the center of the earth has passed to the patentees.* (Italics added.)

The majority opinion cites and relies upon the cases of Van Ness v. Rooney, 160 Cal. 131, 116 P. 392; Brown v. Luddy, 121 Cal.App. 494, 9 P.2d 326; and Chicago Quartz Mining Co. v. Oliver, 75 Cal. 194, 16 P. 780, as authority for its statement that "It is well established that the government cannot convey away land which it no longer owns and that a patent cannot cut off previously existing vested rights in the patented property." In this connection said opinion further states: "The patent secured by the railroad in 1880 was issued under the authority of the Railroad Grant Act of July 25, 1866, and could in no way apply to mineral land title to which had been previously vested in others. Any authority it might acquire in the passage of time as to the nature of the land, despite the limitations of the act, could operate only against subsequently located claims. Van Ness v. Rooney, supra; Brown v. Luddy, supra."

It is worthy of note that the last cited cases have not been cited or referred to in the voluminous briefs, petitions, or printed or oral argument presented to this court by the eminent counsel on either side of this case. These counsel, or at least some of them, are specialists in the field of mining law, and I feel justified in stating that if the principles of law announced in these cases had any relevancy or application to the legal problems involved in this case, or could possibly form the basis for a legal theory upon which this case could be decided, those cases and the principles of law enunciated therein would certainly have been called to the attention of this court by such counsel.

Aside from my own study and analysis of said cases, which has convinced me that they have no application to the legal problems involved in the case at bar, the failure of eminent counsel for defendant to cite or rely upon them as a basis for the determination of this case convinces me beyond the possibility of a doubt that said cases cannot be relied upon in support of the conclusion reached in the majority opinion in this case.

I have long been familiar with the case of Van Ness v. Rooney, supra. It arose in the county where I was born and raised and was the subject of much discussion there for many years; in fact, I called the same to the attention of the author of the majority opinion. The decision of this case, both by the trial court and this court, was predicated upon the proposition that a patent for land included in a railroad grant which expressly excludes and excepts from the lands described in the granting clause "all mineral lands, should any such be found in the tracts aforesaid" [160 Cal. 131, 116 P. 393], does not pass title to a mineral claim included therein which had been duly and legally located prior to the issuance of the patent. Obviously, such is not the problem involved in the case at bar. Furthermore, the case of Van Ness v. Rooney, supra, was decided by this court prior to the decision by the Supreme Court of the United States of the case of Burke v. Southern Pacific R. R. Co., 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527, which held that an exception inserted in patents issued under the Railroad Grant Act to the effect that if any of the lands described should be found to be mineral the same should be ex-

cluded from the operation of the patent is unauthorized and void, because the granting act, contemplated that the patents should effectually and unconditionally pass the title to the land granted. In my opinion the decision of this court in the case of Van Ness v. Rooney, supra, is in direct conflict with the decision of the Supreme Court of the United States in the case of Burke v. Southern Pacific R. R. Co., supra, and the Van Ness case, supra, can no longer be considered an authority for the legal proposition decided therein.

The case of Brown v. Luddy, supra, follows the decision of this court in the Van Ness case, supra, and the conclusion reached by the District Court of Appeal in the Brown case, supra, is predicated almost entirely if not wholly upon the theory advanced by this court in the Van Ness case, supra. The factual situation in the case of Brown v. Luddy, supra, was however, quite different than that in the Van Ness case, supra, and there is no similarity between the facts in either of those cases and the case at bar. In the Brown case, supra, the plaintiffs' mining claim was located and had been in existence and was being actually operated at the time of the passage of the statute authorizing the issuance of the stock-raising homestead patent which was the basis of defendants' title in said case; said statute and the patent issued to Luddy expressly reserved to the United States "all coal and *other minerals in the land*". [121 Cal.App. 494, 9 P.2d 331.] This is quite different than the provision in the patent issued to the railroad company in the Van Ness case, supra, which excepted "all mineral *lands*". In my opinion the decision of the District Court of Appeal in the case of Brown v. Luddy, supra, announces principles of law much broader than was necessary to the decision of the legal propositions involved in said case, but in any event, it cannot be said to be authority supporting the position of the defendant here because the factual situation there was entirely different than that which obtains in the case at bar.

The majority opinion also cites the case of Chicago Quartz M. Co. v. Oliver, 75 Cal. 194, 16 P. 780, as announcing the same principle of law as that enunciated in the cases of Van Ness v. Rooney and Brown v. Luddy, supra. The first mention of the Chicago Quartz Mining Co. case by any of the counsel in the case at bar was on October 9, 1940, when this case was argued for the second time before this court. It was then called to the court's attention by counsel for defendant in an outline of oral reargument. The Chicago Quartz Mining Co. case holds that a patent issued by the United States Government to the Central Pacific Railroad Company for land included within the boundaries of the grant made to it by the Act of Congress of July 1, 1862, is not conclusive evidence that the land covered by the patent is nonmineral in character, and a person claiming the land under a subsequent mining patent may show that the land is mineral, and therefore excepted from the operation of the grant to the railroad company.

The decision in this case is in direct conflict with the now settled rule that the issuance of a patent to a railroad company under the Railroad Grant Act conclusively determines the nonmineral character of the land and that the provision in such a patent excepting mineral land therefrom is void and the title conveyed to the railroad company by such patent is a title in fee to nonmineral land. Burke v. Southern Pacific R. R. Co., supra.

It appears from the opinion of this court in the Chicago Quartz Mining Co. case that the mining company there was claiming under a patent to a mining claim issued approximately thirteen years subsequent to the patent issued to the railroad company, and there is no statement in the opinion of this court from which the conclusion can be drawn that the claim of the mining company to its mineral location antedated the patent to the railroad company. This case appears to have been decided upon the theory that the railroad company did not get title to the land embraced within its patent because the land involved in the action was valuable gold bearing mineral land, and known to be such at the time of the issuance of the railroad patent. As stated above, the decision of this court in the Chicago Quartz Mining Co. case is in direct conflict with decisions of the Supreme Court of the United States and subsequent decisions of this court. See Paterson v. Ogden, 141 Cal. 43, 74 P. 443, 99 Am.St.Rep. 31; Jameson v. James, 155 Cal. 275, 100 P. 700.

The majority opinion makes the statement that "When the Ames tract was finally and definitely located in 1880 its subsurface not only was *known to be mineral* but was subject to the vested extralateral rights of the adjoining mines." I presume

this statement must be interpreted to mean that, when the Ames tract was patented, its subsurface was not only known to be mineral but was subject to the vested extralateral rights of the adjoining miners.

The majority opinion does not, however, state by whom the subsurface of the Ames tract was "known to be mineral". Defendant claims to have known that the Pennsylvania mineral vein underlay the Ames tract at the time of its patenting. It does not appear, however, that such fact was known to anyone else. There is no doubt that the act granting land to the railroad companies excluded mineral lands. However, the Supreme Court of the United States has held that a secure title to such lands must vest at some time and has set that time as the date of the issuance of patent. It is necessary therefore, at that time, said court has held, that land should be determined actually to be mineral or nonmineral. Barden v. Northern Pacific R. R. Co., supra; Shaw v. Kellogg, 170 U. S. 312, 337, 18 S.Ct. 632, 42 L.Ed. 1050. Since the duty of determining the character of land devolves upon the General Land Office, the Supreme Court of the United States has held that the persons to whom the land must be known to be mineral must be the officers of the Land Department in charge of the disposition of public lands. The court recognized that said officers might often from the information available to them determine lands to be nonmineral which in fact contained mineral in quantities sufficient to render the land more valuable for mineral than agricultural purposes; nevertheless, it has regarded the settling of the title to land at a definite date to be of such importance that if the land were not shown or known to be such by said officers at the time of patent, their determination at said time as to the nonmineral character of the land has, in the absence of fraud, been held thereafter to be conclusive. The Supreme Court of the United States expressed this view in Barden v. Northern Pacific R. R. Co., supra, 154 U.S. at page 329, 14 S.Ct. at page 1039, 38 L.Ed. 992, as follows:

"There are undoubtedly many cases arising before the land department, in the disposition of the public lands, where it will be a matter of much difficulty, on the part of its officers, to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands; and in such cases the rule adopted, that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. *The officers will be governed by the knowledge of the lands obtained at the time, as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.*" That a patent is conclusive of the character of the land even where issued without hearing and determination on that point was settled in the Barden case, supra, where Mr. Justice Field said:

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly, by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government, until, by further legislation, a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department."

Likewise, in Burke v. Southern Pacific R. R. Co., supra, 234 U.S. at page 709, 34 S.Ct. at page 923, 58 L.Ed. 1527, the court said:

"Taking up the several questions in the light of what we have here said, we answer them as follows:

"1. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

"Answer.—Mineral lands, known to be such at or prior to the issue of patent, were not included in the grant, but excluded from it, and the duty of determining the character of the lands was cast primarily on the Land Department, which was charged with the issue of patents.

"2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or de-

termination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

"Answer.—A patent issued in such circumstances is irregularly issued, undoubtedly so; but, as it is the act of a legally constituted tribunal, and is done within its jurisdiction, it is not void, and therefore passes the title. (Noble v. Union River Logging Railroad, 147 U.S. 165, 174, 175, 13 S.Ct. 271, 37 L.Ed. 123, 126, 127), subject to the right of the government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued. (McLaughlin v. United States, 107 U.S. 526, 2 S.Ct. 802, 27 L.Ed. 806; Western Pacific Railroad Co. v. United States, 108 U.S. 510, 2 S.Ct. 802, 27 L.Ed. 621). [See, also, West v. Standard Oil Co., 278 U.S. 200, 211, 49 S.Ct. 138, 73 L.Ed. 265].

"3. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

"Answer.—The mineral land exception in the patent is void.

"4. If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural, and that all the requirements preliminary to the issuance of the patent have been complied with?

"Answer.—It is conclusive upon a collateral attack."

Furthermore, lands must not only be "known" mineral lands, but must be known to be more valuable for mining than for agricultural purposes (Hunt v. Steese, 75 Cal. 620, 17 P. 920), and abandoned dry shafts on the land or the discovery of mineral in nonpaying quantities will not bring it within the "known" mineral classification. Brown v. Luddy, supra.

The majority opinion states that "The act alone, however, cannot be the source of title to any mineral lands. As Justice Fields stated in Barden v. Northern Pacific R. R. Co., supra, the Railroad Grant Act of July 25, 1866, when it excepted mineral lands meant that title to all mineral lands was to remain in the United States, and no rights to such lands could in any way pass to the railroad."

But one conclusion can be drawn from the above-quoted statement attributed to Justice Fields in the Barden case, and that is, that the writer of the majority opinion did not read the whole of said decision. The point which is made in the Barden case and which the majority opinion seems completely to have ignored or overlooked is, and I solicit indulgence for repetition, that land known to contain mineral in paying quantities may not be patented under said act to the railroads, but that it is recognized that minerals are often not discovered at the time of the issuance of patent, or that the mineral content is not known at that time to be sufficient to classify the lands as being more valuable for mineral than for agricultural purposes; nevertheless, that title cannot be allowed to float around unsettled indefinitely ad infinitum; that the time of the issuance of patent is the best time to settle once and for all who shall have title to the land; that in view of the mineral land exception in the granting act, a determination as to the character of land is necessary before patent thereto can issue; that said determination shall be conclusive in order to make the title conveyed by said patent settled and permanent regardless of the fact that minerals might later be discovered therein.

The majority opinion criticizes the citation by plaintiffs of Burke v. Southern Pacific R. R. Co., supra; West v. Standard Oil Co., supra; and Davis v. Weibbold, 139 U.S. 507, 11 S.Ct. 628, 35 L.Ed. 238, as authority for the statement that a patent to railroad land is conclusive as to the agricultural character of the land, stating that these cases concern only the rights of a mining claimant coming into existence *after* the securing of the agricultural patent.

It is true that in Davis v. Weibbold, supra, the town-site patent under which defendant claimed the lands in controversy antedated the discovery of minerals therein. The case of Burke v. Southern Pacific R. R. Co., supra, however, did not involve a subsequent discovery of minerals. In said case certain lands were located as mineral claims in 1892. Subsequent thereto on May 9, 1892, the defendant railroad company with knowledge of said prior claims made application to have the same land patented to it under the Railroad Grant Act of July 27, 1866, 14 Stat. 292, and the Joint Resolution of 1870, 16 Stat. 382. The railroad company made a false affidavit, no notice of hearing was given, and a patent was issued on July 10, 1894. The original mineral claimants failed to perform their assessment work for one

year, whereupon the present claimants in March, 1909, relocated said land as placer mining claims. The court held that the government had never brought a bill in equity to have the patent vacated or annulled, that the time for so doing had expired, that there was no privity between the plaintiffs and the original mineral claimants, that the patent could not be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it. It was further held that the patent though issued without investigation on the part of the land officers was conclusive though the land was afterward ascertained to be mineral.

The case of West v. Standard Oil Co., supra, is authority for the proposition for which it was cited, but itself involves a different question. The Standard Oil Company claimed certain school lands under patent from the state of California. The Act of 1853, granting school lands to the states, made no provision for determining the character of such lands or for the exclusion from the grant of the land found to contain mineral; it did not provide for the issuance of patents; and no patent nor any evidence of title had been issued to the state. The Standard Oil Company contended that the nonmineral character of the land had been established by a final determination in the department. The court held that no final determination as to the character of the land had been made by the department, that no patent had been issued which would imply that a determination as to the character of the land had been made, and that, therefore, the Department of the Interior had not lost its jurisdiction over the land, and the original inquiry ordered by the Land Department as to the character of the land was subject to a reopening. The cases above-cited all stand for the proposition that a patent is conclusive as to the character of the land, but do not all involve situations in which the mining claim came into existence after the securing of an agricultural patent.

The majority opinion states that "a patent, however, issued merely on the basis of an ex parte hearing on behalf of the claimant to the land can in no way abrogate the existing vested extralateral rights of parties who had nothing to do with the proceedings." The facts in the cases cited in support of this proposition are not similar to the case at bar, but concern conflicts between mining claimants as to the ownership of extralateral veins. They hold that at the issuance of a patent all surface rights are determined, but that a patent does not necessarily determine all underground conflicts as between mineral claimants.

In my opinion the evidence in this case is not sufficient to prove that the owners of the Pennsylvania and Jefferson mines had followed their veins extralaterally to a point where they penetrated the Ames tract at the time of the issuance of patent thereto. Assuming for the time being, however, that such be the case, it seems to me that the fact that the alleged owners of said veins had knowledge of their existence and their location, makes out an even stronger case for the plaintiffs, for they sat idly by and permitted the railroad company to secure a patent to said lands as being nonmineral, when, if said alleged owners had asserted their claim to the same, the railroad company would have been permitted, in fact required, to select lieu lands in their stead—lands to which it *unquestionably* would have obtained a common law fee title extending to the center of the earth—and therefore, defendant should now be estopped to claim that the character of the land to which it now lays claim could not be determined in a mere ex parte hearing.

The grants in aid of railroads were not mere gratuities, they were designed to be compensation for the building of roads, and the mining claimants here, by their negligence or indolence, let the railroad company take lands which allegedly included their extralateral veins, then causing them to lose their right to select lieu lands in their stead.

It is unfortunate, of course, if the mineral claimants lose a portion of their mineral vein. But it is unfortunate also that the agricultural patentee should suffer. In rendering a decision between the two, it is my opinion that the party who has the knowledge and means of protecting his own rights but slept on them, must be the loser, and not the innocent party who acted to the best of his knowledge and in good faith.

By way of justification for its predecessor's inertia in not protecting the right to which it now lays claim, defendant points out that adverse proceedings are permitted only in case of surface con-

flicts; and that protest likewise would not have been recognized because the Land Department has no jurisdiction to determine underground conflicts in the issuance of patents to public lands.

In the first place, adverse proceedings are proper only between rival mining claimants, and, even if that were not true, had defendant's mining claim been located on the railroad land which was open to location at any time prior to patent, the lands would have been removed from the grant and such proceedings would have been unnecessary. Since notice by publication must be given before patent is issued, defendant's predecessor had at least constructive knowledge that such patent was about to issue and counsel for defendant do not negative that fact in their briefs. Having knowledge of the extension of its vein under the plaintiff's land, and notice that a nonmineral patent was about to issue thereon, defendant's predecessor then had two avenues by which it might have protected its extralateral right. It might either have entered upon the railroad land and located a mineral claim thereon prior to patent, or it might have "protested" the issuance of the patent to the railroad company. That *protesting the issuance of patent is* a proper method of securing a determination as to the character of land is well borne out by the following authorities:

According to Costigan on Mining Law (p. 387), "a protest may be filed at any time prior to the issuance of patent by any person who alleges a state of facts which should prevent the issuance of a patent. Except in the case of an excluded co-owner, the office of a protest is to show that the land claimed is not the kind it is represented to be, or that the applicant has failed to comply with the law in a matter which would avoid the claim."

Quoting from Lindley on Mines, 3d Ed., at p. 1752, I find the statement that:

"Often a protestant is a mere volunteer, an amicus curiae, who calls the attention of the department to an alleged noncompliance with the law on the part of the applicant, which otherwise might be overlooked, *or raises the issues as to the character of the land,* in the ultimate determination of which issue the protestant may or may not have an interest proximate or remote;" and on page 1757, in discussing section 2325 of the Revised Statutes, 30 U.S.C.A. § 29, said authority states:

"While controversies over the character of the land are not subjects of adverse claims under the sections of the Revised Statutes under consideration, they are, however, the subject of protest in any proceeding where title to public land is sought to be acquired, and where such issue is raised, it is the duty of the department to see that the lands are disposed of according to the law governing the quality of the lands under consideration."

In the case of German Ins. Co. v. Hayden, 21 Colo. 127, 40 P. 453, 456, 52 Am.St. Rep. 206, 210, after quoting section 2325, U.S.Rev.Stat. to the effect that no objection to the issuance of a patent shall be heard "except it be shown that the applicant has failed to comply with the terms of this chapter", the court said:

"The standing of the protestant seems to be regulated by the exception in the paragraph last quoted. The statement that he is not a party, and therefore not entitled to appeal, is immaterial to the real question at issue. The law does not knowingly permit a claimant to obtain patent under the mineral laws to agricultural lands, and when a patent is applied for it is quite unimportant as to how the attention of the land department may be called to the character of the land sought to be patented. That department certainly has the right to make necessary and reasonable rules governing the manner in which the character of the land shall be made to appear, both prima facie and ultimately; and if these rules are not complied with, or if it appears that the land is not such as can be entered under the particular claim advanced to it, as, for instance, where agricultural lands are applied for under the mining laws, it is not only the province, but the duty, of the land department to deny the entry. It should be unnecessary to cite authorities in support of the foregoing, but, as the contrary has been seriously urged in this case, we cite the following cases: Lindsey v. Hawes, supra [2 Black 554, 17 L.Ed. 265]; Pierce v. Frace, 2 Wash. 81, 26 P. 192, [807]; Harkness v. Underhill, 1 Black 316 [17 L.Ed. 208]; McCarthy v. Mann, 19 Wall. 20 [22 L.Ed. 49]."

If defendant's predecessor had taken advantage of either of the two methods open to it to preserve its claims, the railroad company would also have been protected, for upon withdrawal of the Ames land from its grant, the company would have been

entitled to select other lands in lieu of those withdrawn. But, the mining company, having knowledge of the existence of the vein which it claimed, made no attempt to protect its claim. By this neglect it deprived the railroad company of the lieu lands which it might have selected, and now asserts that it is the owner of the vein which underlies the surface of the railroad company's land. I can reach but one conclusion from these facts, that the defendant's predecessor slept on its rights and that defendant now is estopped to come in and claim them to the detriment of the plaintiffs.

Let us assume an illustration for the purpose of demonstrating a situation which might exist if the position contended for by defendant and adopted by the majority opinion is correct.

"A" locates a mining claim on unpatented land. Shortly thereafter, "B" files an application for a homestead on a quarter section of land adjacent to "A's" mining claim. "A" proceeds to develop his mining claim and "B" his homestead. "B" proves up on his homestead and obtains a patent thereto from the government. "A" files no contest or protest against the patenting of the land to "B". Years after "B" obtains his patent, "A" finds that in following the vein which apexed on his mining claim, it penetrates "B's" agricultural land. The extraction of ore from this vein on "B's" land, may or may not interfere with the use and enjoyment of "B's" land.

Query.—As a matter of justice and equity or even public policy, should "A" be permitted to mine and extract gold from "B's" land, which had been conclusively determined to be nonmineral land at the time patent was issued to "B"?

Answer.—I think not. I believe that a rule more consonant with justice and equity would require "A" to pay "B" for the privilege of mining on "B's" land if sufficient gold is found thereon to justify mining operations. The fact that "A" located his mining claim before "B" filed his homestead application, should not give "A" the right to follow the dip of a vein apexing on his mining claim into "B's" agricultural land. The situation presented in the case at bar is substantially the same as that contained in the above illustration, and I am not persuaded that there are any considerations of equity, justice, or public policy, to justify the extension of the extralateral right doctrine so as to permit the owner of a vein apexing on a mining claim to follow the same on its dip into land conclusively determined to be nonmineral land even though such determination is made after the discovery and location of the mining claim on which said vein apexes.

The doctrine of extralateral rights is well recognized between mines and mining proprietors. As between them, I do not mean to disturb long-established rules. On the other hand, such extralateral right is purely statutory. The common law would give to each claimant all ore bodies beneath the surface of his tract. It is a special privilege or exceptional right which is conferred by statute as an incident of a valid lode location. It is my view that such special right should be confined and limited to the field in which it was intended to operate and in which it creates no injustice because of its reciprocal character.

As to mining proprietors, each takes his property anticipating that veins apexing thereon may extend extralaterally into the land of others, and that the veins of others may in like manner pierce his boundaries. But the agricultural patentee expects to acquire a common law fee in his land conferring complete ownership therein to the center of the earth. Therefore, those who claim extralateral rights in public lands which are being patented as nonmineral lands owe a duty to inform the General Land Office of said claim.

I do not mean to say here that owners of mining claims are put on notice to protect their extralateral vein from everyone who seeks to patent the land which overlies them. As to mining patentees, that is, of course, unnecessary. However, the means of ascertaining the extent and direction of his mineral veins, if not the actual knowledge, is within the power of the mineral claimant. It is upon him therefore that there devolves the duty of giving notice to the General Land Office about to issue a patent conveying a common law fee to the land overlying said veins that he claims a mineral right therein and that a nonmineral patent thereto should not issue, unless, of course, by some specific agreement the extralateral rights therein are to be excepted or reserved.

In view of the fact that most grants of public lands except mineral lands, and mineral rights therein may be protected by the methods hereinabove-mentioned, no great hardship is inflicted upon mining claimants by requiring them to notify the Land Office of their claims and thus pre-

vent unintentional error on the part of the government officials, and hardship to innocent purchasers of agricultural lands.

The majority opinion states: "The subsurface of the Ames tract being clearly mineral could not pass under the terms of the act *but remained in the government,* and the Pennsylvania and Jefferson mines received full extralateral rights to mine therein by virtue of the Mining Act of July 26, 1866." The majority opinion further states: "It is well established that the government cannot convey away land which it no longer owns and that a patent cannot cut off previously existing vested rights in the patented property." It is obvious that the last statement quoted above is in direct conflict with the first quoted statement; that is, in the first statement above quoted, the majority opinion states that the title to the mineral-bearing subsurface of the Ames tract remained in the government at the time it conveyed the Ames tract to the railroad company, and in the last statement quoted above the majority opinion states that such mineral-bearing subsurface had already vested in the owner of the mining claims.

The case of Reynolds v. Iron Silver Mining Co., 116 U.S. 687, 6 S.Ct. 601, 29 L.Ed. 774, cited by the majority opinion as authority for the last statement quoted above, is not helpful because the court therein decided under a statute which provided that where a vein or lode was known to exist within the boundaries of a placer claim, application for patent which did not include application for the vein or lode, should be construed as a declaration that the claimant had no right of possession of the vein or lode claim, that the jury already had determined that the patentees of the placer claim knew at the time of application for patent of the existence of the lode and did not claim the lode in said application and therefore were precluded from subsequently exerting title thereto.

The fundamental error in the majority opinion is that it in effect holds that the government reserved the mineral in the Ames tract when it conveyed the same to the railroad company. This holding is contrary to all of the decisions rendered by the Supreme Court of the United States in the past eighty years and to all of the decisions of this court with the exception of the cases of Van Ness v. Rooney, supra; Brown v. Luddy, supra; and Chicago Quartz Mining Co. v. Oliver, supra, which, as pointed out hereinabove, were decided upon a theory which has been disapproved by the Supreme Court of the United States.

If both tracts of land had been mineral, it is elementary that each would have had the right to follow into the lands of the other, the extralateral dip of veins which apexed within their respective boundaries, and this without regard to the priority of the patents. But the reciprocal right to so follow mineral veins extralaterally is characteristic of mineral lands only.

That mineral veins extending extralaterally may not be followed into lands conveyed by prior agricultural patents has already been determined. The supreme court of Oregon in Reeves v. Oregon Exploration Co., 127 Or. 686, 273 P. 389, 391, commented on the right to follow an extralateral vein into agricultural lands previously patented under the Timber and Stone Act of June 3, 1878, 43 U.S.C.A. §§ 311–313, in the following manner:

"We find no merit in the contention that defendant has the same right to follow its vein under the surface of plaintiffs' land that it would have had if plaintiffs' land had been acquired under the mining laws. The right of a junior lode claimant, whether his claim be patented or unpatented, to follow the dip of his vein into an adjoining patented or unpatented lode claim, is one which arises under the mining laws, and is confined to titles acquired under the mining laws, and has no application to a case where the vein of a lode claim on its dip extends into lands the title to which has been acquired under agricultural patents. Between lode claimants the right of one to pursue his vein on its dip under the surface of the other is recognized by the courts. See 2 Lindley on Mines (3d Ed.) § 611, and authorities cited. But such right is not recognized by the courts as between a lode claimant and an agricultural claimant, whose title was acquired under a grant made prior to the location of the lode claim. We think that this particular question is settled by the decision of Judge Sawyer in Amador-Medean Gold Min. Co. v. South Spring Hill Gold Min. Co. (C.C.) 36 F. [668], 669, 13 Sawy. 523. The doctrine announced in that case has been recognized as the law for more than 50 years and we have been cited to no case holding to a contrary doctrine." See, also, Anaconda Copper Mining Co. v. Pilot Butte Min. Co., 52 Mont. 165, 156 P. 409.

To my mind, the whole fallacy of the majority opinion lies in the fact that it ignores the sanctity of a patent and the security which the obtaining of a patent is supposed to give a patentee.

I believe, there is nothing more important in our economic system than the certainty of the title under which real property in private ownership is held. Rules applicable to the determination of such titles should be so entrenched in our legal and economic systems that they should not be subject to change or variation or rendered uncertain by judicial decision of this or any other court. When a person receives a conveyance of land predicated upon a patent issued by the Government of the United States containing no reservations or restrictions, he should be able to rest secure in the belief that he is the owner of such land and that his right to exercise all of the incidents of ownership, occupation, possession and use thereof cannot be challenged by anyone not in privity with his legal or equitable title. If the majority opinion in this case is permitted to stand it will remove from the arch of title structure the keystone which renders that structure safe and secure.

It has long been the policy of the courts of this state and of the Supreme Court of the United States to recognize the sacred title of a patentee. The Supreme Court of this state has many times reiterated its policy to regard as final and certain a title acquired by patent. See Saunders v. La Purisima, etc., Co., 125 Cal. 159, 57 P. 656. And in Gale v. Best, 78 Cal. 235 at page 239, 20 P. 550, 551, 12 Am.St.Rep. 44, this court quoted with favor the words of Justice Field, in the case of Steel v. Smelting Co., 106 U.S. 447, 1 S.Ct. 389, 27 L. Ed. 226:

"In Steel v. Smelting Co., supra, Justice Field, whose exhaustive opinion we cannot here undertake to reproduce, among other things, says as follows:

"'We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on that subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, *the nature of the land,* and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.' *And again, speaking of the lands held by the possessor of a patent, he says: 'If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation.* He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence.' [St. Louis Smelting Co. v. Kemp] 104 U.S. [636], 641 [26 L.Ed. 875]. And the pith of the whole matter is aptly expressed by the same learned justice in [St Louis] Smelting Co. v. Kemp, supra [104 U.S. 636, 26 L.Ed. 875], where, speaking of the land department, he says: 'Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in *any circumstances under existing law* a patent would be held valid, it will be presumed that such circumstances existed.'"

If the rule that patents to railroad lands are conclusive as to their nonmineral character were otherwise, to quote from Judge Farrington's decision in Southern Development Co. v. Endersen, D.C., 200 F. 272, 275:

"A title which to-day is valuable because the land is apparently nonmineral to-morrow may become utterly void and worthless

by reason of the discovery of mineral. Methods of extraction and reduction may be devised of such cheapness and efficiency as to render mining highly profitable on lands which, at the date of selection and listing, had and could have had no value for mineral purposes. The courts have never yielded to the argument that Congress intended to provide for titles so elusive."

Therefore the answer to the statement in the majority opinion that title to the vein underlying the Ames tract had passed out of the hands of the government into the hands of mining locators is that that question was determined adversely to said locators by the issuance of the patent to the railroad company. If we do not take this view we place the patentee of land in the situation so roundly condemned by Justice Field in the case of Steel v. Smelting Co., supra [106 U.S. 447, 1 S.Ct. 396, 27 L.Ed. 226], where "his rights * * * upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, * * *."

That the patent so issued determined the mining locators' claims adversely to them is supported by the case of Thomas v. Horst, 54 Mont. 260, 169 P. 731, 733, wherein a patent was issued to a railroad company subsequent to the location of quartz mining claims upon the same land. Instead of determining the character of each parcel of land at the time of patent, the character of all lands granted to the railroad company therein were classified by a commission under authority of an act of congress, and notice of such classification was published prior to the issuance of patent. If no protest was filed, the classification was declared to be final except for fraud. This classification was held to have the same legal effect as a determination at the time of patent such as that held in Barden v. Northern Pacific R. R. Co., supra, to be conclusive.

The court then said, "If lots 1 and 2 outside the limits of the Homestake claim were classified as nonmineral, and no protest was filed, or if protest was filed and, after hearing, was overruled, such classification, in the absence of fraud, became final, and settled for all time that the land was in fact nonmineral in character. * * *

"If we indulge the presumption declared by the Supreme Court that the issuance of patent is in the nature of a judicial determination, that every fact has been found which is necessary to entitle the patentee to the legal title to the land, the conclusion appears inevitable that the allegation in this complaint that patent issued to the Northern Pacific is tantamount to an allegation that the land in controversy was duly classified as nonmineral, and the classification approved before the mineral claims were located; and since the determination of the mineral or nonmineral character of the land presented a question of fact for decision by the land department, its judgment thereon is conclusive upon the courts in the absence of fraud.

"Of course, if the mineral or nonmineral character of this land was open to investigation notwithstanding its classification, then the allegation in the complaint that it was and is mineral land is sufficient to show that the land department was without jurisdiction to convey it to the railway company; but, as we have observed before, if the classification did not finally determine the character of this land, the utmost that can be said of it is that it was an idle ceremony, and the act of February 26, 1895, was a meaningless piece of legislation."

In conclusion, I desire to summarize the principles of law, which in my opinion are applicable to the case at bar, and which, when applied to the facts of this case must result in a reversal of the judgment of the trial court insofar as it grants to the Pennsylvania mining claim extralateral rights in the Ames tract.

The Railroad Grant Act of July 25, 1866, created a present grant of nonmineral land to the railroad company; that is, the grant took effect as of that date, if and when the railroad company complied with the provisions of the act with reference to the location and construction of a railroad and filed its map of location with the General Land Office. The grant of such land remained a float until the filing of such map, and title thereupon vested in the railroad company subject to the determination by the General Land Office as to whether or not said land was mineral or nonmineral in character. If the Land Office determined that any of the land covered by the grant was mineral in character, the same was excluded from the grant, and the railroad company was given other nonmineral land in lieu of the mineral land so excluded. If the Land Office determined that the land covered by the grant was nonmineral,

and a patent was issued to the railroad company, the issuance of such patent conclusively determined the nonmineral character of the land, and the railroad company got a common law fee in the land granted, including all mineral deposited therein. Unless discovery of mineral in paying quantities was called to the attention of the government officials before patent was issued to the railroad company, all claims to the mineral in such land was cut off by the issuance of such patent. The provision in a patent issued to a railroad company excepting mineral or mineral land from the grant was and is void, and the railroad company was granted a common law fee including all mineral deposits in the land upon the issuance of the patent.

A valid mineral location gives to the locator the right to follow extralaterally on their dip downward all veins apexing on his claim which penetrate other mineral lands, but extralateral rights do not exist in agricultural or nonmineral lands.

When the Land Office determined that the Ames tract was nonmineral in character and the government issued a patent thereto to the railroad company, the latter was granted a common law fee in said land which related back to the date of the passage of the Railroad Grant Act of July 25, 1866, and cut off all intervening rights of those asserting that said land was more valuable for mineral than nonmineral purposes. The defendant therefore is barred from asserting the right to extract mineral from the Ames tract upon the theory that it may do so under the extralateral right doctrine.

Defendant admits that the Jefferson title is not as "clear cut" as that to the Pennsylvania, but argues that once said title was in existence, it will be presumed to continue so until the contrary is proved. Although the Jefferson claim was relocated in 1891, and subsequently disputed by various claimants, defendant states that it has acquired by various options and deeds or leases the rights of those rival claimants. In further defense of its right to mine on the Jefferson vein, defendant offers the "Ebert reservation", of which it is the assignee.

I find it unnecessary to give further consideration to the contentions of either party so far as the Jefferson claim is concerned, for the reason that the conclusion which I have reached as to defendant's right to follow extralaterally the dip of the vein apexing on the *Pennsylvania claim is equally applicable to that of the Jefferson claim.*

The right of the defendant to follow the Jefferson claim on its dip under the Ames land is finally determined, however, upon a reservation in the deed from Ebert to Ames hereinabove referred to as the "Ebert reservation". Under this reservation, Ebert reserved to himself, his successors and assigns, "the right to follow the Jefferson gold quartz ledge with its dip, and to mine and extract the ore from the same in and upon said (the Ames) land, without disturbing the surface of said land". I am of the opinion that by this reservation, Ebert retained the right to follow the Jefferson vein under the surface of the Ames land, and that this right was transferable.

By mesne conveyances, defendant succeeded to the rights of Ebert under this reservation. Although it cannot be said that defendant did thereby acquire an estate in the lands of the plaintiffs, it did obtain the right to remove the ore from said vein and title to the ore so mined. Since a right carries with it the incidents necessary to its exercise, defendant has a right of entry which constitutes a complete and ample defense to this action.

Whether or not such right is exclusive is a matter of interpretation depending in part on the intention of the parties and the surrounding circumstances at the time of the grant. For the present, in the absence of evidence, I deem it neither necessary nor proper to reach a determination on that point.

In view of the conclusion which I have reached in the foregoing opinion, the judgment of the trial court should be reversed.

SWEESY v. LOS ANGELES COUNTY PEACE OFFICERS' RETIREMENT BOARD et al.

L. A. 17579.

Supreme Court of California.

Feb. 17, 1941.

Rehearing Denied March 17, 1941.

1. Officers ⇐94

Unless contrary intention plainly appears in law creating pension, persons having a pensionable status are entitled to receive any increase of benefits which may be provided.

2. Counties ⇐69(3)

The pension rights of retired county peace officer under County Peace Officers' Retirement Act vested at time he was retired from service. St.1931, p. 477.

3. Officers ⇐94

Provisions creating a pension system can properly have a retroactive operation, if such intention clearly appears.

4. Counties ⇐69(3)

The widow of a peace officer, retired from service of a county, at time when the County Peace Officers' Retirement Act provided for a pension to such officer but made no provision for a pension to his widow in the event of his death, would be entitled to a pension under an amendment to such act adopted after officer's retirement, but before his death, in view of provisions of amendment. St.1937, p. 664, § 11.

5. Counties ⇐69(3)

Under amendment to County Peace Officers' Retirement Act granting widow of retired officer a pension from time of officer's death until her death or remarriage, provided she had been married to officer at least five years prior to date of his retirement, the rights of any prospective grantee is an "inchoate right" which may be taken away at any time before it becomes vested in her by the happening calling for the fulfillment of the grant. St.1937, p. 664, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Inchoate Right".

6. Officers ⇐94

That a "pension" would be a "gratuity" in one case does not mean that it would also be a "gratuity" in another.

See Words and Phrases, Permanent Edition, for all other definitions of "Gratuity" and "Pension".

7. Counties ⇐69(3)

The amendment to County Peace Officers' Retirement Act granting widow of retired officer a pension from time of officer's death until her death or remarriage, provided she had been married to officer at least five years prior to date of his retirement, is valid as applied to widow of officer, who had retired before enactment of amendment, but whose death did not occur until after its enactment. St.1937, p. 664, § 11.

8. Counties ⇐69(3)

Under amendment to County Peace Officers' Retirement Act granting widow of retired officer a pension from time of officer's death until her death or remarriage, provided she had been married to officer at least five years prior to date of his retirement, a petition which alleged that petitioner was wife of deceased officer at date of his demise and for more than five years prior to his death was insufficient to show compliance with requirement of the amendment. St.1937, p. 664, § 11.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Mary Estelle Sweesy against the Los Angeles County Peace Officers' Retirement Board and others, for a writ of mandate requiring respondents to make an order allowing petitioner a pension. From a judgment dismissing petition after demurrer to petition had been sustained without leave to amend, petitioner appeals.

Reversed with directions to permit amendment of the petition, if requested.

For prior opinion, see 101 P.2d 732.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

Francis A. Cochran and Carl B. Sturzenacker, both of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHENK, Justice.

Mary Estelle Sweesy filed in the superior court in Los Angeles county a petition for a writ of mandate praying that the respondents be directed to order the payment to her of certain monthly instalments under the 1937 amendment to the County Peace Officers' Retirement Act, Stats.1937, p. 664. The trial court sustained a demurrer to the petition without leave to amend. The petitioner appealed from the judgment of dismissal which followed the court's order.

The Los Angeles County Peace Officers' Retirement Board exists pursuant to an act entitled, "An act to authorize the counties of the State of California to establish systems for the retirement and pension of certain county and township officers and employees, namely county peace officers as defined in the act, and to provide certain benefits for their dependents, and empowering county boards of supervisors to levy a special tax." Stats.1931, p. 477. The board of supervisors of Los Angeles county accepted by ordinance the provisions of said act in 1934, whereupon Norris M. Sweesy became a member of the pension system as contemplated by the provisions of the act. Sweesy was employed by the county of Los Angeles as a peace officer, to-wit, a deputy sheriff, from January 13, 1911, until May 31, 1935, when, having arrived at the age of fifty-five years and having served more than twenty years as such county peace officer, his retirement was ordered by the retirement commission. From the time the system was accepted by the board of supervisors of Los Angeles county to the date of his retirement, Sweesy contributed the specified percentage of his salary to the retirement fund. After his retirement he was subject to call for performance of services as a deputy sheriff in cases of emergency. In 1937 the legislature adopted the amendment to section 11 of the act. By the amendment the widow of a retired peace officer became entitled to a pension of $75 per month until her death or remarriage, provided she had been married to the deceased pensioner at least five years prior to the date of his retirement.

In addition to the foregoing, it was alleged that Sweesy died on February 26, 1939; that the petitioner was then and had been married to him for more than five years; that she had not remarried; and that under the act she was entitled to the pension. It was also alleged that the petitioner had made application for the pension provided by the amendment of 1937, and that her application had been denied by the Retirement Board on the sole ground that the widow of a member who had retired from service prior to the effective date of the amendment to section 11 of the act was not eligible to receive pension payments thereunder.

It is apparent that the trial court sustained the demurrer on that ground. For the purpose of the discussion of the question presented we shall assume that the petitioner has stated facts which otherwise bring her within the terms of the amendment. Thus, the question is whether the widow of a retired pensioner is entitled to a widow's pension rights created by an amendment adopted after the retirement but before the death of the retired member of the pension system.

Prior to the amendment of 1937, the act made provision for pension payments to surviving widows of pensioners who became retired by reason of disability ensuing from service. The 1937 amendment purports to extend the provisions for widows' pensions to widows of members retired by reason of age and years of service, and no question arises herein in that respect. It is expressly stated in amended section 11 that its provisions shall be retroactive as to the past service of any member who shall be entitled to the benefits "contained herein."

It is contended on the part of the respondents that in order to avoid constitutional invalidity the amendment may operate prospectively only; and that such prospective operation contemplates pensions to surviving widows of pensioners only who were in active service at the time of the adoption of the amendment, that is, members who were in active as distinguished from retired service, or who later entered such active service. It is argued that if the amendment by the prescribed retroactive operation grants a pension to the widow in this case, it amounts to a gift of public money and is in violation of constitutional prohibitions; and that in any event the prescribed retroactive operation refers only to past service of members on active duty at the time of the amendment, as distinguished from retired members.

On the other hand the petitioner relies on cases such as Home v. Souden, 199 Cal. 508, 250 P. 162; O'Dea v. Cook, 176 Cal. 659, 169 P. 366; Kavanagh v. Board of Police Pension Fund Commissioners, 134 Cal. 50, 66 P. 36; Klench v. Board of Pension Fund Commissioners, 79 Cal.App. 171, 249 P. 46; Aitken v. Roche, 48 Cal.App. 753, 192 P. 464, which she contends require the payment of the pension to her as surviving widow of a retired member.

In Home v. Souden, supra, the member was killed while performing duties as an employee of the fire department of the city of Los Angeles. At the time of his death his widow became entitled to a pension equal to one-third of the salary attached to the rank held by her husband at the time of

his death. Subsequently the yearly pension was increased to one-half the amount of such salary. This court, relying on O'Dea v. Cook, Kavanagh v. Board, etc., and Aitken v. Roche, supra, held that the widow was entitled to the increase and that there was no merit in the contention that the increase constituted a gift of public money. The decision in O'Dea v. Cook, supra, recognized that a pension ordinarily is not a gift or a gratuity. It was there said [176 Cal. 659, 169 P. 367]: "A pension is a gratuity only where it is granted for services previously rendered, and which at the time they were rendered gave rise to no legal obligation. * * * But where, as here, services are rendered under * * * a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." See, also, Klench v. Board of Pension Fund Commissioners, supra, 79 Cal. App. at page 185, 249 P. 46.

In the Kavanagh case, supra, Kavanagh had served for more than twenty years as a police officer and had been retired on a pension. After his death from natural causes his widow applied for payment to her of $1,000 pursuant to an amendment enacted prior to Kavanagh's retirement. The amendment provided that whenever a member of the police department after ten years service died from natural causes his widow should be entitled to one thousand dollars from the fund. The question was whether Kavanagh after retirement was a member of the department so as to entitle his widow to the payment prescribed by the amendment. The retired officer was required to perform duties in case of emergency and to report to the department at stated times. Membership in the pension system could be terminated by death, resignation or dismissal. Following the policy approving liberal construction of pension laws, the court held that retirement did not terminate membership on the police force or in the department; that the retired officer was still a member of the force at the time of his death; and that his widow was entitled to the specified payment.

In Klench v. Board of Pension Fund Comrs, supra, it was held that under the law there involved a pensioner was entitled to the benefits afforded by the increases in the pay attached to the rank he held at the time of his retirement, and that his right to payment was not limited to the amount he was receiving at the time of his retirement. The conclusion was based on the observation that one who has been regularly placed on the pension roll is entitled to all the benefits of the system. That case followed Aitken v. Roche, supra, wherein it was held that under the system and the charter provisions the pensioner was afforded the benefits of subsequent increases in the pay attached to the rank he held at the time of retirement. See, also Rumetsch v. Davie, 47 Cal.App. 512, 190 P. 1075; Jones v. Cooney, 82 Cal App. 265, 255 P. 536.

[1-3] It must be accepted as the settled law of this state that unless the contrary intention plainly appears persons having a pensionable status are entitled to receive any increase of benefits which may be provided. Sweesy's pension rights vested at the time he was retired from service, that is, upon the happening of the contingency upon which the pensionable right depended. O'Dea v. Cook, supra; Kavanagh v. Board of Police Pension Fund Commissioners, supra; Jordan v. Retirement Board, 35 Cal. App.2d 653, 96 P.2d 973. In Whitehead v. Davie, 189 Cal. 715, 719, 209 P. 1008, it was recognized that provisions creating a pension system could properly have a retroactive operation, if such intention clearly appeared. See, also, Jordan v. Retirement Board, supra.

[4] In view of the foregoing decisions the contentions of the petitioner must be held to prevail over those of the respondents. Sweesy had a status as a pensioner at the time of the adoption of the amendment granting pensions to widows of retired members of the department. The provisions were made expressly retroactive so as to include past service of any member entitled to the benefits "contained herein". Unquestionably Sweesy was a member entitled to the benefits of the system. No distinction is made by the legislature between members in active duty on full pay and those on retirement, in so far as the retroactive provisions are concerned, and no distinction may here be drawn on that basis. Therefore, the provisions must be held to apply to members who had a vested as well as to those who merely had an inchoate right to members' pension benefits at the time of the adoption of the amendment. That the widow's pension affords a benefit to the pensioned member cannot be gainsaid. A pensioned member, as has been held, is as much entitled to increased bene-

fits of the pension system as is any other member, unless the legislative body clearly indicates that such application is contrary to its intention. A provision for a pension to his widow obviously benefits the member's economic status in a way similar to an increase of his wages or pension. The problem cannot be solved merely by stating as a proposition that a provision will not be upheld which purports to grant a pension after the completion of the services for which the pension is contemplated as additional compensation. The law is well settled that additional benefits may constitutionally be provided for members of the system who have acquired a pensionable status. This is not a case where the member was already retired and whose services were terminated before the creation of the pension system. There is some language in the decisions which refers to pension benefits as additional or increased compensation for services performed and to be performed. O'Dea v. Cook, supra; Jordan v. Retirement Board, supra; Douglas v. Pension Board, 75 Cal.App. 335, 340, 242 P. 756, citing cases. But that designation may not be strictly accurate in every case. As in this case, the members of the system make contributions to the pension fund, even though contributions may also come from public funds. Such systems are usually founded on actuarial calculations. Therefore, the question of what benefits would be warranted by either the individual or mass contributions to the fund is for the legislative body, and not for the pension board or the courts, whose respective functions in such cases are to administer and interpret the provisions of the law as written. An appropriate restriction of the widow's rights under such a system is indicated by the requirement that the applicant must have been married to the member five years prior to his retirement, if he was retired, or five years prior to his death if he died from injuries received in the performance of his duties. Those provisions and the assumed facts herein serve to distinguish this case from Jordan v. Retirement Board, supra. In the latter case the pension law required that the widow be married to the decedent prior to the injury which resulted in his death. The widow had not married the pensioner prior to the injury which subsequently and during retirement resulted in his death, and for that reason was not entitled to the pension.

[5] It is not to be understood from the foregoing, however, that the provision for an increase in benefits to the retired member by means of a pension to his widow becomes a vested right prior to the happening of a contingency upon which the payment of the widow's pension depends. As aptly shown by the decision in Jordan v. Retirement Board, supra, the grant of a pension to the member's widow is an increase of benefits which may be taken away before the right vests by the happening of the event of calling for the fulfillment of the grant. In this case the provision for pensions to members' widows benefits all members, whether on active or retired duty; but as to any prospective grantee of the pension it is an inchoate right which may be taken away at any time before it becomes vested in her.

[6, 7] The case of Lamb v. Board of County Peace Officers' Retirement Commission, 29 Cal.App.2d 348, 84 P.2d 183, has no persuasive force herein. In that case there was no applicable pension system in existence at the time the officer was retired for disability resulting from performance of duty. The answer to the question whether a pensionable status may be created retroactively to include persons who had already been retired may not afford a guide in resolving the question whether an amendment to the pension law may afford additional benefits by way of a widow's pension to members who already had acquired a retired pensionable status under the law. It does not follow that because the pension would be a gratuity in the one case, it also is in the other. This state and other states (see People v. Board of Trustees of Firemen's Pension Fund, 103 Colo. 1, 82 P.2d 765, 118 A.L.R. 984; Board of Trustees of Policemen's Pension Fund v. Schupp, 223 Ky. 269, 3 S.W.2d 606), recognize that increased benefits to one already having a pensionable status are constitutional and economically appropriate. The amendment in the present case is one providing for such an increase of benefits, and must therefore be held to be valid and constitutional as it applies herein, provided the petitioner can prove the facts which are required to bring the amendment into operation.

[8] The foregoing requires a reversal of the judgment based upon the order sustaining the demurrer without leave to amend. However, an uncertainty appears on the face of the petition which leaves the application of the amendment to the facts in some doubt, but this is a matter

which may be rectified by amendment, if the petitioner sees fit so to amend. The petitioner alleges that the amended section of the retirement act entitles the widow of a retired member to payment of the pension provided she shall have been married to the pensioner at least five years prior to the date of his *retirement*. The petition shows that the decedent was retired in May, 1935, and died in February, 1939. The petitioner then alleges that she was the wife of the decedent at the date of his demise and for more than five years prior to his *death*. These allegations would not show compliance with the alleged requirement of the amended section.

The judgment is reversed with directions to the trial court to permit an amendment to the petition, if requested, so that the petitioner may allege sufficient facts to bring herself within the purview of the amendment to the pension act, and then to proceed in accordance with the foregoing conclusions.

We concur: GIBSON, C. J.; TRAYNOR, J.; CURTIS, J.; CARTER, J; EDMONDS, J.



PEOPLE v. SKINNER.*

Sac. 5360.

Supreme Court of California.

Feb. 8, 1941.

1. Licenses ⇐30

Where notices of additional assessments under Retail Sales Tax Act were mailed to retailer at his place of business, statutory requirements respecting notices were sufficiently complied with by State Board of Equalization, though no summons or notice of any kind was ever served personally on retailer. St.1935, pp. 1259, 1261, 1262, §§ 17, 21, 26.

2. Licenses ⇐32(2)

Under provisions of Retail Sales Tax Act empowering State Board of Equalization to appoint assistants to enforce its powers and perform its duties, the fact that certificate of amount of tax filed by board in county clerk's office with request for judgment against retailer was signed by tax counsel appointed by board rather than by board itself, did not render certificate invalid. St. 1935, pp. 1262, 1264, §§ 26, 27.

3. Taxation ⇐572

A more summary method may be provided for the collection of taxes due to the sovereign than is provided for the recovery of judgment for debts between private citizens.

4. Constitutional law ⇐284(2)

"Due process of law" is satisfied if notice and an opportunity to question the validity or amount of the tax is provided for at some stage of the proceedings, the notice does not have to be personally served, notice of every step in the proceeding is not required, and it is sufficient if the finality of the assessment is determined by the taxing authorities. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

5. Taxation ⇐1

A "tax" is an exaction by the sovereign, and the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him.

See Words and Phrases, Permanent Edition, for all other definitions of "Tax".

6. Constitutional law ⇐280, 283, 289

In judging what is "due process of law", respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law", but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

7. Constitutional law ⇐284(2)

The sufficiency of a notice, as constituting "due process of law", must be determined in each case on the particular circumstances, and in matters of assessment and taxation the same character of notice is not required as in ordinary actions in a court of justice. U.S.C.A.Const. Amend. 14; Const. Cal. art. 1, § 13.

8. Constitutional law ⇐283

The Fourteenth Amendment of the Federal Constitution places a limit on all the

* Subsequent opinion 115 P.2d 488.

powers of the state, including, among others, that of taxation. U.S.C.A.Const. Amend. 14, § 1.

9. Constitutional law ⇐287
Licenses ⇐7(1)

The Retail Sales Tax Act provision that State Board of Equalization must file a certificate specifying amount of delinquent tax, interest and penalties, with the name and last known address of retailer liable, and requesting that judgment be entered against retailer in amount set forth and that county clerk shall immediately enter judgment against the retailer, is not violative of the "due process" clauses of the Federal or State Constitutions. St.1935, pp. 1259, 1260, 1261, 1262, 1265, §§ 17, 18, 20, 21, 26, 33 U.S.C.A. Const. Amend. 14; Const.Cal. art. 1, § 13.

10. Licenses ⇐32(2)

The use of the word "judgment" in section of Retail Sales Tax Act providing that "judgment" shall be entered against retailer in amount of delinquent taxes set forth in certificate issued by State Board of Equalization and filed with county clerk does not of itself require all the antecedent steps in a judicial tribunal usually applicable when private debts are the subject of collection. St.1935, p. 1262, § 26.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

11. Constitutional law ⇐284(2)

The sovereign may adopt any appropriate procedure known to the law to collect taxes, and it is not required to provide for hearing in a judicial tribunal before it may use the processes which follow upon the entry of a judgment in such a tribunal in order not to violate requirements of "due process of law" of State and Federal Constitutions. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

12. Licenses ⇐32(2)

Under provision of Retail Sales Tax Act requiring that judgment be entered against retailer in amount of delinquent taxes set forth in certificate of State Board of Equalization filed with county clerk with request that judgment be entered against retailer in amount thereof, a hearing in a judicial tribunal was not intended nor required for the entry of the judgment. St.1935, p. 1262, § 26.

13. Licenses ⇐32(2)

Under provision of Retail Sales Tax Act that county clerk shall enter a "judgment" against retailer for delinquent taxes on filing of certificate stating amount of such taxes and requesting entry of judgment, the "judgment" referred to, not being one ordered by a judicial tribunal, is not governed by provisions of Code of Civil Procedure in like matters, such as requirement for notice of entry of judgment with right to resort to an appellate tribunal. St.1935, p. 1262, § 26.

14. Licenses ⇐7(1)
Statutes ⇐95(3)

The provisions of Retail Sales Tax Act that State Board of Equalization may file in county clerk's office a certificate specifying amount of delinquent tax, and requesting that judgment be entered against retailer in amount set forth in certificate, and that county clerk shall immediately enter a judgment against retailer, do not vest in board arbitrary or unreasonable powers nor constitute "special legislation", law being "general law" applicable to all retailers of tangible property. St.1935, p. 1262, § 26; Const. art. 4, § 25.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law" and "Special Legislation".

EDMONDS, J., and WARD, Justice pro tem., dissenting.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

The State Board of Equalization filed in the county clerk's office a certificate of the amount of the tax due under Retail Sales Act of 1933, St.1933, p. 2607, with interest and penalty and request for judgment, and pursuant to the request a judgment for the retail sales tax was entered against defendant Roy J. Skinner for the total shown by the certificate to be due. Thereafter the defendant filed a motion to set aside and vacate the judgment. From the judgment entered on the order granting the motion, the People appeal.

Reversed.

Earl Warren, Atty. Gen., and James J. Ardetto, H. H. Lenney, and Adrian A. Kragen, Deputies Atty. Gen. (Roger J. Traynor, of San Francisco, of counsel), for appellant.

Norman Elkington, of San Francisco, for respondent.

Howard B. Crittenden, of Tracy, and H. R. Whiting and Morgan V. Spicer, both of San Francisco, amici curiae for respondent.

SHENK, Justice.

The defendant moved to set aside as void a so-called "judgment" entered in accordance with the provisions of section 26 of the Retail Sales Act of 1933, St.1933, p. 2607, as amended, Stats.1935, p. 1262. The plaintiff appealed from the judgment entered on the trial court's order granting the motion.

The appeal presents the question of the correctness of the trial court's conclusion that the provisions of said section 26 are unconstitutional.

The defendant conducted as "owner" an auto sales company in San Francisco. Therefore, as a retailer of tangible personal property, he was required, under permits duly issued pursuant to the Retail Sales Act of 1933, to make accurate returns of sales and to pay the tax found to be due on account of sales of tangible personal property.

On June 22, 1936, the State Board of Equalization filed in the county clerk's office in Sacramento, pursuant to said section 26, a "certificate of amount of tax, interest and penalty due and request for judgment". The board itemized the tax due as $9,413.81; interest, $569.39; penalty, $1,220.08; total, $11,203.28. Pursuant to the request and on the same day a "judgment for Retail Sales Tax" was entered against the defendant for the total tax shown by the certificate to be due.

About one-third of the tax was computed on voluntary returns made by the defendant. The balance comprised two additional assessments made by the board on sales not reported by the defendant. By the defendant's testimony it appeared that several auditors occupied a month or six weeks in examining his records before the final additional assessment was made, and total tax, interest and penalties computed. There was evidence that notices of such additional assessments were duly mailed to the defendant. A notice was mailed to the defendant on March 20, 1936, which showed that on January 25, 1936, there was due from the defendant a total of tax, interest and penalty of $10,904.85. The defendant was adjudged a bankrupt, and on May 25, 1936, under oath in the bankruptcy proceeding, he listed his sales tax liability to the State of California as $10,904.81.

[1] Subsequent to the filing of the certificate of the Board of Equalization in the county clerk's office in Sacramento, and on May 17, 1939, the defendant filed his affidavit and notice of motion to set aside and vacate the "judgment" entered pursuant to said section 26. The motion was made on the ground that the judgment was void because it violated the due process clauses of the state and federal constitutions, Const.Col. art. 1, § 13; Const.U.S. Amend. 14, and the prohibition against special legislation contained in section 25 of Article IV of the state Constitution. It was stipulated that no summons or notice of any kind was ever served personally on the defendant. As stated, there was evidence that notices of the additional assessments were mailed to the defendant at his place of address in San Francisco. In his affidavit the defendant alleged "that all notices served upon him by the State Board of Equalization under the provisions of the 'Retail Sales Act of 1933' as amended, were served upon him by mail". He also alleged that "during all of said times he was actually living and employed in said city and county of San Francisco; that during all of said times and more particularly at the time of the mailing of said notices of additional assessment and of estimate, tax and penalty, the home address, the business address and the personal whereabouts of said defendant were known to the State Board of Equalization". The foregoing testimony and admissions are sufficient upon which to predicate a conclusion, at which the trial court arrived, that the requirements respecting the notices provided by the pertinent portions of the act were complied with by the board. As noted, the trial court granted the defendant's motion on the grounds that the provisions of section 26 deprived the defendant of due process, and that they constituted special legislation. Therefore the principal question for determination is whether the pertinent provisions of the act are in harmony with constitutional requirements.

Section 17 of the act provides that if the board is not satisfied with the return and payment of tax made by the retailer, it may make an additional assessment based upon the facts contained in the return or upon any information that it may have or obtain; and provides also for certain penalties on account of such additional assessment which it is not necessary to note specifically. That section also requires written notice to be given to the retailer, which may be served

either personally or by mail. Section 18 makes similar provisions with respect to assessments imposed by reason of the failure of the retailer to make any return.

Section 20 gives to the retailer against whom an assessment was made pursuant to sections 17 or 18, the right to file, within fifteen days after the service of notice, a petition for reassessment. It states: "If a petition for reassessment is not filed within said fifteen day period the amount of the assessment becomes final at the expiration thereof." The section also provides for a hearing by the board in the event a petition for reassessment is filed within the time specified. The act (secs. 20 and 33) also makes provision for resort to a judicial tribunal for a consideration and determination of the question whether there was an abuse of discretion on the part of the board.

Section 21, as applied to the facts of this case, requires that every notice of additional tax proposed to be assessed be mailed to the retailer within three years after the retailer's return is filed. No question arises with respect to the time of the mailing of the notices herein.

Section 26 of the act provides that when any tax, etc., is not paid when due, the board may file in the office of the county clerk of Sacramento county, or any other county, a certificate specifying the amount of the tax, interest and penalties, with the name and last known address of the retailer liable therefor; stating that the board has complied with all the provisions of the act in relation to the computation and levy of the tax; and requesting that "judgment be entered against the retailer in the amount * * * set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment * * * against the retailer * * *." It also provides that an abstract of the judgment may be recorded in any county, whereupon the amount shown shall constitute a lien upon all the real property of the retailer in such county, which shall have the force, effect and priority of a judgment lien, and that execution shall issue upon such judgment upon request of the board in the same manner as upon other judgments under the Code of Civil Procedure. By the same section the board is also given power, after delinquency in the payment of tax and notice thereof by registered mail and notice of an intended sale by mail and publication any time within three years, forthwith to collect such taxes by seizure and sale of sufficient real or personal property not exempt from execution to satisfy the amount due. That section also expressly provides that the remedies of the state shall be cumulative, and that the pursuit of one remedy shall not be deemed an election to the exclusion of any other remedy.

[2] The trial court concluded that the certificate of the board was executed and filed in accordance with the provisions of section 26. There is no merit in the contention that the certificate was invalid because signed by tax counsel appointed by the board, rather than by the board itself. Section 27 of the act specifically empowers the board to appoint such assistants as it may deem necessary to enforce its powers and perform its duties under the act. The execution of the certificate through such duly appointed administrative assistant is a compliance with the provisions of the act.

The defendant contends that section 26 of the act offends the constitutional due process clauses in two respects, namely, that a personal judgment is permitted to be entered against the retailer without provision for prior personal notice and hearing in a court as provided by the Code of Civil Procedure, and that the section confers on the Board of Equalization arbitrary and unreasonable powers. In urging that the provisions of section 26, permitting a judgment to be entered against the retailer in the manner therein prescribed, is special legislation, the defendant argues that the "judgment" provided by said section is a "judgment in personam", is governed by the rules of due process, that said rules require personal service of notice and a judicial hearing before such judgment may be entered, and is further governed by the general laws relative to actions in personam.

The defendant and the trial court have misapprehended the requirements of due process involved in proceedings for assessment, levy, and collection of taxes, and the significance of the procedure prescribed by section 26 in relation to the constitutional provisions invoked by the defendant.

[3] Obviously if an action in a court or other judicial tribunal be necessary for a judgment for the collection of taxes, the state is bound by the provisions applicable to the conduct of such action, and by the general law governing jurisdiction of parties and subject matter. But as long standing as the common law itself is the rule

that a more summary method may be provided for the collection of taxes due to the sovereign than is provided for the recovery of judgment for debts between private citizens. This power of government received early recognition in this country. The case of Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 18 How. 272, 276, 15 L.Ed. 372, involved the collection of moneys from a defalcating customs inspector. Summary seizure of property to satisfy the debt was objected to on the ground of lack of due process. The court said: "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Carta. * * * We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown. * * * It is certain that this diversity in 'the law of the land' between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the constitution of the United States. * * * For, though 'due process of law' generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings * * * yet, this is not universally true. There may be, and we have seen that there are cases, under the law of England after Magna Carta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial. * * * The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution. * * * It may be added, that probably there are few governments which do or can permit their claims for public taxes * * * to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to."

Springer v. United States, 102 U.S. 586, 593, 26 L.Ed. 253, involved a summary method of execution and collection of personal income taxes, objected to under the constitutional guaranty of due process. In holding that congress could provide the power to distrain realty as well as personalty, the court said: "The proceedings of the collector were not in conflict with the amendment to the Constitution which declares that 'no person shall be deprived of life, liberty, or property without due process of law.' * * * The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who made congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government."

[4] It has been held that due process is satisfied if notice and an opportunity to question the validity or amount of the tax be provided for at some stage in the proceedings; that the notice does not have to be personally served; that notice of every step in the proceedings is not required; and that it is sufficient if the finality of the assessment be determined by the taxing authorities. Weyerhaueser v. Minnesota, 176 U.S. 550, 20 S.Ct. 485, 44 L.Ed. 583; Hodge v. Muscatine County, 196 U.S. 276, 25 S.Ct. 237, 49 L.Ed. 477; In re Sutter-Butte By-Pass Assess. No. 6, etc., 191 Cal. 650, 218 P. 27; Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353, 40 Am.St. Rep. 17.

[5] In the discussion of the general subject of the system of enforcing the government's claims for taxes, the court said in Bull v. United States, 295 U.S. 247, 259, 55 S.Ct. 695, 699, 79 L.Ed. 1421: "A tax is an exaction by the sovereign, and necessarily the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative

agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation, which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

"In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof, and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution."

[6] The courts of this state have given full recognition to the foregoing precepts. From a discussion of the question of sufficiency of notice in a street improvement condemnation proceeding appearing in the opinion in the case of Wulzen v. Board of Supervisors, supra, 101 Cal. at pages 18–20, 35 P. at page 354, 40 Am.St.Rep. 17, we quote the following:

"Justice Bradley, in discussing what is due process of law in Davidson v. New Orleans, 96 U.S. 97 [24 L.Ed. 616], uses the following language:

" 'In judging what is due process of law, respect must be had to the cause and object of the taking,—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law.'

[7] "In commenting upon the above quotation in Lent v. Tillson, 72 Cal. [404], at page 414, 14 P. 71, Temple, J., says: 'In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand. And, further, in matters of assessment and taxation, the same character of notice is not required as in ordinary actions in a court of justice, for the reason, I presume, that in such summary proceedings it is not practicable or usual.' * * *

"The power of taxation is confided to the legislative department of the government, and 'an act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. It is therefore the law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation.' Cooley, Tax'n, pp. 48, 49. It was said in Kelly v. Pittsburgh, 104 U.S. [78], 80 [26 L.Ed. 658]: 'Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which, in regard to that matter, is, and always has been, due process of law.' "

The court concluded: "In matters of taxation and assessment the state is not bound to accord personal service of process upon the citizen."

In People v. Central Pac. R. Co., 105 Cal. 576, 38 P. 905, the question was whether provisions for taxation of a distinct class of railroads was special legislation. It was said at pages 588, 589, of 105 Cal., 38 P. at page 908: "The collection of taxes is not, however, the mere collection of a debt, but is a sovereign act of the state, to be exercised as may be prescribed by the legislature. Whether the tax is collected by an action in court, or by summary sale by the tax- collector, is immaterial. The state, through its legislature, can avail itself of the judicial power as the means by which it will collect the tax; and in such proceedings it may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals, just as it may avail itself of the executive branch of the government by authorizing the sheriff to sell the property upon which the taxes are delinquent, without requiring him to pursue the same course as is required in sales upon judgments between individuals. Although the tax is an obligation from the citizen to the state, it is not of the same character of obligations as exist between citizens, and for the purposes of its collection the state is not limited to the same mode or to the same procedure which it prescribes for individuals in the collection of obligations between themselves."

The contention was made in Merchants' Trust Co. v. Wright, 161 Cal. 149, 118 P. 517, 518, that the sale of an entire tract of land to satisfy a tax lien, when sale of a smaller portion would produce sufficient, was a deprivation of property without due process of law. The court said, "That the Legislature may provide for the present system of taxation under which the state acquires title to the property of one who permits the taxes thereon to become delinquent and may authorize a subsequent sale thereof is not open to question. While it is undoubtedly true that a delinquent owner cannot be deprived of his property under such proceedings without due process of law, this due process of law, as far as tax proceedings are concerned, means only that due notice of sale shall be given to the delinquent owner, and this is fully accorded him by sections 3764-3767 of the Political Code, which provide for a notice to him by publication of the sale to the state. This is all the notice he is constitutionally entitled to, and when this is provided for by law, as it is here, he has been accorded the full measure of his constitutional right in that respect", (citing cases).

We also note the case of East Tennessee Brewing Co. v. Currier, 126 Tenn. 535, 150 S.W. 541, where the plaintiff, in addition to its brewer's manufacturing license tax, became liable for a liquor dealer's tax. A warrant issued to distrain sufficient property to satisfy taxes of $9,909, interest and penalties. The tax was paid under protest and suit was brought to enjoin further proceedings and to recover the tax paid. It was contended that the distraint, issued without notice or demand, was illegal and in violation of the rule of due process. The statute provided what facts would constitute a prima facie showing of liability for the tax and placed the burden on the dealer to prove that he was not engaged as such liquor dealer. There was no question that the brewer was in fact engaged in dealer's activities. It was held that under the authorities he was not entitled to advance notice that the tax was due; that if he was engaged in the wholesale or retail liquor business, he, of course, knew it, and was charged with notice that he was liable for the license tax exacted by the state. The court relied on Hagar v. Reclamation District, 111 U.S. 701, 709, 710, 4 S.Ct. 663, 28 L.Ed. 569, to the effect that from the nature of a vast number of different kinds of taxation as poll or license taxes, or taxes on things, persons, or occupations, notice to the taxpayer would be of no particular advantage and was, therefore, unnecessary. It quoted the following from 37 Cyc. p. 1233: "Laws providing summary remedies for the collection of delinquent taxes are not open to the constitutional objection, because they dispense with some of the formalities of ordinary judicial procedure, or cut off technical defenses, or authorize the seizure of the property first and the hearing afterward, provided only that the taxpayer is given an opportunity at some stage of the proceedings, and before his rights are finally cut off, to contest the validity of the tax or his liability in respect thereto." [126 Tenn. 535, 150 S.W. 544.] Continuing, it said: "The question of summary remedies for the collection of taxes is also discussed at length by Judge Cooley, in Cooley on Taxation, vol. 2, pp. 827-830, and the question of due process and the law of the land are discussed in the same work, in volume 1, p. 51 et seq.

"From all the authorities, it is evident that the state has the power to assess taxes and fix methods for the collection thereof, and

it does not matter if these remedies be summary in their nature, so long as the taxpayer is in some way, at some stage of the proceedings, given an opportunity to be heard and have his rights determined before some competent tribunal.

"The statute in this case directed the issuance of a distress warrant upon certain conditions made to appear to the clerk of the county court.

"The statute might have prescribed that notice be given to the delinquent taxpayer before the issuance of a warrant; but the Legislature did not see proper to include such a provision, and it was entirely within their power to omit it, inasmuch as the taxpayer has open to him the several methods, heretofore pointed out, of calling in question the validity of the demand made against him."

[8-12] Unquestionably the "first section of the fourteenth amendment places a limit upon all the powers of the state, including, among others, that of taxation." County of Santa Clara v. Southern Pacific R. Co., C.C., 18 F. 385, 397. But the limit in respect to the levy and collection of taxes is well exemplified by the authorities herein discussed. The conclusion to be drawn therefrom is that the provisions of section 26 of the Retail Sales Tax Act do not contravene the constitutional inhibitions upon the legislature. The retailer knows or should know the amount of tax due on the sales reported by him. The statute provides for adequate notice of any additional assessment and an opportunity for mistakes to be rectified upon the filing of a petition within the time prescribed. He is notified by the provisions of the statute that the tax will become delinquent and collectible summarily and without further notice unless he makes objection within the specified time. Nothing further is necessary in so far as the objections raised by the defendant are concerned. No contrary significance may be inferred from the provision that a "judgment" is to be entered against the retailer upon the filing of the board's certificate, or that the lien created thereby "shall have the force, effect and priority of a judgment lien." The fact that the word "judgment" was used to designate the method of the summary procedure does not of itself require all the antecedent steps in a judicial tribunal usually applicable when private debts are the subject of collection. The foregoing authorities are clear to the effect that the sovereign may adopt any appropriate procedure known to the law for the purpose of collecting taxes and that it is not required to provide for a hearing in a judicial tribunal before it may use the processes which follow upon the entry of a judgment in such tribunal. It is plain that a hearing in a judicial tribunal was not intended and is not required by the statute here in question. The use of the word "judgment" in tax collection provisions for the purpose of calling in operation summary execution on and sale of property subject to tax liens is not strange nor unfamiliar. Section 3716 of the Political Code before its repeal in 1939 provided that "every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." See California Loan, etc., Co. v. Weis, 118 Cal. 489, 50 P. 697; see, also, State of California v. Hisey, 9 Cir., 84 F.2d 802; Bull v. United States, supra; Simpson v. Warren, 106 Fla. 688, 143 So. 602, 144 So. 324; State Revenue Comm. v. National Biscuit Co., 49 Ga.App. 409, 175 S.E. 607; In re State Tax Commission, 136 Misc. 104, 240 N.Y.S. 309.

[13] Such a "judgment", not being ordered by a judicial tribunal, is not governed by provisions of the Code of Civil Procedure in like matters, such as the requirement for notice of entry of judgment, with the right to resort to an appellate tribunal.

[14] The foregoing also leads to the conclusion that the provisions of section 26 do not vest in the board of equalization arbitrary or unreasonable powers, and do not constitute special legislation. As indicated, the legislature may employ such procedure without providing for a judgment ordered by a judicial tribunal. The law is general, applicable to all in the class specified, viz., persons engaged in retail sales of tangible personal property. No serious question is or may be raised that that class of taxpayers may not be subjected to the method of tax collection provided by the statute, if otherwise its provisions are in accord with the requirements of due process. Roth Drug Co., Inc. v. Johnson, 13 Cal.App.2d 720, 57

P.2d 1022; see, also, People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029.

Cases relied upon by the defendant do not require or justify a contrary conclusion. State v. Security National Bank, 143 Minn. 408, 173 N.W. 885, involved a judicial proceeding wherein a judgment was reversed which was entered without notice or hearing against certain bank stockholders for a proportion of a tax assessed in the name of the bank. The court there, however, recognized that personal service of notice is not considered essential to due process in respect to the assessment and levy of taxes. As we have noted, the provisions of the Retail Sales Tax Act here in question relate solely to the assessment and collection of taxes and not to any proceeding in a judicial tribunal. The case of Griffin v. Cook County, 369 Ill. 380, 16 N.E.2d 906, 118 A.L.R. 1157, involved a statute which provided for a court proceeding to confirm a certain tax levy, and an appeal to the Supreme Court. It was held that the substituted service of notice by publication only in such judicial proceedings was not a compliance with due process of law. That case likewise is inapplicable to the facts involved here.

The case of Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068, 1072, involved the Idaho sales tax law. Laws 1935, 1st Ex.Sess., c. 12. That law contained provisions with respect to the filing of a notice of lien which should have the force and effect of a judgment duly docketed against the retailer. Section 17 of that act provided that if fraud or evasion on the part of a retailer be discovered by the commissioner, he should determine the amount by which the state has been defrauded, add to the amount so determined a penalty equal to twenty-five per cent thereof, and assess the same against the retailer, the amount so assessed to become immediately due and payable. Notice to delinquents and notice of sale were provided for, but apparently without any opportunity to make any objection to the finality of any additional assessment except by way of payment of the tax under protest and suit for recovery thereof. It was held that the arbitrary processes authorized by section 17, among others, were a deprivation of due process. It was also held that the powers sought to be conferred belong to the judicial branch of the government and could not be conferred upon the department of finance nor its commissioner. The court relied on the provisions of its state Constitution, and authorities stating the rule that "due process of law requires that one be heard before his rights are adjudged." It is questionable whether the court there would have come to any different conclusion had the act and particularly section 17 thereof provided for notice and an opportunity to object to the amount or validity of the tax before the finality of the assessment therein provided; but in any event the absence of any such provision in section 17 of the statute there involved distinguishes that case from the present. Aside from that distinction, if the decision be deemed to be support for the defendant's contentions herein, we must conclude that it is not in accord with the weight of authority.

The foregoing disposes of all the contentions presented by the defendant.

The judgment is reversed.

We concur: GIBSON, C. J.; CARTER, J.; PETERS, Justice pro tem.

TRAYNOR, J., took no part in the consideration or decision of this case.

EDMONDS, Justice (dissenting).

In my opinion, the decision of the majority authorizes a procedure which ignores constitutional rights, and is directly at variance with the fundamental principles of our government. The question for decision, it seems to me, is not answered by reference to the well established rule that the sovereign may provide a summary method for the collection of taxes.

I fully recognize that the maintenance of government is dependent upon the prompt collection of revenue for public purposes. But the provision of the Retail Sales Tax Act (Stats.1933, p. 2599, as amended; Deering's Gen.Laws, 1937 Ed., Act 8493), which is upheld in this case, permits an administrative body to usurp the functions of the superior court in violation of the constitutional provision: "The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this

Constitution expressly directed or permitted." Art. III, sec. 1, Const. It is, of course, true that although there are different departments of our government, and each must act within its own prescribed limitations, executive agencies and judicial tribunals may cooperate for the accomplishment of governmental purposes. However, the constitutional provision contemplates independent action. To require the superior court to enter a judgment against an individual upon the mere demand of an administrative agency, in effect, subjects the judicial department of government to the other branches which are coordinate with but not superior to it.

According to section 26 of the Retail Sales Tax Act, supra, the clerk of the superior court, immediately upon the filing of a certificate made by the State Board of Equalization, "shall enter a judgment for the people of the State of California against the retailer. * * * Execution shall issue upon such a judgment upon request of the board in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure". Under these provisions a judgment in personam is entered against the retailer without any compliance with judicial procedure.

This is not a determination which, under section 3716 of the Political Code, has the "effect" of a judgment. "A judgment is the final determination of the rights of the parties in an action or proceeding." Sec. 577, Code Civ.Proc. But a determination of liability which is given the "effect" of a judgment is an obligation collectible by administrative proceedings. And although by section 3716 of the Political Code tax liens are given the "force and effect" of an execution, the execution to be issued upon the judgment provided for in section 26 is the same kind of execution as is issued "upon other judgments".

In my opinion, therefore, the contention that the proceedings authorized by section 26 of the Retail Sales Tax Act are purely administrative cannot be sustained. "The state, through its legislature, can avail itself of the judicial power as the means by which it will collect the tax", and for that purpose may prescribe procedure summary and different than is provided for the determination of controversies between individuals. People v. Central Pacific R. Co., 105 Cal. 576, 38 P. 905, 908. But where at the instigation of the state the courts are called upon to aid another department of the government and to add judicial action to administrative order, the indispensable prerequisites of judicial action must exist. Notice by an administrative board of a hearing to be held by it is not a substitute for the due process which must underlie judicial action.

Not one of the cases relied upon by my associates concerned procedure similar to that which is here challenged. In accordance with long established principles they hold that summary methods of an administrative body in the levy, assessment and collection of taxes do not violate due process of law if, somewhere in the administrative proceeding, the taxpayer had notice and an opportunity to be heard. However, these cases are not authority for the enforcement of an administrative determination as the judgment of a court of law.

For example, in Springer v. United States, 102 U.S. 586, 26 L.Ed. 253, the tax collector caused a warrant to issue and levied upon real estate. It was urged that the summary levy and sale deprived the taxpayer of property without due process of law. The court held that this administrative process did not violate the constitutional guarantees. In the case of Bull v. United States, 295 U.S. 247, 55 S.Ct. 695, 699, 79 L.Ed. 1421, the court held that administrative procedure of a summary nature is valid, yet its opinion indicates that there is a clear line of demarcation between the administrative and judicial process in the collection of taxes. In this connection it is said that if the amount assessed by the taxing authorities is not paid when due, "administrative officials may seize the debtor's property to satisfy the debt."

So also in People v. Central Pacific R. Co., supra, an administrative procedure to assess and collect taxes upon railroads was upheld, but the decision is not authority for the conclusion reached in the present case. The court said: "The collection of taxes is not, however, the mere collection of a debt, but is a sovereign act of the state, to be exercised as may be prescribed by the legislature. Whether the tax is collected by an action in court, or by summary sale by the tax collector, is immaterial." In other words, the court in that case clearly recognized the distinction between an administrative remedy and judicial proc-

ess. For, as my associates have pointed out, a statute may require the government to proceed by an action at law or it may authorize the summary seizure of property by the administrative officers. The government may choose its remedy, but if it proceeds by way of judicial authority, it must follow the due process required in actions at law.

I concur: WARD, Justice, pro tem.



17 Cal.2d 380

BACKUS v. SESSIONS et al.

L. A. 17700.

Supreme Court of California.

Feb. 17, 1941.

Rehearing Denied March 17, 1941.

1. Automobiles ⇐244(13, 37)

In action for injuries sustained by motorcyclist colliding with truck at intersection at which prima facie speed limit was 15 miles per hour by reason of obstruction of view of traffic within statutory distance, evidence that truck driver cut corner at speed of 25 miles per hour, and that collision occurred while truck driver was cutting the corner, warranted finding that truck driver was negligent and that his negligence was "proximate cause" of collision. Vehicle Code, § 511, St.1937, p. 618.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

2. Appeal and error ⇐1011(1)

An appellate court will not disturb finding of trial court where evidence is conflicting.

3. Release ⇐57(1)

Evidence warranted finding that injured plaintiff, at hospital on day after accident, was not competent and was not aware of what transpired when he signed release because of his physical and mental condition, so that release was void.

4. Release ⇐16

Under statute plaintiff suffering cuts and bruises around the eye did not, by cashing and endorsing draft which was delivered at time of execution of release covering all his injuries, release claim for impairment of vision and ultimate blindness resulting from optic nerve injury and not from cuts and bruises, where plaintiff had no knowledge of optic nerve injury at time of executing release or at time of endorsing and cashing draft, whether or not other parties to release had knowledge of optic nerve injury. Civ. Code, § 1542.

5. Contracts ⇐97(1)

A void instrument cannot be ratified or confirmed where person alleged to have made the ratification did not know what the agreement contained or all the facts when the alleged confirmation took place.

6. Appeal and error ⇐989

In action for injuries sustained by plaintiff asserting that release executed by him did not cover impairment of vision resulting from unknown injury to optic nerve, Supreme Court would not, on defendants' appeal from adverse judgment rendered by trial court sitting without jury, consider evidence of conversation between plaintiff and physician relating to plaintiff's knowledge, at time of execution of release, that vision was permanently impaired, where trial court found on substantial evidence that plaintiff's condition was such that plaintiff was not mentally accountable for what transpired at time of execution of release.

7. Release ⇐57(2)

In action for injuries sustained by plaintiff asserting that release executed by him did not cover impairment of vision resulting from unknown injury to optic nerve, evidence warranted finding that plaintiff, who knew of cuts and bruises about his eye when he executed release, did not, when he cashed and endorsed draft delivered to him at time of execution of release, know of injury to optic nerve and of permanent impairment to vision.

8. Tender ⇐3

The statutes providing that offer in writing to pay sum of money if not accepted, is equivalent to actual production and tender of money, and that person to whom tender is made must specify any objection he has to tender or objection is waived, are not affected by statutes requiring offer to be made in good faith and that offeror must be willing and able to perform according to offer. Code Civ.Proc. §§ 2074, 2076; Civ.Code, §§ 1493, 1495.

9. Release ⇐24(2)

Where plaintiff received $800 and executed release covering known injuries but not covering unknown injury to optic nerve resulting in progressive loss of vision, plaintiff could subsequently sue for injury to optic nerve without rescinding release and offering to restore the $800. Civ.Code, § 1542.

10. Automobiles ⇐247

In motorcyclist's action for injuries sustained in collision with truck making left turn at intersection, finding that motorcyclist's negligence was not a proximate cause of collision and was remote, and that truck driver's negligence was the proximate cause of collision, was sufficient to negative defense of contributory negligence.

Appeal from Superior Court, San Diego County; Robert E. Burch, Judge.

Action by J. W. Backus against Milton Sessions and Edward J. Bonnin to recover damages sustained in collision between motorcycle and delivery truck. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

For prior opinion see 104 P.2d 719.

Wright, Monroe, Hardin & Thomas and Monroe & McInnis, all of San Diego, for appellants.

Joseph S. Campbell, of San Diego, for respondent.

CARTER, Justice.

Defendants appeal from a judgment rendered by the court sitting without a jury awarding plaintiff $3,500 damages for injury to the optic nerve of his left eye, and progressive impairment of vision and blindness resulting therefrom. That injury and other injuries resulted from a collision on April 5, 1939, in the daytime between plaintiff's motorcycle and defendant Sessions' delivery truck, being driven by Sessions' employee, defendant Bonnin. The collision occurred in the city of San Diego at the intersection of India and Redwood streets, each of which is paved and curbed and 52 feet wide. By reason of the obstruction of the view of traffic within the statutory distance on Redwood street to northbound traffic on India street, the prima facie speed limit at the intersection was 15 miles per hour. California Vehicle Code, § 511, St. 1937, p. 618. Under these circumstances plaintiff drove south on India street and made a "U" turn about three-fourths of a block south of the intersection. He then drove north on India street. Defendant Bonnin was driving south on India street, and at a point about 16 feet north of the north line of the intersection with Redwood street commenced to make a left turn into Redwood street and in so doing crossed to his left of the center line of India street, "cut the corner", and proceeded across the northeast quarter portion of the intersection. Just prior to the collision both plaintiff and Bonnin were traveling 25 miles per hour. The collision was head-on and occurred three feet south of the north line and 16 feet west of the east line of the intersection. As a result of the collision plaintiff suffered mental and physical shock, a fractured left ankle and wrist, bruised back and arm, and cuts and bruises on the left side of his head and on the left eye; the optic nerve to his left eye was injured resulting in partial atrophy and 80 per cent loss of vision and the prognostication is total blindness in that eye. The damages were found to be $3,500 for the injury to the optic nerve and the results flowing therefrom, and $800 for all other damages.

[1] Defendants denied that Bonnin was negligent and pleaded as special defenses a release from plaintiff and contributory negligence. From the foregoing facts it is obvious that the finding of the trial court that defendant Bonnin was negligent and that his negligence was the proximate cause of the collision is supported by the evidence.

Defendants contend that the release was a complete defense to the action. After the accident, plaintiff, being a member of the United States Marine Corps, was taken to the United States Naval Hospital in an unconscious condition. He was totally unconscious until 9 o'clock that night. While at the hospital he was under the care of Dr. Grindell, a physician attached to the hospital. The following day, April 6, 1939, at about 3 o'clock in the afternoon, A. B. Severance, an insurance company adjuster, from defendant's public liability carrier, called on plaintiff at the hospital. Severance was accompanied by Dr. Findley, who also came on behalf of the insurance carrier. At that time, according to Severance's testimony, there was a conversation with plaintiff with reference

to plaintiff's injuries and the settlement thereof. Dr. Grindell was present and Dr. Findley examined plaintiff. The conversation between Severance and plaintiff related to the settlement of the case. Plaintiff wanted a new motorcycle and $1,000 and was hesitant about settlement until he knew the extent of his injuries. The upshot was that plaintiff executed a general release of all damages suffered, both personal and property, for the sum of $800; the release provided among other things, that section 1542 of the Civil Code was waived. A draft for $800 was given to plaintiff; he was told about the draft being held for him the following day but had no recollection of it. On the face of the draft appeared the following: "in full satisfaction, compromise and discharge of all claims against Milton P. Sessions and Edwin Bonnin for damages as result of auto accident at India Street and Redwood Street, San Diego, San Diego County, California." The draft also provided that the sum was ordered paid to plaintiff in full satisfaction of the above-mentioned damages. On the reverse side of the draft was the following:

"In full payment and complete satisfaction of all claims against Milton P. Sessions and Edwin Bonnin under policy Number 8130402 for damages as result of accident occurring 4/5/39 at Redwood and India Streets, San Diego County, San Diego, California.

"The Endorsement must be made in conformity with the claim or claims as written on the face of the draft.

"In consideration of such payment of said———Milton P. Sessions and Edwin Bonnin is hereby discharged from all further claim by reason of said settlement, leaving———Dollars $.....only in force under this policy.

(Signed) "Joe Wright Backus."

[2, 3] The court found that at the time the release was executed and the draft delivered on April 6, 1939, and for several hours thereafter, plaintiff was in a dazed and semi-conscious condition and was without capacity to contract and was unaware of his rights and injuries; and further that he had no knowledge of the contents of the release until presented to him at the trial of the case. There is ample evidence to support those findings and, although there is a conflict in the evidence, under the familiar rule that an appellate court will not disturb a finding of the trial court where the evidence is conflicting, that finding cannot be here questioned. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163. Plaintiff testified he had very little memory about what took place on the afternoon of April 6, 1939, that he did not remember signing any release or being examined by Dr. Findley. The evidence shows that less than 24 hours before the signing of the release and the conversation on April 6, 1939, he had suffered a fractured wrist and ankle, bruised arm and back, and injuries on the face, head and left eye and concussion. His left eye and left side of his face were bandaged. He did not recognize friends who called at the hospital. To them he was in a dazed condition. Opiates had been administered to him the night before. We believe that this and other evidence was adequate to support the finding that plaintiff was not competent when the release was executed; and due to his physical and mental condition was not aware of what transpired on the afternoon of April 6, 1939. It must be concluded therefore that the release was void.

However, defendants claim that regardless of what plaintiff's condition may have been when the release was executed and the draft delivered, the subsequent cashing of the draft by plaintiff and his endorsement with the releases stated thereon, on April 17, 1939, was a ratification of the release of April 6, 1939, or was a complete release in itself. It is not disputed that when plaintiff endorsed and cashed the draft he was fully competent and knew what he was doing. The theory of the trial court on this proposition clearly appears from its findings. It found: "and (insurance carrier) having such knowledge, and concealing the same from plaintiff, who first discovered the fact in June, 1939, left at the hospital on April 6, 1939, a draft for Eight Hundred Dollars ($800.00) for plaintiff, which was in release of all claims for injuries on account of the accident. Plaintiff cashed this draft on April 17th, 1939 by endorsement. At that time plaintiff was in full possession of his mental faculties and was aware of and intended to release all of his damages then known to him which were in fact all except as for the injuries to his optic nerve of the left eye, which was then not known to him, and of which he remained in ignorance until after he had spent all of the $800.00."

The court then proceeded to determine that the damages for all of the injuries, except the injury to the optic nerve, was $800, the sum plaintiff had received on the draft. Under these circumstances it is clear that it was the court's conclusion that plaintiff was not bound by the release arising from the endorsement and cashing of the draft because he did not then know of the injury to his optic nerve and therefore the case came within the provisions of section 1542 of the Civil Code.

Defendants state in their brief that neither plaintiff nor defendants knew of the character of the injury to plaintiff's eye. They state: "* * * it is entirely unreasonable and improper to conclude that when Dr. Findley, who was not an eye specialist, made the superficial examination on the day after the accident, he was charged with any accurate knowledge of the injury. The unquestionable fact is that no one knew at the time whether the injury was permanent or otherwise."

The trial court found that defendants did know of the injury to plaintiff's optic nerve and of the permanent impairment of vision, at the time he (Dr. Findley) examined plaintiff on April 6, 1939, and that having such knowledge defendants were fraudulent in concealing it from plaintiff. Be that as it may, it is not material whether or not they had such knowledge. Conceding that neither defendants nor plaintiff knew of the injury to the optic nerve at any time until after the draft was cashed, the trial court's conclusion that plaintiff was not bound by the release or cashing of the draft was proper. Section 1542 provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

[4, 5] Assuming that the release, and draft and endorsement and cashing thereof may be considered all one transaction, it does not follow that the cashing of the draft was a ratification of the release in all its phases. This is true for the reason that there cannot be said to be a ratification or confirmation of a void instrument or agreement when the person alleged to have made the ratification did not know what the agreement contained or all the facts when the alleged confirmation took place. International M. Co. v. National R. Co., 67 Cal.App. 498, 227 P. 918; Schmidt v. Mesmer, 116 Cal. 267, 271, 48 P. 54. Plaintiff knew nothing of the release or what it contained until after the draft was cashed; he knew nothing of it until it was exhibited to him at the trial. It is true he knew the draft contained release provisions and that by cashing it he was making a settlement but nothing was said in the release provisions of the draft about known or unknown injuries or waiving section 1542 of the Civil Code as appeared in the release. Under such circumstances it is not material whether the cashing of the draft with the release thereon be considered as a ratification of the release or as an independent instrument constituting a release and settlement. The essence of the problem is therefore, whether the case comes within the terms of section 1542 of the Civil Code, providing that a release does not include claims for injuries not known or suspected to exist by the releasor when executed. Plaintiff could not know of the injury to his optic nerve when he signed the release because at that time he was not mentally competent and was not aware of what was transpiring. The lower court found that plaintiff did not know of the injury to his optic nerve and the impairment of vision and ultimate blindness which would result therefrom, when he endorsed and cashed the draft. Defendants urge that that finding is not supported by the evidence in that the most that plaintiff can be said to have been ignorant of was that the impairment of his vision would grow progressively greater to the final tragedy of blindness.

[6, 7] In this connection plaintiff testified that he had injuries on the left side of his face and around the left temple and eye; seven stitches were taken, some being in the eyebrow. His eye and the side of his forehead were bandaged for about two weeks. He did not know of his optic nerve being injured and that he would probably lose the sight of his eye until he consulted an eye specialist while still at the hospital, about June 17, 1939, two months after he had cashed the draft. He stated that he had difficulty with his eye since the injury, but what difficulty does not appear. It may have been because of the cuts and bruises alone. Defendants would have the court consider evidence of the conversation between Sever-

ance, Dr. Findley and plaintiff on April 6, 1939, as bearing on plaintiff's knowledge that his vision was permanently impaired, (and other matters) but the trial court has found on substantial evidence, that plaintiff's condition was such that he was not mentally accountable for what transpired at that time; thus, such evidence should not be considered by us. It follows then that the evidence justifies the trial court's finding that plaintiff did not know of the injury to his optic nerve and of the permanent impairment of his vision when he endorsed and cashed the draft. The case is simply one then where a person, when he signs a release for all injuries, has suffered cuts and bruises around the eye and other injuries of which he knows but he is also suffering from an injury to the optic nerve which will result in a permanent impairment of vision and ultimate blindness of which he does not know. Uuder these circumstances section 1542 is applicable. It is not a situation where unexpected and unknown consequences develop from a known injury. The impairment of vision and ultimate blindness are not consequences flowing from the bruising of the eye and the cuts thereabout, rather they are from the unknown injury to the optic nerve. O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A. L.R. 1381, is controlling here. There the action was for wrongful death of a minor, occurring seven months after the accident, caused by an injury to the spleen. The defense was a release of all known and unknown damages given prior to the minor's death. It appeared that there was a bruise over the abdomen causing a hemorrhage in the spleen not visible to the naked eye; the bruise on the abdomen however was observed and known. This court held the release did not cover the damages for the death resulting from the injury to the spleen, stating at page 360 of 204 Cal., at page 337 of 268 P., 60 A.L.R. 1381:

"It appears, therefore, beyond question, that at the date of the release the injury which was the cause of the boy's death was not known to either party. It was not in the minds of the parties at the time of settlement which resulted in the execution of this written release. Accordingly, although the release may purport upon its face to extend to the plaintiff's claim for damages arising from the death of his son, yet, in reality it does not do so. Section 1542, Civ. Code. It is unreasonable to suppose that plaintiff would have entered into said agreement of settlement whereby he released the defendant of all damage for the sum of $250 had he known that there was any possibility that the boy had received this fatal injury to his spleen. Such knowledge would have materially affected his settlement with defendant. To hold him to the terms of the release would not only be manifestly unfair and unjust, but it would be against the law of this state as we understand the same and as we have attempted to state it in the foregoing pages of this opinion."

In Gambrel v. Duensing, 127 Cal.App. 593, 16 P.2d 284, a general release for personal injuries was signed by plaintiffs when they were not aware of what they were doing and under their impression that the $350 received therefor was for property damage and hospital expenses rather than the personal injuries. The court said at page 601, et seq. of 127 Cal. App., at page 287 of 16 P.2d:

"It is further contended that the release was signed when the plaintiff was not in a physical or mental condition to properly apprehend the effect of the instrument which was being signed by her and that the obtaining of her signature under such circumstances constituted a fraud. * * *

"That there was a mistake of the parties as to the extent of the injuries suffered by the plaintiff, and especially as to the injury upon which this action is specially predicated, unquestionably appears in this case. The damages which entered into the $350 as the basis of the settlement was apportioned as follows: $180 for damages to the automobile, and the remainder for hospital bills, doctors' fees, etc.

"There is further testimony in the record to the effect that neither the plaintiff nor Louis Gambrel would have signed the release had they known of the resulting injury to the plaintiff's eyesight. The release signed by the plaintiff and Louis Gambrel is in the words and figures following, to wit:

" 'We, Mrs. Lilly Gambrel & Louis Gambrel, of the city of Yuba City, County of Sutter, State of Calif., for and in consideration of the sum of three hundred fifty dollars paid to us by State Farm Mutual Auto. Ins. Co., the receipt is hereby acknowledged, do hereby release and discharge C. E. & L. E. Duensing and State Farm Mutual Auto. Ins. Co. of the City of Bloomington, County of McClean, State of

Ill. from any and all claims or demands of any nature whatsoever accruing prior to this date, and particularly from all claims and demands arising out of accident 99 highway 1½ miles north of Roseville, Calif. on or about the 8th day of Jan. 1931, in or near the city of Roseville, County of Placer, State of Calif.'

"Irrespective of the question of fraud, or of any undue influence, or whether the plaintiff was in a physical or mental condition to fully comprehend and appreciate the legal consequences of signing the paper which she thought was a receipt, the fact of mutual mistake is fully disclosed by the record. The plaintiff had no knowledge whatever at the time of signing the release that her eyesight had been impaired, or would become impaired by reason of any injury that she had suffered. If the representatives of the insurance company had any knowledge of such fact, then their concealment thereof amounted to a fraud. We do not need to cite authorities that a release can be set aside for a mistake of fact, as section 1542 of the Civil Code provides for such procedure." See, also: Hudgins v. Standard Oil Co., 136 Cal.App. 44, 28 P.2d 433; Wetzstein v. Thomasson, 34 Cal.App.2d 554, 93 P.2d 1028; Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 44 P.2d 405.

Defendants next urge that there was no proper tender of the $800 paid on the draft when plaintiff sought to rescind the release, and that such an offer of restoration was vital to plaintiff's case. By letter to defendants from plaintiff's attorney on May 12, 1939, notice of rescission was given together with a statement of an offer to restore the $800. In reply to that letter the insurance carrier replied that they were going to investigate the matter and would advise of their decision later.

[8, 9] The court found that at the time of the written offer to restore, "plaintiff had assets convertible to cash in the amount of $200.00 and could have borrowed $600.00 to have completed restoration of $800.00, but did not have the sum of $800.00 in cash to restore if defendants had surrendered their claims under said writings of April 6, 1939." That finding is supported by the evidence. Section 2074 of the Code of Civil Procedure provides that an offer in writing to pay a sum of money if not accepted, is equivalent to actual production and tender of the money and section 2076 provides that a person to whom a tender is made must specify any objection he has to it or it is waived. It is true that those sections do not affect sections 1493 and 1495 of the Civil Code which require an offer to be made in good faith and that the offeror must be willing and able to perform according to the offer. Allen v. Chatfield, 172 Cal. 60, 156 P. 47. But we cannot say that when plaintiff had assets convertible in cash of the value of $200 and had sufficient credit and was able and willing to borrow $600, he was unable or unwilling to restore the $800 to defendants. It is quite evident that the offer of rescission and to restore was not accepted by defendants. Apparently plaintiff heard nothing further from them after the offer was made; and after he commenced his action defendants claimed in their answer that the release was in full force and effect and a complete bar to plaintiff's action. In any event rescission and an offer of restoration are not necessary under circumstances such as are here existent. The original release made on April 6, 1939, was absolutely void and no rescission was necessary. There was clearly no meeting of the minds because plaintiff was incompetent at that time. The release contained in the draft considered either as a separate release instrument or as a ratification of only the general release provisions of the original release required no rescission or offer to restore for the simple reason that there was nothing to restore. The release, in the language of section 1542, did not extend to unknown injuries, that is, the injury to the optic nerve. Putting the matter affirmatively it did extend to all injuries except that to the optic nerve, and therefore the $800 was the settlement figure agreed upon for all other injuries and being such there would be no occasion for restoring it to defendants. They had received for that sum a release for all of such other injuries and they are not in any way prejudiced. The injuries to the optic nerve being unknown were simply not a part of the release contract, or stated another way, no release was made with reference to the optic nerve. It is not dissimilar to a release which specifies on its face that it covers only part of the injuries suffered. In either case the release stands as the agreement of the parties as to the known injuries. Realizing this the trial court found, as heretofore shown, that the $800, the amount of the draft, was the amount of damages suffered by plaintiff by reason of all injuries, except the optic nerve. This reasoning finds support in Meyer v. Haas, 126 Cal. 560, at page 563,

58 P. 1042, at page 1043, where it was held that the release extended only to the loss of time item of damages, and the court said:

"The contract, under such circumstances, will be held to be what the maker of it intended it should be, and not what it was made to appear to be by the deception practiced. The $25 paid plaintiff may, therefore, properly be said to have been received in payment for the loss of time during his illness, and not in satisfaction of anything that his mind never consented that it should satisfy. The claim sued upon does not include this loss of time, and the court instructed the jury that they could find nothing against defendants for loss of time. No offer to return the money was necessary, for the reason that the plaintiff in this case 'is not attempting to avoid a contract which he has made, but is showing that he did not make the contract which he apparently made.' Mullen v. [Old Colony] R. R., 127 Mass. 86 [34 Am.Rep. 349]; [Chicago, etc.] Ry. Co. v. Lewis, 109 Ill. 120; Senter v. Senter, 70 Cal. 619, 11 P. 782; Wilson v. Moriarty, 77 Cal. 596, 20 P. 134; Id., 88 Cal. 207, 26 P. 85; Sullivan v. Moorhead, 99 Cal. 157, 33 P. 796."

It is said in Wetzstein v. Thomasson, 34 Cal.App.2d 554, 560, 93 P.2d 1028, 1032:

"The objection has also been raised by defendant that in order for plaintiff to maintain this action she should have offered to restore to defendant the sum paid at the time of signing the releases. No offer to restore the consideration received is necessary where a party is tricked or deceived into signing a contract different in its terms and objects from the contract which she has made and which she understands that she is executing. No offer to return the money was necessary because plaintiff is not seeking to avoid a contract made by her but is merely showing that she did not make the contract which was apparently made by her. Meyer v. Haas, supra; Tyner v. Axt, supra [113 Cal.App. 408, 298 P. 537]. Plaintiff understood that the release covered only doctor bills incurred to date and the cost of obtaining a helper in the flower shop for thirty days. The judgment covered only such items of damage as have accrued since the date of the settlement. The rule is well stated in Garcia v. California Truck Co., supra (183 Cal. 767, 192 P. [708] 710): 'In other words, if the situation is such that reforming the release to make it read as it would have read except for the fraud upon the plaintiff, the release would still purport to be a bar to the plaintiff's cause of action, then in order to maintain his action he must rescind and avoid the release, and for rescission an offer of restoration is necessary.'" See also: O'Meara v. Haiden, supra.

It follows then that because of the ignorance of the existence of the injury to the optic nerve, the payment of the $800 necessarily covered all damages except those flowing from such injury, and the trial court found plaintiff's damages for injury to the optic nerve was $3,500 and that "for all other damages are the sum of Eight hundred Dollars ($800.00).", and also that "the draft for $800.00 was a full release and satisfaction of all plaintiff's damages known at the time it was negotiated by plaintiff, and these include all damages except injury to optic nerve of his left eye and progressive loss of vision thereof". Under these circumstances defendants are not in a position to object to the sufficiency of any offer of rescission or restoration.

[10] Finally defendants complain that the finding against contributory negligence is insufficient and that the evidence establishes contributory negligence as a matter of law. From the foregoing discussion of the facts it is apparent that there was adequate evidence from which the trial court could find a lack of negligence on the part of plaintiff contributing proximately to the collision. The mere fact of the speed at which plaintiff was traveling, 25 miles per hour, was not necessarily a proximate cause of the accident. It is true that due to the view being obstructed the prima facie speed limit was 15 miles per hour, but that limit has reference to traffic entering into India street from Redwood street rather than traffic turning left from India street into Redwood street as was done by defendant Bonnin. The obstruction of view did not affect the parties involved in the collision here involved. The trial court found:

"After defendant Bonnin turned left into the east half of India Street neither operator could have avoided the collision. Plaintiff had no knowledge of defendant Bonnin's intention to turn in front of plaintiff until defendant Bonnin had begun his left turn. Plaintiff's negligence was not a proximate cause of the collision and was remote. Defendant Bonnin's negligence was the proximate cause of the collision." Although more precise findings could have been prepared, we believe that such finding was sufficient to negative the defense of

contributory negligence. In Frazzini v. Cable, 114 Cal.App. 444, 455, 300 P. 121, 126, it is said:

"However, finding No. 15, as follows, 'That it is not true that the death of Renardo Frazzini occurred proximately and directly through and by reason of the unlawful and wrongful act of said plaintiff in any manner at all,' read in connection with finding No. 3, which fixes the negligence of the appellant as the proximate cause of the death of Renardo Frazzini, is sufficient to constitute a finding negativing contributory negligence, even considering the pleading sufficient to raise the issue of contributory negligence." See also: Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 P. 391; Miner v. Dabney-Johnson Oil Corporation, 219 Cal. 580, 28 P.2d 23; Katz v. T. I. Butler Co., 81 Cal.App. 747, 254 P. 679.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.



17 Cal.2d 364

WALLING et al. v. KIMBALL et al.

L. A. 17653.

Supreme Court of California.

Feb. 17, 1941.

1. Appeal and error ⇐1015(5)

On motion for new trial for misconduct of counsel, trial court's finding that there had been no prejudicial misconduct was justified, for all matters covered by affidavits took place in presence of trial judge who was in the best position to observe the demeanor of the parties and to gauge any possible effect it might have had upon the jury.

2. Appeal and error ⇐933(1)

Where motion for new trial for misconduct of counsel was denied, trial court must be deemed to have concluded that no prejudice was suffered by movant.

3. Appeal and error ⇐978(2)

The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to misconduct of counsel and trial judge's conclusion should not be disturbed unless under all the circumstances it is plainly wrong.

4. New trial ⇐32

Any prejudicial effect resulting from assertion by counsel that an attorney for two defendants was attempting to confuse the issues and that such attorney also represented witness whose deposition was being read, and that two attorneys were representing the three defendants jointly, was removed by trial court's direction to jury to disregard such assertion.

5. New trial ⇐29

Denial of motion for new trial for alleged misconduct of counsel was proper.

6. Damages ⇐43

A husband has a right of action which he may pursue in his own name for damages to himself by reason of his wife's injuries, such as medical and other expenses incurred by reason of such injuries.

7. Damages ⇐216(9)

In husband's action against master and servant for special damages by reason of injuries sustained by wife through servant's alleged negligence, charge that if jury found for plaintiff jury might assess stipulated sum expended for wife's treatment was proper as to both defendants.

8. Appeal and error ⇐900

An appellate court will never indulge in presumptions to defeat a judgment, but every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of orders and judgments of superior courts.

9. Appeal and error ⇐901

All presumptions and intendments are in favor of supporting the judgment or order appealed from, and appellant has burden of showing reversible error, and in absence of such showing the judgment or order appealed from will be affirmed.

10. Appeal and error ⇐932(1)

Presumption was that verdict for husband was for general damages for husband's personal injuries alone to exclusion of special damages for expense of treating wife also injured in same automobile collision, particularly where husband's injuries would sustain verdict for amount awarded and verdict for wife would otherwise be excessive under statute to amount of special damages

allowed husband. Vehicle Code, § 402(a, b), St.1935, p. 153.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Jones D. Walling and Grace Walling against David K. Kimball, Kimball Motor Car Company and Noah Hastings for damages resulting from automobile collision. From judgments for Jones D. Walling for $5,000 and judgments for Grace Walling for $5,000, David K. Kimball and Kimball Motor Car Company appeal.

Affirmed.

For prior opinion, see 103 P.2d 984.

Bronson, Bronson & McKinnon and Paul C. Dana, all of San Francisco, for appellants.

Jack W. Bradley, of Bakersfield, for defendant Noah Hastings.

Ira J. McDonald, of Los Angeles, and J. K. Lilly, of Bakersfield (Harvey D. Taylor, of Los Angeles, of counsel), for respondents.

CURTIS, Justice.

Defendants David K. Kimball and Kimball Motor Car Company appeal from a judgment for plaintiffs in an action for damages sustained by the latter in an automobile accident which occurred on November 24, 1935, some twenty-five miles south of Bakersfield on Highway No. 99. The car in which plaintiffs were riding collided with a Cadillac automobile owned by the defendants Kimball and driven by the defendant Noah Hastings. David K. Kimball is the sole owner of Kimball Motor Car Company and does business under that trade name in Huntington Park.

The first trial of the case before a jury resulted in a disagreement. On the second trial the jury returned the following verdicts: (1) In favor of Jones D. Walling for $5,000 as against all defendants; (2) in favor of Grace Walling for $20,000 as against the defendant Hastings and for $5,000 as against the defendants David K. Kimball and Kimball Motor Car Company. Motions for new trial were made by all defendants and denied, whereupon said defendants David K. Kimball and Kimball Motor Car Company appealed from the judgments entered against them.

This appeal is based upon two grounds: prejudicial misconduct of counsel, which prevented appellants from having a fair trial, and erroneous instructions as to statutory liability. Consideration of the first point—misconduct of counsel—requires a somewhat detailed discussion of the facts and circumstances forming the substance of this charge.

Hastings was represented at both trials by his own counsel, Mr. Bradley, who was paid, however, by appellants. During the course of the first trial Hastings, while on the witness stand, acknowledged Mr. Bradley to be his attorney and stated he would cooperate with said counsel. During cross-examination by appellants' counsel in the course of the first trial and contrary to court order, Hastings disappeared and has never been located by court or counsel. Consequently Hastings did not appear at the instant trial.

From the evidence it appears that Hastings first started to work for the appellants on November 18, 1935, just six days before the accident. Since his work as a general utility man—his principal duties being to wash cars and do janitor work—required him to open the place in the morning, he had a key to the premises. On Saturday, November 23, 1935, he was told to take a Dodge car and go to Long Beach on a specific errand. He did not return until 11 o'clock that night, at which time no one was at the garage, which was closed at 9 p. m. He left the Dodge on the premises and took the Cadillac for the purpose of making a trip to Bakersfield to see his sister. The accident happened en route to Bakersfield. The next morning when the Cadillac was missed, the matter was reported to the police. That afternoon the appellants received a wire from Hastings advising them of the wreck. Respondents concede that Hastings was not acting within the scope of his employment at the time of the accident, and liability is sought to be imposed upon appellants under subdivisions (a) and (b) of section 402 of the Vehicle Code St.1935, p. 153.

The pivotal point of the entire case on appeal centers on the question of Hastings' permission to drive the Cadillac. The evidence presented in support of this permissive use consists of a portion of the deposition of Hastings, taken by respondents under section 2055 of the Code of Civil Procedure, and the testimony of Jones D. Walling and his investigator concerning certain oral admissions by Hastings made some months after the accident to the ef-

fect that he had had such permission. With reference to this matter Hastings testified that he began working for the appellants seven or eight months before the accident occurred; that he had used their cars for his own personal convenience some forty or forty-five times; that about a week after he went to work David K. Kimball and his brother had told him to take a car whenever he needed it; and that on the first day he went to work there the brother told him he could take a car whenever he wanted it for his own personal use.

This evidence was contradicted by the testimony for appellants and by a portion of the testimony of Hastings himself. In this connection it was conclusively shown that the business operated by the appellants was not opened until September 10, 1935, a little more than two months before the accident; that Hastings did not go to work for them until November 18, 1935; that he worked for and was paid by a firm in Long Beach up to November 15, 1935; and that he later paid the appellants for the damage to the Cadillac.

There was testimony on behalf of the appellants that no general permission to take cars was given, and that Hastings had been allowed to use a car for his own personal purposes only once, November 16, 1935, when he drove to Long Beach, where he had previously been employed, to pick up some of his belongings. When his deposition was taken Hastings was confronted with his signed statement of November 26, 1935, two days after the accident, wherein he said: "I had no permission to use the Cadillac and no one at the Kimball Motor Company knew I had the Cadillac until I reported the accident on Sunday afternoon," and also: "I was acquainted previously with Mr. Vaus (manager of the used car sales department) and I presumed that I could use a car without asking for permission." In his deposition Hastings testified that these statements were true.

The appellants contend that, in view of the weak and unsatisfactory character of the evidence on the most important issue in the case, i. e., whether or not Hastings had permission to use the Cadillac, certain statements made by the respondents' counsel during the reading of Hastings' deposition in the course of the trial amounted to prejudicial misconduct which prevented them from having a fair and unbiased hearing. With reference to this instance, after he had finished reading the direct examination of Hastings, counsel for the respondents objected to the reading of his cross-examination by the appellants' counsel on the ground "that Mr. Dana (appellants' counsel) in this case as a matter of fact is the representative of Mr. Hastings, and that he is attempting to indulge in this cross-examination to confuse the issues, and that he and Mr. Bradley (Hastings' counsel) are representing these parties jointly, and that Mr. Dana * * * employed Mr. Bradley in this case, and that due to that relationship they are certainly not entitled to put Mr. Hastings on the 'pan' and have their cake and eat it". In the ensuing argument, respondents' attorney claimed that his own integrity was challenged by the charge of appellants' attorney that he (respondents' attorney) had broken his word to the court, that his statement was false and untrue and the breach of a stipulation setting forth the facts as to the employment of counsel for Hastings. Finally, the objection to the introduction of the cross-examination was overruled, and respondents' counsel concluded the altercation with the following statement: "I will later then have to call both Mr. Bradley and Mr. Dana to the stand and find out the true facts of this matter." Counsel for the appellants assigned these quoted remarks as misconduct and requested the court to strike them from the record, which was not done. Subsequently, in the course of the hearing on a motion for mistrial, which was denied, counsel for respondents withdrew the accusations thus made, though the jury was not advised of this. Later in its general instructions, the court told the jury not to consider any statements of counsel as evidence.

Appellants urge that the statements so made before the jury contained all of the prejudicial elements in that they injected a false quantity into the case; they were not made in good faith; and coming as they did, during the most important part of the evidence relating to whether or not Hastings had permission to use the automobile in question, their purpose was to mislead the jury by accusing the appellants' counsel of conniving with the attorney for Hastings for the purpose of suppressing the evidence.

[1] The entire controversy and every issue here set up as misconduct were before the trial court upon the motions for new trial and the affidavits filed by respective counsel in support thereof and in opposition thereto. Upon the issues thus raised in the trial court, the court decided that

there had been no prejudicial misconduct, and this was a finding of fact which the trial court was justified in making when the motions for new trial were denied, for all of the matters of which complaint is made also took place in the presence of the trial judge, who was in the best position to observe the demeanor of the parties and to gauge any possible effect it might have had upon the jury. In the leading case on this subject, LaFargue v. United Railroads, 183 Cal. 720, at page 724, 192 P. 538, at page 540, this Court said:

[2, 3] "The trial court denied a motion for a new trial based upon the ground, among others, of misconduct of plaintiff's attorney. In doing this the court must be deemed to have concluded that no prejudice was suffered by defendant by reason of any of the matters to which we have referred. Conceding some of the statements made by counsel, whatsoever the provocation thought by him to exist therefor, were improper, we are satisfied that this conclusion of the trial judge should not be disturbed by an appellate court. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. * * *"

The fundamental logic of the reasoning underlying this basic principle was given equally strong recognition and support in Roddy v. American Smelting & Refining Company, 34 Cal.App.2d 457, 93 P.2d 841; Behrendt v. Times Mirror Company, 30 Cal.App.2d 77, 85 P.2d 949; Pandolfo v. Jackson, 12 Cal.App.2d 232, 55 P.2d 550; and Aydlott v. Key System Transit Company, 104 Cal.App. 621, 286 P. 456.

In support of their argument that the action of the respondents' counsel during the course of the instant trial constitutes misconduct sufficiently prejudicial to justify a reversal, appellants cite the cases of Merralls v. Southern Pacific Company, 182 Cal. 19, 186 P. 778; Keena v. United Railroads, 197 Cal. 148, 239 P. 1061; Gackstetter v. Market Street Railway Company, 130 Cal. App. 316, 20 P.2d 93; and Gee v. Fong Poy, 88 Cal.App. 627, 264 P. 564. These cases, however, are readily distinguishable from the instant one. In the Merralls case the appeal was by defendant *from an order granting a new trial* to plaintiff, and this court there refused to disturb the finding of the trial court where no abuse of discretion was shown.

In Keena v. United Railroads, supra [197 Cal. 148, 239 P. 1065], particular emphasis in the opinion is placed on the fact that "the misconduct consisted, not in a single utterance of the charge, but rather embraced *iteration and reiteration thereof, and included hints, suggestions, and insinuations* to such an extent that by no possibility could the meaning of counsel have been misinterpreted or misunderstood by the members of the jury." (Italics ours.) Likewise, in Gackstetter v. Market Street Railway Company, supra, and Gee v. Fong Poy, supra, there was *repeated and persistent misconduct* of such unmistakable character that the general inclination of this Court not to disturb the findings of the trial court could not be followed under the circumstances.

[4, 5] In the instant case there is but a solitary assignment of misconduct, which on its face is of such doubtful character that it cannot be said that the trial court, after a full hearing of the facts forming the basis of such charge, erred in denying the motions for new trial herein. Examination of the prejudicial statements to which appellants make objection reveals that they could have conveyed nothing to the jury other than a charge that one of the attorneys for the defendants was attempting to confuse the issues and a declaration that said attorney was in fact the representative of the witness whose deposition was being read, and that the two attorneys were representing the defendants jointly. Apparently, the respondents' counsel acted in good faith in reliance on the admitted employment of Hastings' counsel through arrangement of appellants' counsel, and it seems to us that any prejudicial effect which said statements might have had was removed by the trial court's direction to the jury to disregard entirely the remarks of counsel. Conceding that the statements made by respondents' counsel, whatever may have been the basis of his assertion, were improper, we are satisfied that the conclusion of the trial judge, after consideration of these same facts presented by the conflicting affidavits in the course of the argument on the motions for a new trial, should not be disturbed by this Court.

Appellants further contend that the trial court erroneously instructed the jury with respect to the limit of liability upon the

owner of an automobile for injuries to one or more persons.

The court read to the jury subdivisions (a) and (b) of section 402 of the Vehicle Code. Subdivision (b) limits the liability of the owner in such a case as this to $5,000 "for the death of or injury to one person in any one accident," and subject to this limitation, to $10,000 "with respect to the death of or injury to more than one person in any one accident." At this point the court admonished the jurors to respect these limits as to appellants, naming them, even though they should award a greater sum as against the driver Hastings. This was followed by some instructions of a general nature, after which the court gave its charge as to the elements of damage to be considered by the jury in connection with each of the respondents. It is the concluding paragraph of this charge on the subject of damages which is attacked as erroneous:

"It has been stipulated that plaintiff, Jones D. Walling, incurred as special damages, for hospital, medical, x-rays and incidental expense for treatment of his own injuries, to-wit, the sum of $500.52, and expense of treatment of the injuries of his wife, Grace Walling, to-wit, the sum of $3,260.55, and as damage to his Chevrolet automobile, to-wit, the sum of $600.20, and that said items of expense were reasonable. If you find the plaintiff, Jones D. Walling, is entitled to recover you may assess said items as his special damages."

[6] It is contended by appellants that this instruction is erroneous in that it told the jury that the expense of treatment for the injuries to the wife in the sum of $3,260.55 could be recovered by the husband as his special damages. That a husband has a right of action which he is entitled to pursue in his own name for damages to himself by reason of his wife's injuries, such as medical and other expenses incurred by reason of such injuries, is so well settled that the proposition requires no citation of authority, but if authorities are desired, they may be found assembled in 13 Cal.Juris. at page 880, section 69.

[7] It is a little difficult to understand the position of counsel for either of the parties as to the propriety of giving this instruction. Counsel for respondents states that this instruction was proper as to the defendant Hastings. We see no reason to place any such limitation upon this instruction. Respondent Jones D. Walling sued for the exact amount stated in this instruction as special damage sustained by him by reason of his wife's injuries, the items making up this amount being set forth in said instruction. If Hastings' negligence was the proximate cause of the injuries to the two respondents, and he was driving the Cadillac machine with the consent of the appellants, and the respondents were free from negligence, then both Hastings and the appellants were severally liable for the amount of the special damage sustained by respondent Jones D. Walling as set forth in said instruction. The instruction, therefore, was proper as to each and all of said defendants.

The difficulty we find in this case relates not to the judgment in favor of Mr. Walling, but that in favor of Mrs. Walling. Her action was for general damages. She did not sue for special damages. Therefore, no part of the item of $3,260.55 is or could be held to be included in the judgment for $5,000 rendered in her favor. We have, therefore, this situation: a judgment for $5,000 in favor of the wife and against the appellants for injuries to her and a judgment for $5,000 against the appellants in favor of the husband for injuries sustained by him by reason of Hastings' negligence. If the judgment in favor of the husband included said sum of $3,260.55, then we have judgments aggregating $8,260.55 against the appellants for injuries to Mrs. Walling. But can we hold that the judgment in favor of the husband does include said sum of $3,260.55? It is true that he sued for this amount as his special damage sustained by reason of his wife's injuries. He also sued for $10,000 general damages sustained by him on account of his own injuries. The evidence in our opinion would sustain a verdict in his favor for $5,000 general damages. We will refer to this evidence in more detail later on in this opinion.

Did the jury in fixing the amount of his damage base its award upon his claim for general damages alone, or did it include as a part of said award his claim for special damages? According to appellants' theory the jury did include in its award of $5,000 in favor of Jones D. Walling his claim of $3,260.55 for damages sustained by him by reason of his wife's injuries and, therefore, having also awarded Mrs. Walling $5,000 damages against the appellants for the injuries sustained by her, this judgment in favor of Mrs. Walling against the appel-

lants is excessive to the extent of $3,260.55. We will assume that appellants' construction of said section 402 of the Vehicle Code is correct, and that under said section of the code the combined damages of the husband and wife as against the owner of the machine for an injury to the wife cannot exceed the sum of $5,000. We expressly refrain, however, from deciding this point.

While the jury was instructed that it might include said item of $3,260.55 as special damages in its verdict in favor of Jones D. Walling, it was also instructed that it might award him general damages not exceeding the sum of $10,000, with a further instruction that the liability of the appellants was limited to $5,000 for injury to one person. We have already stated that the evidence was sufficient to sustain a judgment in Jones D. Walling's favor for $5,000 general damages. It was, therefore, within the power of the jury to render a verdict in his favor and against the appellants for the sum of $5,000 for general damages alone, or a verdict in that amount made up of both general and special damages.

If the verdict in his favor and against the Kimballs was for general damages alone, then the verdict for $5,000 in his wife's favor and against the appellants was a legal verdict. If, however, the verdict in his favor included special damage sustained by him by reason of his wife's injuries, then the verdict of $5,000 in favor of his wife and against the appellants would be excessive and erroneous to the extent of the special damage included in the judgment in his favor, according to appellants' construction of section 402 of the Vehicle Code. In this state of the case can we presume that the jury included in its verdict in favor of the husband his claim for special damages sustained by reason of his wife's injury, when such an award would have rendered that in favor of the wife excessive and to that extent illegal and erroneous?

[8] It is a well established rule in this state that "an appellate court will never indulge in presumptions to defeat a judgment. It will never presume that an error was committed, or that something was done or omitted to be done which constitutes error. On the contrary, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts." 2 Cal.Juris. 852.

[9] "It is well settled that all presumptions and intendments are in favor of supporting the judgment or order appealed from, and that an appellant has the burden of showing reversible error, and that, in the absence of such showing, the judgment or order appealed from will be affirmed. [Citing authorities.]" Hibernia Sav., etc., Soc. v. Ellis Estate Co., 132 Cal.App. 408, 412, 22 P.2d 806, 808.

[10] Under the requirements of this rule the presumption is that the verdict in favor of Jones D. Walling was for general damages alone. To presume that it included his special damages, sustained by reason of his wife's injuries, would render improper and illegal the verdict of Mrs. Walling to the extent of the special damages included in the verdict in favor of Mr. Walling. This would be contrary to the rule just stated.

An incident which took place after the case had been submitted to the jury sheds some light upon the intentions of the jury in rendering the verdict in favor of Mr. Walling. After the jury had retired, it returned into court and the foreman made the following statement and inquiry to the court: "There is a question in regard to the expenses to which Mr. Walling was,—had to pay the doctor bills, so forth. Is that assessable in addition to the $5,000.00?" To which the court replied: "No, except for property damages that is all. The property damage not to exceed, the evidence shows $600.20."

By the "doctor bills, so forth" the foreman must have intended to refer in part at least to the item of $3,260.55, which Mr. Walling had paid out as "expense of treatment of injuries to his wife". Evidently the jury wanted to know whether it could award this amount to Mr. Walling in addition to his general damages of $5,000. The court informed the foreman that this could not be done. The jury then retired and found a verdict for $5,000 in favor of Mr. Walling. The only reasonable inference to be drawn from the action of the jury after making this inquiry of the Court is that the jury designedly, in compliance with the information received from the court, awarded Mr. Walling a verdict for $5,000 exclusively as general damages. As we have stated before, the evidence was

amply sufficient to sustain such an award. It shows that he was seriously injured about the head and back; his upper jaw was broken; he lost five teeth; he received a concussion of the brain; he was disabled for nine months; and was thereafter required to wear for two and a half years a special belt to hold his spine in place; his eyes, mind and memory were affected; he had not entirely recovered at the time of the trial more than three and one-half years after the accident, at which time he could not lift any appreciable weight and still suffered pain; he was required to wear a dental plate.

The judgment in our opinion should be affirmed, and it is so ordered.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.; CARTER, J.



17 Cal.2d 346

DRILLON v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 17484.

Supreme Court of California.

Feb. 17, 1941.

1. Workmen's compensation ⇐1452

Evidence disclosing that horse owner ordered jockey to permit horse to run his own race to last quarter mile and then to whip horse three or four times but, if that amount of whipping were not effective, to whip him no more, and that jockey's compensation was determined by whether he won or lost the race, supported Industrial Accident Commission's finding that jockey was an "employee" entitled to workmen's compensation for injuries and not an "independent contractor".

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

2. Workmen's compensation ⇐1939

Industrial Accident Commission's finding of employer-employee relation is conclusive on court unless there is an entire lack of evidence to support finding or the only inference that can be drawn from evidence is contrary to it.

3. Workmen's compensation ⇐1349

Under Workmen's Compensation laws, burden of establishing defense of independent contractor relation rests on employer, not on employee, when services have been performed. St.1937, p. 299, § 5705.

4. Workmen's compensation ⇐338

Test in determining whether jockey was "employee" of owner of horse rather than "independent contractor" was whether owner had authority to discharge jockey, and it was immaterial that because of physical inability owner was unable to communicate his exercise of such authority to jockey after he was physically out of reach or that jockey was employed only for a single race.

5. Evidence ⇐47

Court takes judicial notice of rules adopted by California Horse Racing Board. Code Civ.Proc. § 1875; St.1933, p. 2046, as amended.

6. Workmen's compensation ⇐338

Rule of horse racing board that no jockey shall be weighed out for a race until fee in case race is lost is deposited or guaranteed did not make jockey an "independent contractor" rather than an "employee". St. 1933, p. 2046, as amended.

7. Workmen's compensation ⇐338

Rule of horse racing board that any change of jockey shall be exhibited by clerks of scales on the notice board had no bearing on whether jockey injured while riding horse was an employee or an independent contractor. St.1933, p. 2046, as amended.

8. Workmen's compensation ⇐338

Rule of horse racing board that, when owner shall discharge jockey, he shall upon demand of employee give written statement of discharge setting forth cause thereof, did not make jockey injured while riding horse an "independent contractor" rather than an "employee." St.1933, p. 2046, as amended.

9. Workmen's compensation ⇐338

Rule of horse racing board requiring jockey to register agent authorized to accept mounts for him and binding him to acceptance of mounts by his agent did not make jockey injured while riding horse an "independent contractor" rather than an "employee." St.1933, p. 2046, as amended.

10. Workmen's compensation ⇐338

Rule of horse racing board that jockey must report to scale room one hour before race and must remain there until all his day's

racing engagements are fulfilled did not make jockey injured while riding horse an "independent contractor" rather than an "employee". St.1933, p. 2046, as amended.

11. Workmen's compensation ⇐338

Rule of horse racing board that if jockey engaged for certain race fails to abide by his agreement, unless excused by stewards, he shall be fined or suspended, merely imposed penalties in addition to right of employer to recover for damages for breach of contract and did not make jockey injured while riding horse an "independent contractor" rather than an "employee". St. 1933, p. 2046, as amended.

12. Workmen's compensation ⇐338

It was not purpose of legislature in adopting horse racing act, or of the horse racing board in adopting its rules under that act, to make jockeys independent contractors rather than employees or to exempt jockeys and owners from workmen's compensation laws. St.1933, p. 2046, as amended.

13. Workmen's compensation ⇐338

Horse racing act and rules of horse racing board adopted thereunder are designed to regulate horse racing to the end that races may be conducted in an orderly manner and without evil so often attendant upon contest in which wagering is permitted, and purpose is not to affect an owner and jockey insofar as their personal contract relations are concerned with thought of making jockey an independent contractor regardless of their personal conduct in their negotiations. St.1933, p. 2046, as amended.

14. Workmen's compensation ⇐234

Statutory or administrative regulations bearing upon conduct in action of a person furnishing services to another and on conduct of such other person do not operate to change relation between those persons or alter conclusion that must be drawn from facts.

15. Constitutional law ⇐52, 79

Issue of whether a person is an employee or an independent contractor is a "judicial question" and legislative and administrative regulations relating to affairs of person furnishing services to persons to whom furnished cannot control judicial branch of the government in its determination of that question.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Question".

16. Workmen's compensation ⇐306

In determining whether person injured is an employee or an independent contractor, essence of issue is whether the employer has right of authoritative control and direction over employee by reason of agreement between them and not what regulation some independent authority may impose on contracting parties.

Petition by E. Drillon for writ of review to annul an award of the Industrial Accident Commission in favor of Claude Hooper.

Award affirmed.

For prior opinion, see 104 P.2d 518.

Whelan & Whelan, of San Diego, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Chas. A. Son, of Los Angeles, Earl Warren, Atty. Gen., and John J. Daily, Deputy Atty. Gen., amici curiae for respondents.

Maurice P. McCaffrey, of San Francisco (Lee Stanton, of Los Angeles, of counsel), for California Employment Commission.

CARTER, Justice.

Petitioner seeks an annulment of an award made against him by the Industrial Accident Commission in favor of Claude Hooper, a jockey suffering injuries while riding a horse for petitioner in a race at Del Mar, California. The respondent commission found that Hooper was an employee, as against the defense that he was an independent contractor and accordingly made the award to Hooper including an increased indemnity as petitioner was found to be wilfully uninsured. Hooper was injured on August 22, 1939, as the result of a fall when the horse he was riding for petitioner stumbled.

Hooper was regularly employed by Senator Jack Metzger on a monthly salary basis to exercise Metzger's horses and to ride them in races when Metzger desired. However, his contract of employment permitted him to ride horses for other persons when that could be done without interfering with his duty to Metzger, and for such rides he received compensation in addition to his monthly salary. Hooper was licensed as a jockey by the California Horse Racing Board under the Horse Racing Act of California. Stats.1933, p. 2046, as

amended. Pursuant to the rules adopted under the Racing Act, there are certain regulations pertaining to the conduct of jockeys; more will be said about those rules later herein.

During the racing season of 1939, petitioner, having a string of horses at the Del Mar track and racing them, engaged Hooper for the first time to ride his horse, Pomposa, in a single race on August 22, 1939; Hooper was to be paid $10 if the horse lost and $25 if he won. The engagement was made through Charlie Thompson, an agent of Hooper, who obtained mounts for him to ride. Hooper's first personal contact with petitioner was when the latter came to the paddock just before the race at which time petitioner instructed Hooper how to handle the horse in the race. In this connection Hooper testified:

"Q. What instructions did he (petitioner) give you that day? A. Well, as far as I can remember, *Mr. Drillon* (petitioner) *told me* the horse didn't have much speed and *to let him run his own race until the last quarter of a mile and then do the best I could from there on* * * * I think *Mr. Drillon told me to hit him* (the horse) *four or five times and if he responded, all right, and if not, not to whip him no more.*

"Q. * * * Did Mr. Drillon give you instructions as to how to ride that horse in that race? A. Well, yes * * * What I mean by that, you see any time an owner or a trainer puts a rider on the horse, he tells him how to ride. Now, his exact instructions, how many times to hit him * * * *Mr. Drillon give me orders and told me how to ride the horse.*

"* * * The stewards at any time at all *if Mr. Drillon went in there and said, 'I don't want this boy to ride this horse,'* and *the stewards could take me off his horse,* * * *

"Q. Now, what was Mr. Drillon's language when you went down to the paddock? A. Well, I tell you, that has been three months ago and to remember his exact words, I couldn't do it, but as far as getting any, you can ask any horseman or any rider or anybody that has ever rode a race, and he will tell you the owner gives you instructions how to ride the horse. * * *

"Q. I thought I understood you to say to the commissioner that when you were there in the paddock, ready to mount the horse, that Mr. Drillon told you to let the horse run his own race to the last quarter of a mile and then do the best you could? A. *Yes, and then to hit him three or four times, and if he didn't run for the whip, then to hit him no more.*

"Q. Now, you knew when you accepted the mount from Mr. Drillon, did you not, that the stewards had authority to instruct and advise the jockeys in the race how they should ride the particular horse they were riding? A. No, the stewards don't tell the riders how to ride the horse. The owner or the trainer tells the rider, gives them their instructions. * * *

"Q. And if a horse is inclined to bear out wide as he goes around the curve, they tell you to watch as he goes around the curves and make him go straight? A. Once in awhile, if it is a very unusual horse, why they (stewards of racing clubs) might tell you at curves, but as far as giving you any instruction or telling you how to ride, no, they don't. That is up strictly to the owner or the trainer."

[1-8] Petitioner contends that the evidence shows that the only purpose of the instructions was the final result sought to be accomplished, that is, winning the race, rather than an exercise of control and direction over the means to be employed in accomplishing that purpose, and that therefore Hooper was an independent contractor and not an employee. We cannot agree with that contention. Those instructions advised Hooper precisely how to ride the mount; he was ordered to permit the horse to run his own race to the last quarter mile and then to whip him three or four times but if that amount of whipping were not effective to whip him no more. Ordinarily there would be no occasion for being more particular in the instructions as to the method and means by which the ride should be made. There were ends to be gained by the instructions, other than winning the race, notably the effect of whipping on the horse's health and on his performance in future races. Certainly if a horse is improperly managed in a race, that mismanagement will be reflected in the condition and performance of the horse thereafter. It is of no consequence that it might be inferred that petitioner was merely acquainting Hooper with the characteristics of the horse to assure success in the race or that other inferences from those instructions might arise supporting the independent contractor theory, when we are mindful of the rule that the commission's

finding of an employee-employer relation is conclusive on this court unless there is an entire lack of evidence to support it or the only inference that can be drawn from the evidence is contrary to it. Los Flores School Dist. v. Industrial Accident Commission, 13 Cal.App.2d 180, 56 P.2d 581; Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570; Schaller v. Industrial Accident Commission, 11 Cal.2d 46, 77 P.2d 836. And also it must be kept constantly in mind that under the workmen's compensation laws the burden of establishing the defense of independent contractor relation rests on the employer, not the employee, when services have been performed. Labor Code, Section 5705, St. 1937, p. 299; Murray v. Industrial Accident Commission, 216 Cal. 340, 14 P.2d 301. Nor is it important that Hooper was paid $10 if he lost and $25 if he won, as indicating that the final result to be accomplished was the only purpose of the instructions. On the contrary the very fact that he would receive $10 if he lost, establishes that the winning of the race was not the only result sought, otherwise he would receive nothing if he lost. In any event, it is a situation not dissimilar to an employee whose compensation is based solely on commissions on the sales made by him. The fact that his compensation is thus contingent does not of itself make him an independent contractor. Brown v. Industrial Accident Commission, 174 Cal. 457, 163 P. 664. Petitioner also urges that because he could not have communicated with Hooper and discharged him after the race commenced and as only a single race was to be run, he did not have authoritative direction and control of Hooper and could not discharge him. Of course the power to discharge a person furnishing services is a significant factor in the issue involved, and here the evidence shows that petitioner had the *power and authority* to discharge. He could have dismissed Hooper any time until he was physically out of reach. But the test is whether petitioner had the right or authority to discharge Hooper, and it is of no consequence that because of physical inability he was unable to communicate his exercise of such authority to Hooper. Certainly if Hooper in response to petitioner's instructions on how to ride the horse, had replied that he would ride him as he pleased and ignore the instructions, petitioner would have had the right to immediately discharge him in response to such refusal to obey. The fact that Hooper was employed for a single race only is not controlling. In the Murray v. Industrial Accident Commission, supra, the applicant, an airplane pilot, was engaged for the sole task of delivering a plane owned by his employer to a certain place. His compensation was to be his expenses enroute. The pilot was held to be an employee and not an independent contractor, although he was entitled to choose the route to his destination. That case is so closely similar to the case at bar that it is determinative of it. Although the precise issue here involved has never been determined in California, there are very persuasive authorities from other states. In Moore v. Clarke, 171 Md. 39, 187 A. 887, 107 A.L.R. 924, the jockey was employed for a single race for a compensation fixed by the Jockey Club. It appeared that the owner of the horse or the trainer gave instructions as to how to ride the horse but generally with experienced jockeys few instructions were given. Nevertheless the jockey was found to be an employee. Pierce v. Bowen, 247 N.Y. 305, 160 N.E. 379, involved an employment of a driver to drive horses in four races for $15 per race. He received an injury in the first race. The court said at page 379 of 160 N.E.: "He [driver] was directed by the respondent to drive the horse with the rein not too tightly drawn. He was directed to drive on the outer circumference of the track in order to avoid frightening the horse. These instructions, and many others which might have been given, it was claimant's duty to honor under the penalty of a discharge for disobedience. Consequently the claimant was a servant and the respondent was his master."

We think it is clear therefore that the evidence is sufficient to support the respondent commission's finding that Hooper was an employee and not an independent contractor. However, petitioner makes the further contention that by reason of certain rules adopted by the California Horse Racing Board pursuant to its power so to do under the Horse Racing Act, Hooper is an independent contractor, because those rules involved the right of petitioner to discharge Hooper and the latter's right to refuse to ride the race. The court of course takes judicial notice of those rules. Code of Civil Procedure, sec. 1875. It is worthy of note that the declaration of the board in making the rules states that "They

have been compiled with the hope that they will promote *racing* on a high plane and encourage the breeding and ownership of thoroughbred horses in this state." These rules embrace comprehensive regulations designed to safeguard the public and to prevent the evils and corruption which have been too frequently characteristic of horse racing. An analysis of the few of those rules which could possibly have a bearing here reveals that they are not determinative. Rule 158 provides that no jockey shall be weighed out for a race until his fee, in case the race is lost, is deposited or guaranteed and the failure to abide thereby will declare the horse out of the race. That rule could have no effect on the issue here. The labor laws are replete with provisions securing to the laborer assurance that he will receive his pay such as fixed times for pay days, making it a criminal offense to fail to pay laborers, requiring the contractor to pay the prevailing rate of wages in public contracts, and like provisions. Surely, it cannot be said that such provisions make a laborer an independent contractor. Rule 149 states that any change of jockey shall be exhibited by the clerk of the scales upon the notice board. Obviously, that has no significance; indeed, if it has any bearing it may be said it contains the inference that the jockey is wholly subject to the control of the owner of the horse as he may be changed, that is, discharged. Rule 292 reads: "When an owner or trainer shall discharge a jockey, groom or attendant, he shall, upon demand of the employee give a written statement of discharge setting forth the cause thereof. Upon refusal to do so the owner or trainer may be fined or suspended." There is nothing in that rule inconsistent with the master-servant relationship. Rather it recognizes the right of the owner to discharge his jockey. The only requirement is that he give the jockey, if demanded, a written statement of the reason for the discharge. Similar requirements are not unusual in labor contracts between a union and the employer which require an investigation by the union before a man is discharged. The National Labor Relations Act, 29 U. S.C.A. § 151, et seq., has various restrictions on the right of the employer to discharge; for illustration he cannot discriminate in regard to hire an employee for or time of employment by reason of membership in a union.

[9] Rule 279 requires jockeys to register the agent authorized to accept mounts for him and binding him to acceptance of mounts by his agent. He would be bound in any event under ordinary laws of contracts under such circumstances. The rule creates no greater obligation.

[10, 11] Rule 274 provides that the jockey must report to the scale room one hour before the race and must remain there until all his day's racing engagements are fulfilled; no one except jockeys, officials and attendants are permitted in the scale room. It is wholly reasonable to infer that that rule was designed to protect the public and legitimate horse racing from the vice of bribery and "fixed races". There appears no intention to establish or affect the relationship between a jockey and the owner. The essence of petitioner's contention is that by Rule 281, the jockey may not quit or refuse to ride a horse once he has engaged to do so, except upon suffering penalties greater than for ordinary breach of contract. That rule provides as follows: "If a jockey, engaged for a certain race or for a specified time fails or refuses to abide by his agreement, unless excused by the stewards, he shall be fined or suspended; and if a jockey refuses to ride a horse on the order of the stewards he shall be reported to the racing board." This rule, insofar as the owner is concerned, does not *prevent* the jockey from quitting. It is the case of a third party, the State, providing a penalty for breach of an employment contract in addition to the damages that could be recovered by the owner. The essential relationship between the jockey and owner is not altered. The owner still has direction and authoritative control over his employee, and the employee still is subject to an action by the owner for damages for quitting the same as he would have been if there were no such rule. It is elementary that a master may recover from his servant any actual damages suffered by reason of his servant's breach of the contract of employment by unjustifiably refusing to perform the services required. 39 Corpus Juris, 133, 134. We fail to see how the fact that a third person, the state here, through the California Horse Racing Board, may impose penalties in *addition* to the right secured to the master, has any effect or bearing on the question of whether the relationship is that of independent contractor rather than

master and servant. It would not be doubted that in many instances a servant would suffer penalties for refusing to perform his contract of employment, in addition to his liability to his master for damages. An airplane pilot regularly employed to operate a passenger plane would certainly be subject to dire penalties if he should decide to quit, don his parachute, jump and abandon the ship full of passengers in midair. Nevertheless, he is unquestionably not an independent contractor.

[12-14] But on a broader basis than the particular effect of each of the rules above considered we do not believe it was the purpose or intention of the legislature in adopting the Horse Racing Act, or the Horse Racing Board in adopting its rules under that act, to make jockeys independent contractors rather than employees, or by that method or any other method, to exempt the jockeys and owners from the workmen's compensation laws. To say such was the intent of the legislature would be fanciful and unreasonable. It would be tantamount to deciding that the legislature by conferring the power to make rules on the Racing Board thereby authorized the board to amend the workmen's compensation laws, by particularly exempting jockeys from its operation. The Act and the rules are designed to regulate horse racing to the end that races may be conducted in an orderly manner and without the evils so often attendant upon contests in which wagering is permitted. It is the aim and purpose to protect the public against immoral practices and to place horse racing on a high plane. It is not to affect an owner and a jockey insofar as their personal contract relations are concerned with the thought of making the jockey an independent contractor regardless of their personal conduct in their negotiations. This finds support in the declaration of policy made by the Racing Board when it established its rules, where it is said: "They (the rules) have been compiled with the high hope that they will promote racing on a high plane and encourage the breeding and ownership of thoroughbred horses in this state." Even aside from the legislative intent we believe it is clear that statutory or administrative regulations bearing upon the conduct and action of a person furnishing services to another and on the conduct of such other person, do not operate to change the relation between those persons or alter the conclusion that must be drawn from the facts. It is said in the American Law Institute's Restatement of the Law of Agency, Vol. 1, section 220, page 487: "The fact that *the State regulates the conduct of an employee* through the operation of statutes requiring specific acts to be done or not to be done *does not prevent the employer from having such control over the employee as to constitute him a servant.*"

[15, 16] In any event the issue of whether or not a person is an employee or an independent contractor is a judicial question and not a legislative or executive one. Legislative and administrative regulations relating to the affairs of persons furnishing services to the persons to whom furnished cannot control the judicial branch of the government in its determination of that question. It is doubtful that even an outright declaration in the rules that a jockey was an independent contractor would be in any way binding upon the courts. The essence of the issue is whether the employer has the right of authoritative control and direction over the employee, by reason of the agreement between them, and not what regulations some independent authority may for one reason or another impose on the contracting parties.

The award is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.

COTTON v. HUDSON et al.

Civ. 11282.

District Court of Appeal, First District, Division 1, California.

Feb. 13, 1941.

Hearing Denied April 5, 1941.

1. Evidence ⇐183(3)

Where there are circumstances indicating that a document is intentionally withheld, the sufficiency of the proof of its loss is a precise, definite, and certain showing of a thorough and exhaustive search, and the exactness of proof may be relaxed in proportion to the evidentiary weight or value of the document, with due consideration given to the interest in its production of the party offering to prove loss. Code Civ.Proc. §§ 1855, 1937.

2. Appeal and error ⇐970(2)

The sufficiency of the proof of loss of a written instrument is a "question of law" addressed to the sound discretion of the trial court, and unless there is an abuse of that discretion, its determination will not be disturbed on appeal. Code Civ.Proc. §§ 1855, 1937.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

3. Evidence ⇐183(1)

After there has been a sufficient showing of loss of a written instrument, the contents may be proved by secondary evidence addressed to the trier of facts. Code Civ. Proc. §§ 1855, 1937.

4. Evidence ⇐183(1)

Where the surrounding facts demand an inquiry concerning a lost document, the law requires only a diligent investigation of every person who, according to the evidence, would be likely to have the document or to know of its whereabouts. Code Civ.Proc. §§ 1855, 1937.

5. Appeal and error ⇐992

In action on notes, sufficiency of preliminary proof of loss of collateral handwritten agreement making payment of notes conditional on a contingency was for the trial court. Code Civ.Proc. §§ 1855, 1937.

6. Appeal and error ⇐1050(1)

In action on notes, evidence did not show that plaintiff was prejudiced in the admission of evidence of the contents of a lost handwritten collateral agreement making payment of notes conditional on a contingency before proof of diligent search in good faith to locate the agreement. Code Civ. Proc. §§ 1855, 1937.

7. Appeal and error ⇐1041(3)

Plaintiff appealing from a judgment for defendants in action on notes could not urge error in permitting defendants to amend their respective answers without notice and after plaintiff's case had been closed, so as to plead the loss of a collateral agreement making payment of notes conditional, where it was not contended that plaintiff was prejudiced or suffered a disadvantage in the trial as a result of the amendment.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action on two notes by Harriet F. Cotton against James J. Hughes and his wife. From a judgment for defendants, plaintiff appeals. Following the trial of the case, both defendants died, and W. G. Hudson and another, executor and administrator, respectively, of their estates were substituted in their places.

Affirmed.

Fred B. Mellmann, of Oakland, for appellant.

Hudson, Martin & Ferrante and Webster Street, all of Monterey, for respondents.

Geo. K. Ford and Simpson Finnell, Jr., both of San Francisco, for respondent Lee Crawford.

WARD, Justice.

Plaintiff, assignee of the payee of two promissory notes, appeals from a judgment in favor of defendant makers of the notes. The main question presented on appeal is whether the trial court erred in receiving testimony of the contents of a collateral written agreement, which defendants claim was lost. Following the trial of the case, both defendants died and the executor and administrator respectively of their estates have been substituted in their places.

The facts of the case are as follows: L. C. Walters and W. Y. Bewick had been employees of Reid Bros., Inc., and each of them was the owner of a claim against the corporation for wages, the claim of Walters being in the sum of $5,885, and that of Bewick in the sum of $1,832.50. These claims were assigned to James J. Hughes,

who, with his wife, gave each a note for the amount of his claim pursuant and subject to a handwritten agreement already entered into between the claimants and defendant Hughes, by the terms of which payment was to be made only in the event Reid Bros. of America was successful in acquiring title to and possession of all the corporation assets of Reid Bros., Inc., within one year from the date of the agreement. At the time of the assignment of these labor claims, a third employee of Reid Bros., Inc., also assigned his claim to defendant Hughes on the same basis, but he does not appear in this action.

While no allegations of the loss of the collateral agreement above mentioned were made in the pleadings, or until the close of plaintiff's case, defendants were permitted by the court to amend so as to allege the loss of the instrument.

Plaintiff admitted the execution of the agreement, but disputed its terms and claimed the court erred in admitting evidence of its contents where there had been insufficient proof of a diligent and bona fide search therefor; also that the court erred in permitting defendants, over objection, to amend their respective answers so as to allege the loss of the collateral agreement.

Defendants argue that the court did not abuse its discretion in permitting secondary evidence of the contents of the document to be admitted, also that there was sufficient evidence to support the court's finding that the payment of the notes was conditioned upon a contingency that never occurred.

[1, 2] Where it is contended that a writing has been lost, proof of loss must be made before evidence of its contents may be given. Code Civ.Proc. §§ 1937, 1855. When there are circumstances indicating that the document is intentionally withheld, the sufficiency of the proof of its loss is a precise, definite and certain showing of a thorough and exhaustive search. The exactness of proof may be relaxed in proportion to the evidentiary weight or value of the instrument, with due consideration given to the interest in its production of the party offering to prove loss. The sufficiency of the proof is a question of law addressed to the sound discretion of the trial court, and unless there is an abuse of such discretion its determination will not be disturbed on appeal.

[3] After sufficient showing of loss, the contents may be proved by secondary evidence addressed to the trier of the facts. Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; White v. White, 39 Cal.App.2d 57, 102 P. 2d 432; Wolf v. Donahue, 206 Cal. 213, 273 P. 547.

In the present case the agreement was in the handwriting of the receiver for Reid Bros., Inc. It was signed by the wage claimants and defendant Hughes. On the day following its execution, during a luncheon at which were present the receiver, Mr. Hughes, Mr. Hughes' then attorney and a Mr. Peters, the receiver, according to his testimony and that of Mr. Hughes, handed the agreement to Mr. Hughes' attorney who read it and placed it in his pocket. Mr. Peters testified that he accompanied the attorney to his (the attorney's) office and saw him place the document on his desk, saying he would make copies thereof. The attorney remembered reading the agreement, but did not recall taking it with him after the luncheon. He testified that at the request of the receiver and of Mr. Hughes he had made a diligent search of his papers and files but was unsuccessful in locating the instrument. Later he permitted Mr. Hughes to make a search of his files, which at that time had been removed to the attorney's home.

Appellant lists ten persons as possible sources of information in connection with the lost document, only four of whom were questioned. Of the remaining six, only one, another attorney, had any representative business connection with Hughes. This attorney had drawn certain documents in connection with the organization of Reid Bros., Inc., some years prior to the time of the preparation of the lost agreement. There is no evidence from which an inference may be drawn that anyone was given possession of the agreement except the attorney representing Mr. Hughes at that time. A diligent search was made of his office and his home, the most likely places where it might be found. The evidence does not indicate that any of the ten persons enumerated by appellant, other than those of whom inquiry was made, was reasonably likely to have possession of the agreement or any knowledge of its whereabouts. Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 P. 27.

[4, 5] There is no suspicion of wrongdoing in connection with the loss of the

instrument in question. When the surrounding facts demand such inquiry, the law requires only a diligent investigation of every person who, according to the evidence, would be likely to have the document, or to know of its whereabouts. As stated, the question of the sufficiency of the preliminary proof of loss was one for the trial court on the evidence introduced, and the suggested grounds for disturbing its finding thereon are not sufficient as a matter of law. In Wolf v. Donahue, supra, 206 Cal. at pages 219, 220, 273 P. at page 550, the court said: "* * * this court will not review its ruling unless the proof is manifestly insufficient to warrant the secondary evidence or unless the evidence offered to establish the loss is inherently improbable or incredible."

[6] Witnesses for the defendants in substance agree that the lost instrument provided the notes should not be payable or collectible unless within one year all assets of Reid Bros., Inc., were acquired by Reid Bros. of America. There was a conflict on other matters, namely, whether a certain witness was present when the agreement was signed, whether the agreement was handed to the attorney before or during the luncheon and whether in fact it provided for a reassignment of the wage claims in the event the plan for reorganization failed. The recollections of the witnesses are not entirely in accord with letters written by Mr. Hughes to the payees of the notes two days after the signing of the agreement, which letters were accompanied by the promissory notes. Each letter refers to the agreement and states that the note is to be paid off "at the rate and in proportion of three and four-tenths (3 4/10ths %) per cent per month of the total of said note as the same shall appear to be due from month to month". According to Hughes' testimony, the monthly payments were not to commence until the reorganization of the company was consummated; if not consummated within the year there was to be no liability on the notes. There is testimony that Hughes "wanted" to reassign to the wage claimants. Whatever the understanding may have been relative to the time for the payment of the notes, the trial court did not have the advantage of the testimony of either of the payees, assignors of plaintiff, who were not called as witnesses.

The question before this court is whether the evidence is sufficient as a matter of law to support the finding of an express provision for conditional liability. The letters of transmittal were not complete statements of the contents of the agreement. Their evidentiary value primarily was not to prove the contents of the lost instrument, but rather to impeach the testimony of Hughes. In Nicholson v. Tarpey, 124 Cal. 442, 447, 57 P. 457, 459, the court said: "The same rule which declares incompetent the statements of one of the contracting parties made before or contemporaneously with the execution of the written agreement equally declares incompetent his declarations made after such execution. The reason in both cases is the same. In neither are the declarations evidence of the contents of the paper, the only thing which, the paper lost or at hand, the law allows to be proven."

Some of the witnesses testified to the search and also to the contents of the agreement. It does not appear from the record that plaintiff was prejudiced in the admission of evidence of the contents of the lost instrument prior to proof of diligent search in good faith to locate it.

[7] Appellant contends that the trial court erred in permitting defendants to amend their respective answers, without notice and after plaintiff's case had been closed, so as to plead the loss of the collateral agreement. Appellant admits that such an amendment is addressed to the sound discretion of the court. It is not claimed that plaintiff was prejudiced or suffered a disadvantage in the trial as a result of the amendment.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

43 Cal.App.2d 90

ALLEN et al. v. STATE BOARD OF EQUALIZATION et al.

Civ. 12800.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1941.

1. Constitutional law ⇐1

The primary purpose of a constitution is to place limitations upon the legislative authority as well as upon the powers of its co-ordinate branches of government.

2. Constitutional law ⇐38

Where constitution contains a provision prescribing a course to be pursued by a department, board, commission, or an official, all statutes must be consonant therewith and any resolution, order or decree contrary to such provision by whatsoever body ordained is void.

3. Officers ⇐11

A state civil service employee, who had performed duties of one of a higher class than class in which his position was rated, could not require personnel board to classify him in such higher position for the period during which he served in such position and recover a judgment to compel the controller to pay the differential between the salary of the lower class and that of the higher class, in view of constitutional provision that permanent appointment and promotion in civil service should be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination. St.1937, pp. 2086, 2093, §§ 5, 60, 61; Const. art. 24, § 1.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Elisha S. Allen and others against the State Board of Equalization of the State of California and others, for a writ of mandate requiring respondents to reclassify and reinstate petitioners to the position of investigators, State Board of Equalization, for periods during which they were collectors; to correct the books and records of the California State Personnel Board to conform to the duties, services and work performed by the petitioners during such periods and to direct respondents to pay to each of petitioners the respective amounts alleged to have been earned by them while performing the duties of investigator when they held positions of collectors. From a judgment denying writ, after order sustaining demurrer without leave to amend, petitioners appeal.

Affirmed.

Leo B. Wayland, Frank L. Stearns, and Aaron Ziony, all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

MOORE, Presiding Justice.

Appeal from judgment after order sustaining demurrer without leave to amend. Petitioners had been certified as eligible for, and had been appointed to positions of "collector", State Board of Equalization. While holding those positions at salaries of $120 per month, they were assigned to, and for different periods performed the duties of the position of "investigator" which is classified as a higher position, requires a different examination and pays a salary of $150 monthly. Subsequently they all qualified for and were certified as eligible for the position of investigator or took other positions in the classified service.

By a writ of mandate, petitioners sought to require respondents to reclassify and reinstate them to the positions of investigator, State Board of Equalization, for the periods during which they were collectors; to correct the books and records of the California state personnel board to conform to the duties, services and work performed by the petitioners during the respective periods in which they performed the duties of investigator while classified as, and drawing the salary of the position of collector; and to direct respondents to pay to each of the petitioners the respective amounts alleged to have been earned by them while performing the duties of investigator when they held positions of collector.

The question for our determination is whether a civil service employee, who has performed the duties of one of a higher class than the class in which his position is rated, may require the personnel board to classify him in such higher position for the period during which he served in that position and may recover a judgment to compel the controller to pay the differential between the salary of the lower class and that of the higher class of civil service.

In substance the petition alleges that each of the sixteen petitioners was at various times from July 2, 1935, to August 26, 1937,

appointed to the position of collector of said board of equalization at a salary of $120 per month during said period; that each petitioner, except Davis and Garrett, passed a "promotional examination for investigator" on or about May 19, 1937; that each was thereafter placed upon the eligible list for the positions of investigator; that thereafter between December 1, 1937, and March 1, 1938, they were appointed to the positions of investigator at a salary of $150 per month; that Davis accepted civil service employment with another department of the state August 7, 1937; that petitioner Garrett did not qualify by a promotional examination for the position of investigator and is now connected with another department of the state service; that all petitioners, except Davis and Garrett, demand payment of the difference between the salaries of investigator and collector, from the dates of their original appointments as collectors to the dates of their promotional appointments as investigators; that at all times they performed the duties of investigator while holding the office of collector "with the consent, authorization and requirement of respondents"; that David and Garrett demand the differential between the salary of an investigator and that of a collector during the period they respectively served as investigators while classified as collectors.

Petitioners contend that in enacting sections 5, 60 and 61 of the Civil Service Act, Stats.1937, p. 2085, the legislature intended that employees were to be paid for the duties performed under a certain classification and not according to classification without regard to the duties performed and that, therefore, it is mandatory upon respondents to make payment of salaries according to duties performed. They base this contention upon the language of those three sections. Section 5 requires that the commission grade all positions within each class with respect to salaries to the end that like salaries shall be paid for like duties. Section 60 provides that the board shall adjust classes of positions in the state civil service; while section 61 provides that "the allocation of a position to a class shall derive from and be determined by the ascertainment of the duties and responsibilities of the position and * * * that substantially the same requirements as to education, experience, knowledge and ability are demanded of incumbents, that substantially the same tests of fitness may be used in choosing qualified appointees, and that the same schedule of compensation can be made to apply with equity, shall be included in the same class."

[1-3] They, therefore, urge that notwithstanding the requirements of the Civil Service Act that civil service examinations must be taken in order to be reclassified, yet, by the conduct of the appointing power, an employee may obtain a status different from and a position higher than that in which he was classed at the time of his original employment by virtue of the actual performance of the duties of the advanced status. Having performed the duties of investigator over a period of almost three years, petitioners insist that they acquired the status of that position without regard to the constitutional requirement of examination, certification and appointment to the advanced position. But their contention pales in the light of section 1, Art. XXIV, of the Constitution which provides that "permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination". The acts of the head of a department of the state do not have the sanctity of even a legislative enactment. Far short do they fall of the force of a provision of the organic law. Of this effective constitutional provision, petitioners, as well as the members of the respective boards, had knowledge and by it they are all bound. The primary purpose of a Constitution is to place limitations upon the legislative authority as well as upon the powers of its co-ordinate branches of government. When, instead of forbidding an act, it contains a provision prescribing a course to be pursued by a department, board, commission, or an official, all statutes must be consonant therewith and any resolution, order or decree contrary to such provision by whatsoever body ordained is void. In view of the quoted language of Article XXIV, no official or board could by order made, or by services performed, promote an employee in the classified service to a position in a higher class.

A situation similar to that of petitioners was presented to the court in the case of Pinion v. State Personnel Board, 29 Cal. App.2d 314, 84 P.2d 185, 187, wherein the petitioners sought by mandate proceedings to compel the personnel board to recognize petitioners as holders of certain positions and to allow them to continue to perform

the duties of such positions and to assume the official title thereof. The court there held that sections 60, 61, 62 and 63 of the Civil Service Act were not enacted "for the purpose of giving Civil Service employees status in positions higher than those for which they were examined." If the appointing power could, by assigning duties of a higher nature to an employee, and the state personnel board could, by classifying those duties to a higher class than that of the employee's original position, give to an employee a permanent civil service status, the entire fabric of the civil service system would fail. Promotion and appointments in civil service would then no longer be made "exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination".

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



43 Cal.App.2d 65

ALLEN v. CITY OF LOS ANGELES.

Civ. 12619.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1941.

1. Municipal corporations ⇐821(5, 6)

In actions under Public Liability Act against municipalities for injuries allegedly sustained as result of defective sidewalks or streets, question whether defect in sidewalk or street is of such a nature as to render city liable is for jury. St.1923, p. 675.

2. Municipal corporations ⇐755(1)

The Public Liability Act making a city liable for injuries resulting from defective condition of streets or sidewalks must be strictly construed against the claim. St.1923, p. 675.

3. Municipal corporations ⇐791(1)

Where a defective condition in a sidewalk is of a trivial nature, court will hold as matter of law that its existence is insufficient in and of itself to charge the city with constructive notice thereof, so as to create liability under Public Liability Act. St.1923, p. 675.

4. Pleading ⇐214(3)

In action against city for injuries to pedestrian who fell on sidewalk, allegation that city had actual notice of defective condition must be accepted as true on demurrer. St.1923, p. 675.

5. Municipal corporations ⇐821(6)

In action under Public Liability Act against city for injuries to pedestrian who fell upon defective sidewalk at night wherein complaint alleged that there was elevation in sidewalk two inches high, six inches in width and as long as width of sidewalk of which condition pedestrian had no knowledge, issue of city's liability was for jury. St.1923, p. 675.

6. Municipal corporations ⇐816(3)

A complaint in action against city for injuries to pedestrian who fell on sidewalk was not demurrable on ground that there was no allegation that there was anything unusual about method of construction of temporary portion of sidewalk where complaint merely alleged that temporary portion was constructed in such manner as to constitute a dangerous and defective condition of which city had knowledge. St.1923, p. 675.

7. Municipal corporations ⇐821(6)

In action under Public Liability Act against city for injuries to pedestrian who fell on sidewalk at night, whether temporary structure used as a sidewalk was constructed in customary or usual manner was for jury. St.1923, p. 675.

8. Appeal and error ⇐863

On appeal from judgment entered after sustaining a demurrer to complaint in action against city for injuries to pedestrian who fell on sidewalk, appellate court had to consider nothing except legal doctrine with reference to insufficiency of defective condition of sidewalk to create an actionable cause. St.1923, p. 675.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Laura Allen against the City of Los Angeles for injuries sustained when plaintiff fell on a sidewalk. From a judgment after an order sustaining a general

demurrer without leave to amend, plaintiff appeals.

Reversed with instructions.

Dempster & Dempster and Jerrell Babb, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Victor P. Spero and Louis A. Babior, Deputy City Attys., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

From a judgment after order sustaining a general demurrer to the complaint without leave to amend, plaintiff appeals.

The complaint alleges that prior to December, 1938, the city commenced the construction of a storm drain within an alley, which intersects Indiana street, 150 feet west of Lincoln avenue, both public highways in the city of Los Angeles; that such construction required an excavation across the sidewalk, along the side of Indiana street; that a board bridge was built across the excavated portion of the sidewalk; that "in the construction and building of said board bridge the defendants caused same to be built by the laying of boards across said excavation the top of which boards were of even height with the top of said sidewalk and that said boards were so laid and nailed in place by the defendant without due or any regard for the protection of people using said sidewalk and said bridge and carelessly and negligently caused to be placed across said sidewalk and bridge at each end where said bridge met said sidewalk a timber which was approximately 2 inches thick and 6 inches wide and which timber of said dimensions at each end of said bridge where it met said sidewalk were securely nailed and fastened, said two timbers each extending clear across said sidewalk and caused an obstruction to be in said sidewalk which was raised 2 inches above the level of said sidewalk and above the level of said bridge; * * * that said obstruction above described was not guarded or protected by any warning signs, barriers, lights or signals of any kind or nature whatsoever"; that upon such bridge was a dangerous and defective condition for all pedestrians; it was not guarded or protected by any signs, lights or barriers; that defendant had notice and knowledge of the existence of the dangerous condition but failed to remedy the same within a reasonable time; that on December 24, 1938, at 9 o'clock p. m., while passing along the sidewalk and without any knowledge that the obstruction was upon the bridge, and no barrier or light being at the point, plaintiff caught her foot on the obstruction and was thrown violently upon the paved sidewalk and sustained injuries, which were described.

[1] The city's liability for plaintiff's injuries is predicated upon the provisions of the Public Liability Act of 1923, Stats.1923, page 675; Deering's General Laws, 1931, Act 5619. That act makes a city liable for injuries to persons "resulting from the dangerous or defective condition of public streets [and] highways" etc., where the governing board of the city, after notice or knowledge of such condition, fails for a reasonable time to remedy such condition. From an examination of the numerous decisions which have considered the question of liability, under the provisions of the above act, it is evident, as we have heretofore held, "that as a general rule it is a question for the jury to determine whether a defect in the sidewalk or street is of such a nature as to render the city liable". Ackers v. City of Los Angeles, Cal.App., 104 P.2d 399, 400, If this general rule is to be applied to the facts alleged in plaintiff's complaint, we must of necessity hold that the demurrer thereto was improperly sustained.

Notwithstanding the universal acceptance of the doctrine announced by the rule as declared, respondent urges that an exception thereto should prevail as against the complaint at bar. The exception referred to is that where the defect from which the accident resulted is of a minor or trivial nature, the court may then determine as a matter of law that the city is relieved from liability. Citing Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990; Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725; Taylor v. Manson, 9 Cal.App. 382, 99 P. 410. But the cited cases do not support defendant's position. Each of those cases involves an appeal by the defendant from a judgment following a trial on the merits. In the Whiting case, the court found that one square of the cement walk was gradually raised three-fourths of an inch above the adjacent square; that this "unsafe and defective condition" which existed for six years during which four people had stumbled and fallen over the joint and suffered injuries; that the defendant city had constructive notice of the existence of such defect. No attempt was made to prove that

the city had actual knowledge of the defective condition.

[2-4] On appeal by the defendant, the judgment was reversed because the existence of the defect was common knowledge in the community and plaintiff was familiar with it. She tripped over it in daylight while walking toward the exposed side of the risen square of cement. Although the city had constructive knowledge of the defective condition of the sidewalk, yet it had no notice of its dangerous character, which was essential to recovery in such cases. Nicholson v. City of Los Angeles, supra. The statute of 1923 creating liability in such cases must be strictly construed against the claim. Cook v. Superior Court, 12 Cal.App.2d 608, 55 P.2d 1227. In the Nicholson case, the defective condition complained of was very much like that in the Whiting case. It had existed for a long time and its character was so trivial as to be insufficient to charge the city with constructive notice of its existence. In the Taylor case the court expressly refrained from deciding whether the defect was too slight to be nonactionable as a matter of law. Judgment was reversed because of error in the instructions. Thus it will appear that the authorities relied upon by respondent merely support the principle that where a defective condition in a sidewalk is of a trivial nature, the court will hold as a matter of law that its existence is insufficient in and of itself to charge the city with constructive notice thereof. But in the instant case, the complaint alleges that the defendant had actual notice of the defective condition. Upon demurrer, such allegation must be accepted as true.

[5] We have considered the authorities cited by respondent (Kawiecka v. City of Superior, 136 Wis. 613, 118 N.W. 192, 21 L.R.A.,N.S., 1020; Kleiner v. City of Madison, 104 Wis. 339, 80 N.W. 453) upholding the doctrine that the court may declare as a matter of law that a trivial defect in a sidewalk is nonactionable. Both cases were tried on the merits. The Kawiecka case involved a defective sidewalk constructed with planks 2 inches in thickness nailed to the upper side of the walk on a bridge one-half mile in length, leaving the lower part of the walk unchanged. The Wisconsin court [136 Wis. 613, 118 N.W. 193, 21 L. R.A.,N.S., 1020], emphasized that want of repair in a highway "is always one for a jury, unless conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy" and concluded that "it is not always easy to determine just where the province of the court in passing upon such a question ends and that of the jury begins". The Kleiner case arose out of the fact that a residential owner of Madison laid an apron less than 2 inches in thickness consisting of pine planks fastened with cleats, as a protection to the public against slipping on the frozen pavement. It was held that the apron was a proper covering of the walk for the purpose for which it was laid. But in view of our own decision, these cases at their best are without efficacy. The facts in the case at bar are not to be distinguished from those presented in the case of Ackers v. City of Los Angeles, supra, wherein we held that whether a defect in a sidewalk is of such a nature as to render the city liable is a question of fact. The Ackers case involved a depression in a sidewalk 2 inches deep, 12 inches long and 3 inches wide. In the case before us, the condition complained of consisted of an elevation in the sidewalk 2 inches high, 6 inches in width and as long as the width of the sidewalk. Also, it was a newly-created condition and plaintiff had no knowledge of it. There is no appreciable distinction between this elevation on a sidewalk and the 2-inch depression in a pavement. Certainly it cannot be said as a matter of law that the alleged condition is so trivial as to be nonactionable.

[6, 7] The final contention advanced by respondent is that the temporary portion of the sidewalk was constructed in the manner customarily followed in such construction work and that there is no allegation that there was anything unusual about such a method of construction. The cases cited in support of this contention are not in point. James v. City of San Francisco, 6 Cal. 528, 529, 65 Am.Dec. 526; Hammer v. Philadelphia, 104 Pa.Super. 119, 158 A. 659; Boughn v. Los Angeles City School District, 7 Cal.App.2d 347, 46 P.2d 223. It is sufficient to say that there is nothing in the record to support such contention. The allegation is merely that the temporary portion of the sidewalk was constructed in such a manner as to constitute a dangerous and defective condition, of which defendant had knowledge. Whether or not the temporary structure used as the sidewalk was constructed in the customary or usual manner is a question of fact to be proved at the trial of the case.

[8] Inasmuch as this appeal is from a judgment entered after sustaining a demurrer to the complaint, we have had to consider nothing except the legal doctrine heretofore discussed with reference to the insufficiency of the defective condition to create an actionable cause.

In view of the foregoing, the judgment is reversed with instructions to overrule the demurrer.

We concur: WOOD, J.; McCOMB, J.



42 Cal.App.2d 807

TEEL v. BANK OF EUREKA et al.

Civ. 6462.

District Court of Appeal, Third District, California.

Feb. 11, 1941.

1. Deeds ⇐210, 212

In grantor's suit to quiet title to realty and recover possession of deed which she had executed in favor of her son and deposited in escrow with bank, evidence sustained findings that deed was executed in consideration of grantee's promise to maintain grantor during remainder of her life and that grantee, since deceased, during his lifetime, failed to perform such conditions.

2. Covenants ⇐36

Covenants, in consideration of conveyance of realty, to support and maintain the grantor, are personal in character and not assignable and die with the grantee.

3. Deeds ⇐19

If grantees, in conveyances conditioned for maintenance or support of grantor, so neglect or refuse to fulfill the condition that there is a breach thereof, equity has jurisdiction to rescind the contract, cancel or set aside the deed, compel a reconveyance, or otherwise restore the consideration to the grantor.

4. Deeds ⇐19

Where mother executed deed to realty in favor of son in consideration of son's oral promise to maintain mother during remainder of her life and deposited deed in escrow with written instructions that it be delivered to son at mother's death, mother was entitled to have deed canceled and returned to her upon son's failure to perform condition as to maintenance, regardless of whether deposit in escrow constituted a delivery, particularly after son's death, since such covenant of support was personal in character.

5. Evidence ⇐444(4)

In suit to cancel and recover possession of deed to realty executed in favor of grantor's son and deposited in escrow with written instructions that it should be delivered to son at grantor's death and should not be withdrawn by grantor, evidence that conveyance was made in consideration of son's promise to maintain grantor during remainder of her lifetime was not inadmissible as tending to vary and modify the terms of the written instruction, but was evidence as to a separate agreement that if son failed to perform he would have no title in the property. Civ.Code, § 1056.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Suit by Sarah Elma Teel against the Bank of Eureka and others, to quiet title to realty and to recover possession of a deed. From a judgment for plaintiff, defendants appeal.

Affirmed.

Kenneth D. Sevier, of Eureka, for appellants.

E. S. Mitchell, of Eureka, for respondent.

TUTTLE, Justice.

Respondent, an elderly lady (85 years of age), on or about February 6, 1936, executed a deed to certain real property to her son, Otto Teel. The deed was delivered to appellant, "The Bank of Eureka", placed in an envelope with another deed to another son with the following instructions typed upon the envelope containing both deeds: "To be delivered upon my death and in no event to be withdrawn by me." Said instructions were subscribed by respondent in her own handwriting, the only consideration for the deed involved being an oral promise by the grantee to maintain and support his mother during her life.

Said Otto Teel died June 20, 1937, and appellant W. L. Wallace, was appointed administrator of his estate on August 6, 1937.

Respondent commenced this action to quiet title to the real property described in said deed, and to recover possession of said deed from appellant bank. Findings were entered in favor of respondent upon all issues, and judgment was entered accordingly. The appeal is from said judgment.

The evidence is without conflict, and the substance of it is given above.

It is the contention of appellants that the evidence is not sufficient to sustain the findings. They state that the only conclusion to be drawn therefrom is, when the deed was delivered to the bank, respondent thereupon divested herself of any and all right, title and interest in the real property. Respondent contends that the deed was executed and the instructions signed on condition that the grantee would maintain and support respondent during her lifetime; that the grantee failed to fulfill the condition in any particular, and that there is sufficient evidence to support the findings which are in accord with her contention. The pertinent portions of the findings read as follows:

"4. That on or about the month of March, 1935, plaintiff executed a certain deed to said real property in favor of one Otto Teel, now deceased, which said deed and instrument of conveyance was delivered to the bank of Eureka, a corporation, specified in Finding One, with instructions to deliver the same to said Otto Teel on plaintiff's death.

"5. That the condition upon which it was agreed that said deed should be executed and placed in escrow with instructions to deliver upon the death of said plaintiff was that the said Otto Teel would support and maintain plaintiff during her natural life, and the said Otto Teel did agree that if she would execute and place said deed in escrow and maintain plaintiff during the remainder of her natural life and would fulfill said condition in its entirety, *and did agree that if he did maintain plaintiff during the remainder of her natural life, then said deed should be delivered to him, and if he failed so to do, he would have no right, title or interest in or to said property, and that said deed should be returned to plaintiff.*

"6. That said Otto Teel, during his lifetime and after the execution of said deed and the delivery thereof to said Bank of Eureka with the instructions as aforesaid, on such condition that he would maintain and support plaintiff during her natural lifetime, wholly failed and refused to fulfill or perform such conditions and or to maintain or support said plaintiff in accordance with his agreement so to do."

[1] The evidence is sufficient to sustain the findings. Plaintiff gave the following version of the transaction:

"Q. Now, what did your son say he would do if you would make out the deed to this property? A. He said he would absolutely support me in every particular and pay all my expenses, and when I came to leave this world he would put me away beautifully. * * *

"Q. Now, did you know when you went down there that you couldn't get this deed back, or did you think you could get it back any time you wanted? A. Well, I absolutely would because if he died first the deed certainly ought to revert back to me.

"Q. And that's what you thought when you took it down there? A. Yes, that's what I intended when it was taken out. When it was made it was to go back to me because he died before I did."

[2, 3] We believe that the judgment should be upheld. It is the rule, followed in most jurisdictions, that covenants to support and maintain the grantor are not assignable and die with the grantee. The cases proceed upon the premise that such covenants of the grantee are personal in character; are not subject to performance by any other person, and that cancellation of the deed may be had at the instance of the grantor. In 18 C.J., page 380, paragraph 439, it is said: "If the grantees, in conveyances conditioned for maintenance or support, so neglect or refuse to fulfill the condition that there is a breach thereof, equity has jurisdiction to rescind the contract, cancel or set aside the deed, compel a reconveyance, or otherwise restore the consideration to the grantor."

In Bishop v. Aldrich, 48 Wis. 619, 4 N.W. 775, 777, it is said: "The covenants of Mrs. Carlton to support and maintain the plaintiffs were not assignable, and died with her. Her death, a few months after the conveyance, put an end to the obligation to maintain the plaintiffs; and, if the conveyance stands, her heirs would take the land conveyed to her, subject to the life lease, with-

out any obligation on their part to perform her covenants. This would be most inequitable. The use of the property may or may not be sufficient to maintain the plaintiffs; but whether it is or not, the principle is the same. The consideration for the conveyance has failed, and, under the circumstances peculiar to cases of this class, the conveyance ought to fail with it."

In the case of Payette v. Ferrier, 20 Wash. 479, 55 P. 629, an action was brought to cancel a deed where there was a similar agreement, and the grantee failed to perform. The court stated the rule to be as follows: "The jurisdiction of a court of equity to cancel a conveyance made by a parent to a child, when the child fails to furnish the support provided by the agreement constituting the consideration for the conveyance, is well established. Bogie v. Bogie, 41 Wis. 209; Thomas v. Thomas, 24 Or. 251, 33 P. 565; Patterson v. Patterson [81 Iowa 626], 47 N.W. 768; Bresnahan v. Bresnahan, 46 Wis. 385, 1 N.W. 39; Jenkins v. Jenkins, 3 T.B.Mon. [Ky.] 327; Scott's Heirs v. Scott [3 B.Mon.] 2; Leach v. Leach [4 Ind. 628], 4 Port. 628 [58 Am.Dec. 642]; Bishop v. Aldrich, 48 Wis. 619, 4 N.W. 775; Reid v. Burns, 13 Ohio St. 49. * * * We think there is also another reason why the plaintiff is entitled to be revested with title. The covenants of the grantees to support and maintain the plaintiff were personal, and died with them. The happening of that event put an end to the obligation. Bishop v. Aldrich, supra."

In Thomas v. Thomas, supra [24 Or. 251, 33 P. 566] it is said, speaking of an agreement of like import: "The consideration for the conveyance, was a personal obligation, to be performed by him [the son] alone, and could not be assigned, without the consent of the father, so as to substitute some other person in his place. * * The sale of the land by the son puts it out of his power to comply with the condition upon which he was to receive the title, and utterly defeats the object sought by plaintiff in making the conveyance, and therefore works a forfeiture of the estate. Any other rule would destroy the very purpose of the grant, and render the grantor dependent for his support and maintenance upon the pleasure and convenience of successive assignees, whether agreeable to him or not. Nothing can be more effectual, in securing the faithful performance of a contract of this kind, than the right of the parent to revest the entire estate in himself upon a breach by the son, in putting himself in a position where he is unable to comply with his contract. The rule which holds the child to a strict performance of his part of the contract, and gives the parent the right to recall the gift if he fails, is founded upon obvious principles of justice and right, and is the only rule, it seems to us, which will preserve the rights of a parent who enters into a contract of the character now under consideration."

[4] We are of the opinion that the foregoing authorities fully sustain the position of respondent, and that she is entitled to have the deed annulled and returned to her.

Most of the discussion in the briefs of both parties is directed toward the question of the *delivery* of the deed, plaintiff insisting that there was no valid delivery, and defendants maintaining that the delivery was effective for all purposes. It appears that the trial court found that the deed was delivered, but it also found that a contemporaneous oral agreement was made between the mother and son, wherein the son agreed, in consideration of the grant, to maintain and support his mother during her lifetime, and that the son had died before performing any part of his obligation. The agreement and subsequent death of the grantee, brings the case squarely within the rule stated above. It is therefore unnecessary for us to discuss the validity of the delivery. If it was invalid, plaintiff must prevail. If it was valid, plaintiff may invoke the rule laid down in the authorities cited.

[5] It is contended by appellants that the trial court erred in permitting plaintiff to testify concerning the oral agreement mentioned, upon the ground that such agreement varies and modifies the terms of the written instructions. Civ.Code, sec. 1056. We do not believe that the facts bring the case within the purview of that rule. It was not an attempt to modify the instructions. It was a separate contract which provided, impliedly, if not expressly, that if the grantee should die prior to full or partial performance, the property should revert to the grantor. In fact, the trial court finds that the grantee agreed that if he failed to perform, he would have no title to the property. (See italicized portion of the findings above.)

We believe that the judgment of the trial court was not only legally correct, but that it was also in conformity with sound equity practice.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



43 Cal.App.2d 6

In re WEBSTER'S ESTATE.

CRANE et al. v. YOUNG WOMEN'S CHRISTIAN ASS'N OF SAN DIEGO et al.

Civ. 2907.

District Court of Appeal, Fourth District, California.

Feb. 13, 1941.

Rehearing Denied March 12, 1941.

See 111 P.2d 355.

1. Wills ⇐166(1)

In will contests, evidence sustained jury's finding that portion of will bequeathing residuary estate was the result of undue influence exerted on aged testatrix by residuary devisees and legatees. Civ.Code, § 2235.

2. Appeal and error ⇐151(2)

A party, who has no interest in property in dispute in will contest, cannot be "aggrieved" by any disposition the court may make of the property, even where the court gives it to the wrong party, and an appeal by the one having no interest in the property will be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved".

3. Wills ⇐161

Generally, if the whole will is the result of the presence of undue influence, probate of the whole will must be refused.

4. Wills ⇐161

If only a part of a will is affected by undue influence, that part may be rejected as void, but the remainder, which is the outcome of the free action of the testator, ought to be sustained, if it is not inconsistent with and can be separated from the part which is invalid, and should be admitted to probate. Probate Code, §§ 22, 72.

5. Wills ⇐161

The fact that jury in will contests found that residuary clause of one of the wills was obtained by undue influence exercised by the residuary legatees and devisees would not authorize the court in declaring as a matter of law that the revocation clause in such will and the clause appointing one of the devisees as executor were obtained by undue influence. Code Civ.Proc. § 624; Probate Code, §§ 371, 373.

6. Wills ⇐181

A revocation clause in a will is as much a part of the will as any other portion thereof.

7. Wills ⇐181

Trial court was without authority to change revoking clause of will to court's liking because of court's belief that revoking clause was put in codicil by testatrix without a great deal of thought.

8. Wills ⇐386

When the District Court of Appeal considers the findings of a jury on issues submitted to them in a will contest, the findings stand the same as the findings of fact made by a court in a civil action.

9. Wills ⇐324(3)

In will contests, evidence required submission to jury of issue whether revocatory clause of one of the wills and clause appointing executor were made under undue influence, notwithstanding that other portions of the will were found to have been made under undue influence. Probate Code, §§ 371, 373.

10. Wills ⇐358

Order denying motion for judgment notwithstanding the verdict in will contests was not an "appealable order", under the Probate Code, and attempted appeal therefrom would be dismissed. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Ella M. Webster, deceased. James L. Crane offered for probate a will dated March 28, 1934, and a codicil dated January 2, 1935. Evan H. Curtiss presented for

probate a will dated February 29, 1932, and simultaneously the Young Women's Christian Association of San Diego filed opposition to the probate of the will dated March 28, 1934, and the codicil dated January 2, 1935. James L. Crane and others filed their opposition to the probate of the will of February 29, 1932. The contests of the respective wills were tried jointly before a jury. From a judgment in favor of the Young Women's Christian Association and others, and from an order denying judgment notwithstanding the verdict, James L. Crane and another appeal.

Judgment affirmed in part and reversed in part, with directions, and attempted appeal from order reversed.

Arthur F. H. Wright, of San Diego, for appellants.

Gray, Cary, Ames & Driscoll and John M. Cranston, all of San Diego, for respondents.

GRIFFIN, Justice.

Appellants James L. Crane and Annette M. Crane, husband and wife, became acquainted with Ella M. Webster, deceased, a short time before or during the year 1933. At that time Ella M. Webster was a widow, crippled, and approximately 81 years of age. The meeting of the parties was occasioned by the rental of a flat owned by the deceased to the appellants herein, which flat was situated across a vacant lot from the home in which Ella M. Webster was then living. Friendship developed between the parties and appellant Annette M. Crane spent considerable time visiting and nursing Ella M. Webster because of her ill health and age.

In November, 1933, Mr. Crane determined that Mrs. Webster was "incompetent and required a guardian for her person and estate". In January, 1934, he filed his verified petition for appointment of himself as her guardian, through his attorney, A, reciting that "she is not now capable of taking care of herself or her property or effects, but that by reason of old age and the infirmities of such age is unable unassisted to properly manage or care for herself or her property and by reason thereof is likely to be deceived or imposed on by artful and imposing persons". He secured from her and attached to the petition a written statement signed by her which recites: "* * * by reason of my advanced years and weak physical condition, I am unable to properly care for my person and estate and request and petition the court that James L. Crane, an intimate friend and neighbor of mine, * * * be appointed as the guardian of my person and estate".

In February, 1934, Crane was appointed her legal guardian and took over the management of her property consisting of real and personal property of the approximate value of $45,000. On February 29, 1932, Ella M. Webster made her will devising certain real property and one-half of her bonds and securities to the Young Women's Christian Association of San Diego, and certain other real property, and one-half of her bonds and securities to the San Diego Children's Home, with the proviso that if either of the bequests should fail by virtue of the provisions of section 41 of the Probate Code the same should go to Mrs. H. P. Davison and Miss Mary Belle Williams in equal shares. R. F. Ruth, Jr. and Evan H. Curtiss were nominated as joint executors.

This will was prepared by Mrs. Webster's own attorney, B. The record discloses that Ruth, a bond salesman who had advised with Mrs. Webster as to investments, and who was one of the executors nominated in the will, about October, 1933, procured another attorney, C, to draw a will for Mrs. Webster, in which he was named executor and was the beneficiary. Mr. Crane had knowledge of this fact. The record indicates that Ruth subsequently misappropriated some of Mrs. Webster's bonds or stock and an action was threatened against his company. A compromise was effected. Just prior to Mr. Crane's appointment as guardian, Mrs. Crane consulted attorney B in reference to making a new will for Mrs. Webster, claiming that she felt "terribly tormented about this will that he had drawn...and it wasn't the way she wanted it, and of course that was affecting her physical condition". Immediately thereafter attorney B was present at the Webster home with a Dr. Carter, her regular physician, at which time a proposed will was read. The doctor was asked if he would attest the will. After propounding a few questions as to whether she knew what disposition was being made of her property he refused to sign as a witness because she was not "sufficiently clear on the subject". Nothing further was done at that time.

From February 8, 1934, to January 18, 1939, Mrs. Crane was employed by Mr.

Crane as nurse for Mrs. Webster at $15 per week, and subsequently he increased her salary. Mr. Crane also received compensation for acting as guardian during the same period. Shortly after Mr. Crane's appointment as guardian he again consulted attorney A about making a new will for Mrs. Webster. Attorney A informed him "that he did not feel that he could prepare a will for Mrs. Webster, because he had knowledge of the fact that she had been declared incompetent and did not feel that it would be ethical for him to do it". Through another party Mr. Crane was referred to attorney D. Attorney D visited Mrs. Webster and obtained a statement of her desires. Subsequently Dr. Carter was again called to witness the will prepared. After an examination of Mrs. Webster, Mr. Crane being present, he again refused for the same reason. He found her to be "suffering from senile dementia".

Early in March, 1934, Dr. Andrews, a psychiatrist, who had had a previous interview with Mrs. Webster, was called to her home. Attorney D and Mrs. Crane "and perhaps Mr. Crane" were present. After some interview by the doctor, he decided that Mrs. Webster was competent to execute a will although he had no memory that she stated that she wanted the Cranes included in the will. Thereupon attorney D and his wife witnessed the will. The Cranes, although not present at the signing of the will, "were right around the house". This will, dated March 28, 1934, provided: (1) That all former wills made by her were revoked; (2) that the Society for Crippled Children for San Diego county be given certain real property; (3) that the San Diego Children's Home Association be given certain other property; (4) a certain portion was given to the Rest Haven Preventorium; (5) to Mrs. Davison $2000; (6) the residue to go to James L. Crane; and (7) James L. Crane was nominated executor without bond.

On January 2, 1935, Dr. Andrews and attorney D were again approached by appellants to examine and interview Mrs. Webster and make a codicil to her will, changing the residuary legatee thereunder to both Mr. and Mrs. Crane. This was done and the codicil was signed and witnessed. Included therein was the following clause: "It has been rumored that another will or codicil subsequent to the one under date of March 28, 1934, has been signed by me. If true, I hereby revoke any such will or will and codicil. * * *" Shortly after the execution of the will dated March 28, 1934, Mrs. Webster was removed from her home to a home owned by appellants and rent therefor was charged against Mrs. Webster's estate for this accommodation.

The evidence shows that friends of Mrs. Webster were unjustly precluded from seeing her on many occasions and that when some of them did gain admission Mrs. Crane remained in the room with them; that on one occasion Mrs. Crane was called to the phone and Mrs. Webster told the visitor that "I want to get rid of these people and I wish you would help me". Another witness testified that while visiting Mrs. Webster she (Mrs. Webster) said "I am told I signed a paper, but I don't know what was in it. I want to get rid of these people, and how can I do it"? Although conflicting evidence was offered, the voluminous record in this regard clearly indicates that appellants were quite apprehensive that Mrs. Webster's friends might learn of her true condition and conclude that she was under the domination of the appellants. On January 18, 1939, Mrs. Webster died. James L. Crane offered for probate the will bearing date March 28, 1934, and the codicil dated January 2, 1935. On February 17, 1939, Evan H. Curtiss presented for probate the will dated February 29, 1932, and simultaneously the Young Women's Christian Association of San Diego filed opposition to the probate of the will dated March 28, 1934, and the codicil dated January 2, 1935, upon the following grounds: (1) Unsound mind of decedent; (2) improper execution; and (3) undue influence of appellants.

Appellants filed their answer denying the allegations and filed their opposition to the probate of the will of February 29, 1932, upon the ground that said will had been expressly revoked by the will of March 28, 1934, and the codicil of January 2, 1935. To this opposition Evan H. Curtiss filed his answer setting forth in substance the allegations of the opposition to the probate of the will of March 28, 1934, and codicil of January 2, 1935. The contest of the respective wills was tried jointly before a jury, appearances having been made by appellants as proponents of the will dated March 28, 1934, and codicil of January 2, 1935, Young Women's Chris-

tian Association of San Diego, as contestants, Rest Haven Preventorium, and Society for Crippled Children for San Diego County, beneficiaries under the will dated March 28, 1934.

The court directed a verdict in favor of appellants and proponents on the first ground of contest, holding that the evidence was insufficient to show that the decedent was not of sound and disposing mind at the time of the execution of the March 28, 1934, will and January 2, 1935, codicil.

The second ground of contest to the opposition to the probate of the will of March 28, 1934, and codicil of January 2, 1935, namely, that the said will and codicil were not executed in the manner or form required by law, was dismissed by contestants. The court thereupon submitted special interrogatories on the sole question of undue influence in the execution of the will dated March 28, 1934, and codicil of January 2, 1935, as follows: (1) Was the will of Ella M. Webster dated March 28, 1934, in whole, made under undue influence? The jury answered in the negative. (2) Was the codicil to the will dated January 2, 1935, in whole, made under undue influence? The answer was in the affirmative. (3) Was the devise to the Society for Crippled Children for San Diego County made under undue influence? The answer was in the negative. (4) Was the devise to San Diego Children's Home Association made under undue influence? The answer was in the negative. (5) Was the devise to Rest Haven Preventorium made under undue influence? The answer was in the negative. (6) Was the devise to Mrs. Hannah P. Davison made under undue influence? The answer was in the negative. (7) Was that portion of the will which leaves the residue of the estate to James L. Crane obtained under undue influence? The answer was in the affirmative. (8) Was that portion of the codicil changing the bequest of the residue from James L. Crane to James L. Crane and Annette M. Crane, his wife, obtained under undue influence? The answer was in the affirmative. It should be noted that the trial court failed to submit to the jury the question whether the revoking clause and the clause appointing Crane executor were obtained under undue influence.

Upon the answers returned by the jury the court rendered judgment in favor of the contestant Young Women's Christian Association of San Diego and admitted the will dated February 29, 1932, to probate and admitted the will of March 28, 1934, omitting therefrom the clause designating appellant James L. Crane as residuary legatee, and further omitting the clause designating the appellant James L. Crane as executor without bond, and upon motion for new trial, in the absence of special interrogatories submitted to a jury, made its finding and amended judgment deleting the revocation clause of the will dated March 28, 1934. The court further denied probate of the codicil dated January 2, 1935 in its entirety. From this judgment, the amended judgment and order denying judgment notwithstanding the verdict, the appellants have appealed.

It is appellants' contention that the admission to probate of the will dated March 28, 1934, deleting therefrom that portion which leaves the residue of the estate of Ella M. Webster, deceased, to appellant James L. Crane, and the refusal of the court to admit to probate the codicil dated January 2, 1935, constitutes reversible error; that there is no substantial evidence in the record to support the verdict of the jury, citing Estate of Velladao, 31 Cal.App. 2d 355, 88 P.2d 187; Estate of Burns, 26 Cal.App.2d 741, 80 P.2d 77; Estate of Kilborn, 162 Cal. 4, 120 P. 762; and Estate of Donovan, 114 Cal.App. 228, 299 P. 816.

It is further argued that the findings of the trial court on questions which were not submitted to the jury, namely, that the revocatory clause and the clause appointing the executor in the March 28, 1934 will was unauthorized, particularly in view of the fact of the jury's finding that parts of the will were free from the taint of undue influence; that it is impossible to conceive how the jury arrived at the fact that there was no undue influence on certain portions of the will and then allowed the court on the very same evidence to arrive at the conclusion that there was undue influence exercised in other portions of the same will; that a revocatory clause in a will is as much a part of the will as any other portion thereof; that the provisions of the will are unseverable; that the will should have been admitted in its entirety or rejected in its entirety; that the revocatory clause in the will of March 28, 1934, must stand and therefore the will of February 29, 1932, was thereby revoked in its entirety; and that the decision of the trial court must be reversed.

[1] First considering the sufficiency of the evidence to justify the verdict, appellants concede that Crane, during all of the time in question, was sustaining a confidential relationship to the testatrix, but claim that the presumption of undue influence does not apply because there is lacking evidence of activity on the part of appellants in procuring the execution of the will and that they unduly profited thereby, citing Estate of Baird, 176 Cal. 381, 384, 168 P. 561; and Estate of Holloway, 195 Cal. 711, 723, 235 P. 1012. We are convinced that there is little merit to this contention for the evidence conclusively shows not only activity on the part of Mr. Crane but also Mrs. Crane, in procuring the execution of the will and the codicil. It also shows that in addition to receiving adequate compensation for the services performed as guardian and as nurse, they, under the terms of the will, would benefit to the extent of approximately $20,000. Although the evidence is conflicting, we are convinced, from reading the record, that there are sufficient circumstances surrounding the execution of the will and codicil, if believed by the jury, to justify the conclusion reached by it in reference thereto. Estate of Witt, 198 Cal. 407, 245 P. 197; Estate of Johnson, 31 Cal.App.2d 251, 87 P.2d 900; Olson v. Washington, 18 Cal.App.2d 85, 63 P.2d 304; Sec. 2235, Civ.Code; Estate of Nelson, 134 Cal.App. 561, 25 P.2d 871; Estate of Ramey, 62 Cal.App. 413, 217 P. 135; Estate of Gallo, 61 Cal.App. 163, 214 P. 496; Estate of Arnold, 147 Cal. 583, 82 P. 252; Estate of Snowball, 157 Cal. 301, 107 P. 598.

In Estate of Graves, 202 Cal. 258, 259 P. 935, 936, it is said: "* * * Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of a decedent's volition, stand out clearly in the record: The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed. In addition, appellant unduly profited as beneficiary under the will. While none of these circumstances standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination."

The same "three well-established facts" upon which the court relied in the Graves case also stand out clearly in the record in the instant case. Appellants had an opportunity to control the testamentary act; Mrs. Webster's condition was such "as to permit of a subversion of her freedom of will"; and appellants were active in procuring the instruments to be executed. In addition they unduly profited thereby. In the language of the court all these factors taken together "make the question as to undue influence one of fact for the jury's determination". The jury having determined this question in favor of respondents, that determination should not be set aside. Either the evidence presented by the record or the presumption of undue influence, standing alone, would support the verdict of the jury. However, respondents need not rely upon one factor to the exclusion of the other. Each is strengthened and reinforced by the other, and the two together are without question sufficient to uphold the judgment that the appellants procured the residuary clause of the 1934 will and the entire 1935 codicil thereto by undue influence. The propriety of the court's holding that the evidence was insufficient to show that the deceased was of unsound mind and directing a verdict in accordance therewith is not questioned. We will therefore not give consideration to it. We must, therefore, conclude that the order denying the codicil dated January 2, 1935 to probate was proper. If the trial court was authorized, without the aid of the jury, to make the determination that the revocation clause in the will dated March 28, 1934, and also that the clause appointing Crane executor of the will were made under undue influence, then the order admitting the will of February 29, 1932, to probate and appointing the executors named therein was also proper if the remaining provisions of the will of March 28, 1934 were not inconsistent therewith. Estate of Mallon, 28 Cal.App.2d 106, 81 P.2d 992; Estate of Schnoor, 4 Cal.2d 590, 51 P.2d 424; Estate of Iburg, 196 Cal. 333, 238 P. 74; Estate of Smith, 140 Cal.App. 508, 35 P.2d 335.

[2] If this determination of the trial court was proper, the appellants would no longer have any interest in the distribu-

tion made under the will of February 29, 1932, and the remaining clauses of the will of March 28, 1934. In 2 Cal.Jur. p. 212, section 54, it is said: "If a party has no interest in the property in dispute, he cannot be aggrieved by any disposition the court may make of the property, even where the court gives it to the wrong party, and an appeal taken by him will be dismissed." See also Estate of Zollikofer, 167 Cal. 196, 197, 198, 138 P. 995; Estate of Land, 166 Cal. 538, 137 P. 246.

[3, 4] The general rule is that if the whole will is the result of the presence of undue influence, probate of the whole will must be refused. If only a part of it is affected by undue influence, that part may be rejected as void, but the remainder, which is the outcome of the free action of the testator, ought to be sustained if it is not inconsistent and can be separated from the part which is invalid, and should be admitted to probate. Underhill on Wills, Vol. 1, sec. 159, p. 223; Schouler on Wills and Administration, Part 2, sec. 248, p. 124; secs. 22 and 72, Probate Code; Steadman v. Steadman, 14 A. 406, 10 Sadler, Pa., 539; Estate of Carson, 184 Cal. 437, 441, 194 P. 5, 17 A.L.R. 239.

In support of the court's independent finding respondents argue: (1) That it was authorized to so find because "the finding of the jury that the residuary clause was obtained by undue influence is a finding that the appellants were active—at least to some extent—in obtaining the will. This is the only 'fact' which it is necessary to know in order to declare as a matter of law that the revocation clause and the clause appointing Crane executor were obtained by undue influence". (2) That from the facts established by the evidence and the finding of undue influence reached by the jury, as to the residuary clause, there arose an inference of fact and from it there flowed the right of the court to draw the ultimate conclusion of law reached. Sec. 624, Code Civ.Proc.; Estate of Keithley, 134 Cal. 9, 66 P. 5.

[5] We are not in accord with this contention. The verdict of the jury finding that the appellants used undue influence in reference to the residuary clause of the will would not necessarily be any determination that they used undue influence in respect to the provisions of the will revoking the former will and appointing Crane executor where the jury also found that certain provisions of the same will were not made under their undue influence. In fact the evidence rather strongly indicates it was the intention of Mrs. Webster to change the joint executor Ruth, named in the first will, because of his claimed misconduct and claimed misappropriation. There was highly conflicting evidence as to the question of undue influence in the making of the will and all of its provisions. Assuming there was a presumption of undue influence remaining in the case, it merely created a conflict which should have been determined by the jury. Duehren v. Stewart, 39 Cal.App.2d 201, 102 P.2d 784. We feel impelled to hold that the trial court should have submitted to the jury the question of whether the revocation clause and the clause appointing Crane executor was made under undue influence before a proper judgment could have been made admitting the 1932 will or denying portions of the 1934 will to probate. In fact, it was appellants' main contention and ground of contest that the second will revoked the former will.

[6, 7] In view of this conclusion, these questions presented by the pleadings have not been properly determined and seriously affect the validity of the orders admitting the 1932 will to probate and denying admission to probate of a portion of the 1934 will and the order appointing an executor. A revocation clause in a will is as much a part of the will as any other portion thereof and the trial court had no right in law or in fact to change the will to its liking as indicated by its statement: "It is my belief that this revoking clause was put in there without a great deal of thought on the part of Ella M. Webster...."

In Estate of Thompson, 185 Cal. 763, 198 P. 795, 798, the following may be found: "These cases at least make it clear that the revoking clause of a will is a part of the will, and is to be treated as such * * *." See also, Estate of Smith, supra.

[8] Respondents' second contention is equally untenable. The findings of the jury upon the issues submitted to them stand the same as the findings of fact made by the court in a civil action, i.e., when we are brought to the consideration of their sufficiency to support the judgment rendered. In the one case the jury makes the findings, and in the other the court makes them.

In Estate of Benton, 131 Cal. 472, 63 P. 775, 776, the case of Bull v. Bray, 89 Cal.

286, 26 P. 873, 13 L.R.A. 576, is quoted to the effect that: "'Where probative facts only are found, yet, if the ultimate fact flows as a necessary conclusion therefrom, the findings are sufficient; but, in order to warrant the appellate court in inferring an ultimate fact from probative facts, it must inevitably follow from the facts found.' So, in a case where the probate of a will is contested, if the issues presented to the jury involve simply probative facts, then, to justify the court in rejecting the probate of the will, the ultimate fact of fraud, undue influence, or mental incompetency must appear conclusively from the probative facts found. In other words, the trial court may not indulge in inferences of fact in order to support the judgment it makes."

[9] The diversified findings of the jury and the evidence presented preclude a conclusion, as a matter of law, that the revocatory clause and the clause appointing Crane executor were made under undue influence. The omission or failure of the court to submit those issues to the jury was prejudicial error. Estate of Hewitt, 63 Cal.App. 440, 218 P. 778. The trial of such issues "must be tried by a jury, unless a jury is waived". Sec. 371, Probate Code. And the "jury must return a special verdict upon the issues submitted to them by the court; and upon the verdict, * * * the court must render judgment * * *." Sec. 373, Probate Code.

It is with reluctance that we have reached the conclusion that we are required by law to reverse portions of the judgment, because they are so obviously correct in fact. They are strongly supported by the presumptions as well as the testimony of disinterested witnesses. The residuary clause of the 1934 will making Crane the residuary beneficiary is so closely related to the clause revoking the 1932 will and the clause appointing Crane executor of the 1934 will that it does not seem possible that any jury would find the first clause void because of undue influence and the other two clauses valid because made voluntarily and free from undue influence or that a trial judge would let any such inconsistent verdict stand should one be returned. However, we have been unable to discover any lawful ground upon which the judgment can be affirmed as it now stands.

[10] We see no reason for a retrial of the issues heretofore found by the jury. The attempted appeal from the order denying the motion for judgment notwithstanding the verdict, not being an appealable order under section 1240 of the Probate Code, is dismissed. Estate of Patterson, 220 Cal. 370, 31 P.2d 197; Estate of Armstrong, 8 Cal.2d 204, 64 P.2d 1093; In re Walkerly, 94 Cal. 352, 29 P. 719; Guardianship of Morro, 36 Cal.App.2d 623, 98 P.2d 552; Estate of O'Dea, Cal. Sup., 104 P.2d 368; Estate of Wittmeier, 118 Cal. 255, 50 P. 393; Estate of Allen, 175 Cal. 356, 165 P. 1011.

The portion of the judgment of the trial court denying probate of the codicil herein mentioned is affirmed. That portion of the judgment denying admission to probate of that provision of the will of March 28, 1934, which leaves the residue of the estate to James L. Crane is affirmed. That portion of the judgment admitting to probate the remaining clauses of the 1934 will (excepting therefrom the revocation clause and the clause appointing Crane executor) and those portions of the same will which the jury found were not made under undue influence is affirmed. That portion of the judgment admitting to probate the will dated February 29, 1932, appointing the executor, and denying probate of the two mentioned provisions of the 1934 will relating to the revocatory clause and the clause appointing Crane executor, is reversed with directions to the trial court to present to the jury the sole questions: (1) Was the provision of the will dated March 28, 1934, "revoking any and all other wills and codicils heretofore made and/or executed by me" made under undue influence? (2) Was the provision of the will dated March 28, 1934, nominating James L. Crane executor made under undue influence? If these questions are answered in the affirmative the court may then be authorized to admit the first will to probate, appoint the executors named and deny probate to those additional portions of the will of March 28, 1934, found to be made under undue influence. If answered in the negative, the court should then make an appropriate order and judgment in accordance with the combined findings of the jury. Each party to pay its own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

43 Cal.App.2d 46

WRIGHT v. WRIGHT.

Civ. 2617.

District Court of Appeal, Fourth District, California.

Feb. 14, 1941.

1. Appeal and error ⇐110

Order denying motion for new trial was not appealable. Code Civ.Proc. § 963.

2. Appeal and error ⇐554(2), 627(2)

Where there was nothing on file in District Court of Appeal other than moving papers and certificate of county clerk, from which it appeared that motion for new trial was denied April 27, 1940, notice of its denial was filed April 29, 1940, notice of appeal and notice to prepare transcript were filed on May 8, 1940, and trial court terminated proceedings for preparation of transcript on September 17, 1940, and there were no proceedings pending for settlement of a bill of exceptions or transcript on appeal, motion to dismiss appeal was granted.

From Superior Court, Fresno County; Ernest Klette, Judge.

Action by William B. Wright against Daisy Wright. From an adverse judgment, plaintiff appeals, and from an order denying motion for new trial, plaintiff purports to appeal. On motion to dismiss appeal.

Appeal dismissed.

N. Lindsay South and Charles A. Hill, both of Fresno, for appellant.

Rae B. Carter and Harris, Willey & Harris, all of Fresno, for respondent.

MARKS, Justice.

[1] This is a motion to dismiss the appeal from a judgment, and from an order denying the motion for new trial. Such an order is not appealable. Sec. 963, Code Civ.Proc.

[2] There is nothing on file here other than the moving papers and the certificate of the county clerk, from which it appears that the motion for new trial was denied on April 27, 1940; that notice of its denial was filed on April 29, 1940; that notice of appeal and notice to prepare the transcript were filed on May 8, 1940; that on September 17, 1940, the trial court terminated the proceedings for preparation of transcript; that there are no proceedings pending for the settlement of a bill of exceptions, or transcript on appeal. Under such circumstances the motion must be granted. Bales v. Metropolitan Casualty Ins. Co., 3 Cal.App.2d 43, 38 P.2d 799; Carrasco v. Marcus, 18 Cal.App.2d 96, 62 P.2d 1405; Olinger v. Pacific Greyhound Lines, 18 Cal.App.2d 104, 62 P.2d 1406.

The appeal is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.



43 Cal.App.2d 32

MILLER v. LaGRUA et al.

Civ. 12232.

District Court of Appeal, Second District, Division 1, California.

Feb. 14, 1941.

1. Appeal and error ⇐1008(1)

In action against motorist for injuries sustained when pedestrian was struck by automobile while crossing street intersection where traffic lights changed when pedestrian was near middle of street, whether pedestrian was contributorily negligent was for trier of facts.

2. Appeal and error ⇐996

Where evidence permitted two possible inferences to be deduced therefrom, one of which supported trial court's findings, the findings would not be disturbed upon appeal.

3. Appeal and error ⇐843(2)

In action against motorist for injuries sustained when pedestrian was struck by automobile where court properly found for motorist on issue of contributory negligence, question raised as to ownership of automobile was immaterial.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by George Miller against Mario LaGrua and another, for personal injuries

sustained as the result of an automobile accident. From a judgment for defendants, plaintiff appeals.

Affirmed.

Fred W. Heath and Daniel A. Knapp, both of Los Angeles, for appellant.

Richardson & Jordan, by Harold Richardson, of Whittier, for respondents.

DORAN, Justice.

This is an appeal from a judgment in favor of defendants in an action brought by plaintiff to recover damages for personal injuries sustained as the result of an automobile accident. The case was tried before the court sitting without a jury.

The facts, so far as necessary to a determination of the question here presented, are as follows:

The accident occurred on February 1, 1937, about 7:30 in the evening, at the intersection of Slauson avenue and Pacific boulevard in the city of Huntington Park, county of Los Angeles. The intersection in question is at right angles, Pacific boulevard running north and south and Slauson avenue east and west. Slauson avenue is 70 feet wide at that point. Traffic on both streets at the intersection at the time of the accident was controlled by automatic traffic lights, coupled with warning signal bells. At the first ring of the bell the lights controlling the street on which traffic was moving would change from "Go" to "Stop", that is, from green to red, and on the second ring the lights on the other street would change from red to green. The intersection was well lighted. Plaintiff arrived at the intersection in a car driven by his daughter west on Slauson avenue. The car drew up to the curb at the northeast corner of the intersection, at which time the signal on Slauson was red. Plaintiff alighted from the car at this point and proceeded to cross Slauson avenue from north to south in the marked pedestrian zone between the northeast and southeast corners. When plaintiff was one quarter or one third of the way across, the first signal bell rang. When plaintiff was crossing the westbound lane of traffic on Slauson closest to the center line of the street he appears to have moved over to the westerly boundary of the pedestrian zone to avoid a westbound car which arrived at the intersection. The car apparently stopped to allow plaintiff to pass. At that time the second bell rang and the signal on Slauson avenue changed to "Go". Plaintiff, then just about at the middle of the intersection, proceeded on across the street and, about twelve feet south of the center line of Slauson avenue, was struck by a car driven by defendant La Grua traveling east on Slauson. There is some evidence indicating that when at the center of the street plaintiff had looked to his right, the direction from which defendant's car approached, although it is not entirely clear from the record just when plaintiff looked to his right. According to defendant La Grua and the witness who was riding with him in the car at the time of the accident, he was driving at about 15 or 20 miles an hour in second gear when he struck plaintiff. He does not appear to have seen plaintiff until very shortly before or at the time he struck him. La Grua testified, as did his companion, that his car, a 1929 or 1930 Peerless, was traveling east on Slauson avenue, that he stopped for the signal at Pacific boulevard and did not proceed across the intersection until that signal changed to "Go". This testimony was not directly controverted. A witness for defendants testified that just prior to the accident he had been driving west on Slauson, that when he was about twenty feet east of the pedestrian zone, in which plaintiff crossed, he heard the first warning bell. The witness was traveling west in the lane closest to the center line of the street. When he arrived at the pedestrian zone in question he saw plaintiff hurrying in front of the witness's car and he applied his brakes and then turned the window of his car down in order to shout a warning at plaintiff.

The court found that the plaintiff failed to use reasonable care at the time of the accident and that his negligence contributed directly and proximately to the occurrence thereof. Plaintiff (appellant) contends that such findings are unsupported by the evidence.

[1, 2] Without discussing the evidence in greater detail than above set forth it is sufficient to state that an examination of the record reveals the question of plaintiff's negligence in this case to be clearly one of fact for the determination of the trial court. The evidence permits two possible inferences to be deduced therefrom, one of which supports the findings of the court with regard to plaintiff's contributory negligence. In such a case the

court's findings will not be disturbed upon appeal.

[3] The court having made a proper finding for the defendants on the issue of contributory negligence, the question here raised as to the ownership of the car is immaterial.

For the foregoing reasons the judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.



42 Cal.App.2d 788

O'HARE et al. v. PEACOCK DAIRIES, Inc.

Civ. 2550.

District Court of Appeal, Fourth District, California.

Feb. 10, 1941.

1. Appeal and error ⇐1214

Under order of District Court of Appeal, reversing judgment awarding damages for breach of contract to purchase grade A milk produced by sellers and remanding cause for new trial solely on issue of amount of damages, proof of quality of milk produced by them after breach was admissible on subsequent trials as necessary in fixing amount of damages.

2. Appeal and error ⇐1096(1)

In action for breach of contract to purchase grade A milk produced by plaintiffs, where counsel's stipulation, reports of representatives of approved milk inspection service of state, and proof of contents of other such reports, which had been lost or destroyed, were sufficient to support finding that milk produced by plaintiffs was of such quality on retrial after reversal of judgment for plaintiffs on question of damages only, competency of lay witnesses' testimony to establish condition of plaintiffs' dairy and grade of milk produced therefrom need not be decided on appeal from second judgment for plaintiffs.

3. Stipulations ⇐14(7)

In action for breach of contract to purchase grade A milk produced by plaintiffs, counsel's stipulation, from which defendant did not ask to be relieved, that a witness, if called, would have testified that milk produced by plaintiffs during period when defendant took it was grade A milk, constituted evidence creating conflict and supporting finding of such fact.

4. Evidence ⇐83(1)

In action for breach of contract to purchase grade A milk produced by plaintiffs from tuberculin tested cows, where defendant introduced in evidence plaintiffs' dairy farm score cards, made by representative of approved milk inspection service of state, District Court of Appeal must presume on appeal from judgment for plaintiffs that inspector performed his duty and scored dairy in accordance with law. St.1933, pp. 132, 138, §§ 471(b), 488(b).

5. Sales ⇐72(1)

Under contract for sale and purchase of grade A milk produced by sellers, they were not required to produce grade A raw milk, but only grade A pasteurized milk, in view of statutory provisions. St.1933, pp. 132, 138, §§ 471(b), 488(b).

6. Sales ⇐181(12)

In action against dairy company for breach of contract to purchase grade A milk produced by plaintiffs from tuberculin tested cows, dairy farm score cards, made by representative of approved milk inspection service of state and indicating that plaintiffs' dairy received ratings showing that their cows were inspected, found healthy and tested for tuberculosis, that re-actors were removed, and that milk produced from such cows was at least grade A pasteurized during all of period in which defendant took such milk and succeeding period in which another dairy company took it, constituted evidence supporting finding that milk was of quality required by contract during such periods. St.1933, pp. 132, 138, §§ 471(b), 488(b).

7. Sales ⇐181(12)

In action for breach of contract to purchase grade A milk produced by plaintiffs, testimony of laboratory technician of creamery company, to which plaintiffs delivered milk during certain period after defendant ceased to take it, that witness tested such milk every week and found it grade A so far as bacteria count was concerned, and testimony of such company's production manager that state inspectors' certificates showed milk to be of such grade, *held* sufficient to

support finding that plaintiffs' milk was grade A during such period.

8. Sales ⇐389

In action for breach of contract to purchase grade A milk produced by plaintiffs, trial judge's findings that plaintiffs were able, willing and ready to deliver milk according to terms of agreement, that they duly performed all conditions thereof to be performed by them, and that all denials of defendant's answer to complaint were untrue, *held* sufficient on question whether plaintiffs' milk was of quality required by contract.

9. Appeal and error ⇐1011(1)

In action for breach of contract to purchase grade A milk produced by plaintiffs from tuberculin tested cows, where there was evidence that grade A milk cannot be produced from tuberculin infected cows, that other qualified veterinarians than those who made tuberculin tests of plaintiffs' cows were available to make such tests, and that milk produced by plaintiffs was grade A, testimony of veterinarians making tests that they were made at too great intervals merely created conflict in evidence presenting question for trial judge as to whether plaintiffs were producing grade A milk.

Appeal from Superior Court, Kern County; Louis C. Drapeau, Judge.

Action by James M. O'Hare and others against the Peacock Dairies, Inc., for breach of a contract to purchase milk from plaintiffs. Judgment for plaintiffs, and defendant appeals.

Affirmed.

See, also, 39 Cal.App.2d 506, 103 P.2d 594.

Mitchell, Johnson & Ludwick, of Los Angeles, for appellant.

Joseph Scott, of Los Angeles, and Claflin, Dorsey & Campbell, of Bakersfield (J. Howard Ziemann, of Los Angeles, of counsel), for respondents.

MARKS, Justice.

This is an appeal from a judgment for damages resulting from a breach of contract on the part of defendant, wherein it agreed to purchase grade A milk produced by plaintiffs on their farm near Bakersfield, in Kern county. The case has been here before. O'Hare v. Peacock Dairies, Inc., 26 Cal.App.2d 345, 79 P.2d 433; O'Hare v. Peacock Dairies, Inc., 26 Cal.App.2d 753, 79 P.2d 443. The principal facts of the case are there sufficiently detailed so that they need not be repeated here.

After our reversal of the former judgment on the question of damages only, the case was retried on three separate dates, December 16, 1938, May 12, and June 26, 1939. On the first day of trial, counsel for both parties seemed to assume that the only questions to be decided were the quantity and market value of milk produced and delivered by plaintiffs after the breach of contract; that the quality of that milk had been determined and was not an issue at the second trial. The case was reopened for the purpose of taking additional evidence. On this hearing the question of the quality was raised and contested. On a third day, additional evidence was taken and the question of the quality of the milk was again litigated.

At the commencement of the first day of the trial counsel attempted to stipulate certain facts. The question of the quality of the milk did not seem to be regarded as important. The remarks of the trial judge indicated that he considered that question settled and not open for decision. However, counsel for defendant consistently attempted to limit the stipulation to the quantity of milk produced and the price paid therefor, as appeared in certain exhibits introduced and testimony given at the former trial. Because of the indefiniteness of this stipulation and our inability to determine just what was stipulated to, we consider it fair to construe its terms so as to cover only the quantity of milk produced by plaintiffs and the prices paid for it as shown by certain exhibits and the testimony of certain witnesses concerning those exhibits which appear in the records in the first appeal. It is clear that the stipulation covered these facts if it did not go much beyond them. We have limited our examination of the first record to those exhibits and that testimony.

In construing the stipulation we are not aided by being able to determine how the trial judge regarded it and how it was acted upon, because of the manner in which the case was tried. He reserved his rulings on many objections and admitted other evidence subject to motions to strike. The record fails to disclose any rulings on these objections. The minutes show that motions to strike were denied but there is nothing to in-

dicate at what evidence these motions were directed. This is not unusual in cases disclosing a similar procedure and this case is a prime example of the danger involved in following it.

What we have just said concerning the stipulation made at the opening of the trial does not apply to another stipulation to which we will refer.

[1] Plaintiffs argue that the question of the quality of the milk was settled and determined in the first trial; that under our earlier opinions (O'Hare v. Peacock Dairies, Inc., supra) it became the law of the case that the milk produced after the breach of contract was grade "A" milk produced from tuberculin tested cows, as specified in the contract; that only the questions of the quantity of milk produced and its market value in Bakersfield were open for further litigation.

On the other hand, defendant points to our order on the former appeals where this court said [26 Cal.App.2d 345, 79 P.2d 443]: "The judgment is reversed and the cause is remanded for new trial solely on the issue of the amount of damages, with direction to the trial court to retry the issue of the amount of damages only; to amend its findings of fact and conclusions of law in accordance with the evidence so taken and the views herein expressed, and to render judgment in favor of plaintiffs for the amount of damages so found upon a determination of that issue."

It is argued that this order is the real measure of the issues to be presented and litigated at the second trial; that the contract between the parties required defendant to accept and pay for only milk "produced from tuberculin tested cows under grade A inspection"; that because defendant was not required to accept or pay the contract price for milk of a lesser grade the quality of the milk produced was a necessary element to be established by plaintiffs in determining the amount of their damages; that under this clause of the contract the quantity of milk produced which defendant was required to accept depended on its quality as did its market price; that damages could not be computed without proof of the quality of the milk produced. From this it is argued that, as defendant was not required to accept or pay for any milk less than grade A, plaintiffs could recover no damages for any milk which the evidence failed to show had been "produced from tuberculin tested cows under grade A inspection".

Under the rather broad terms of the orders made by this court on the former appeals we are inclined to accept the arguments of defendant on this question as sound and will regard the question of proof of the quality of the milk produced as necessary in fixing the amount of plaintiffs' damages.

[2] Defendant again argues the question of the competency of the evidence of lay witnesses to establish the condition of a dairy and the grade of milk produced from it. It is again argued that only licensed veterinarians of the state of California or representatives of an approved milk inspection service of the state are competent to testify to the condition of a dairy and dairy herd and the consequent grade to be given the milk produced.

This question was thoroughly considered in our former opinion and under the evidence then before the court we held that the evidence of lay witnesses could be received on that issue. Were it not for the fact that there is now in the record on this appeal evidence which might have a bearing on the question which we did not find in the records on the former appeals, we would regard our former opinion as establishing the law of the case. However, we do not need to decide the question as now presented for the reason that we do not need to go beyond a stipulation of counsel, the reports of representatives of an approved milk inspection service of the state of California, and proof of the contents of other such reports that had been lost or destroyed, to find sufficient evidence to support a finding that the milk produced by plaintiff was of the quality which defendant was required to accept under the terms of its contract. No question is raised as to the quantity of milk produced and its market value in Bakersfield, assuming that it was all grade A milk produced from tuberculin tested cows.

We must consider the evidence as to the quality of the milk produced during three separate periods as the evidence bearing on this question largely comes from separate sources. The first period is from June 22 or 24, to July 27, 1933, when defendant took the milk. We will refer to this as the first period. The next is from July 27, 1933, to January 31, 1934, inclusive, when Our Own Dairies took the milk. We will refer to this as the second period. The third is

from February 1, 1934, to December 1, 1935, both inclusive, when the Wasco Creamery & Construction Company took the milk. We will refer to this as the third period and the purchaser as the Wasco Creamery.

Plaintiffs' dairy was officially degraded to a butterfat basis on June 22, 1933. It was officially reinstated to "Grade milk for L. A. Gr. A Cr. purpose" on June 28, 1933. (The abbreviations are translated, Los Angeles Grade A Cream.) Defendant purchased the milk during this period, or at least part of it, as grade B milk under a stipulation that such fact would not preclude plaintiffs from proving that the milk was in fact grade A and from claiming damages for breach of contract over this period.

[3] There is much evidence in the record which would have supported a finding that the milk produced during the first period was not grade A. However, we find in the record the following referring to the first period:

"Mr. Dorsey: * * * Now we are not withdrawing the proposition, we being the innocent parties and in the circumstances of handling milk that we should have the difference between the amount they did pay us and the 70 cents for that period of time that they took that milk, the Court having determined in the case that we were delivering grade A milk; in order to constitute a breach of contract we had to prove that and that is an established fact in the case, so therefore under the decision in this case they got from us the grade A milk during that period of time. * * *

"Mr. Mitchell: I think that is all right, Your Honor, except for the fact that we cannot stipulate the prevailing market price was anything because it is our contention it wasn't anything.

"The Court: That is true, but subject to your general objection of incompetent, irrelevant, etc., that offer of proof is stipulated to?

"Mr. Mitchell: That is to say if a witness on their behalf were called he would testify along that line.

"The Court: That is right."

The foregoing amounts to a stipulation that a witness, if called, would have testified that the milk produced during the first period was grade A milk. Defendant did not ask to be relieved from this stipulation and it remains in the record. It therefore remains as evidence in the case, creating a conflict, and would support a finding that the milk delivered during the first period was grade A milk.

[4-6] Defendant introduced dairy farm score cards of plaintiffs' dairy for a longer period than that covered by the first and second periods. These score cards were made by a representative of an approved milk inspection service of the state of California. Their respective dates and scores are as follows: January 17, 1933, score 81.7; June 1, 1933, score 74.2; June 28, 1933, score 72.6; September 29, 1933, score 75.8; November 28, 1933, score 81.5; January 19, 1934, score 76.8; March 8, 1934, score 84.0. On each of these score cards are blanks for scoring the "apparent good health" of the cows and "tested and reactors removed". Plaintiffs' dairy received a perfect score on every card under both headings.

Subdivision "b" of section 471 of the Agricultural Code provides in part as follows:

"Milk shall be produced from nonreacting tuberculin tested cows as determined by a test applied by an approved veterinarian under the supervision of the department, or shall be pasteurized and shall otherwise conform to the rules and regulations adopted by the department." Chap. 723, Stats. 1933.

Subdivision "b" of section 488 of the same code, prior to its recent amendment, provided as follows: "Grade A pasteurized milk is market milk which conforms to the following minimum requirements: the health of the cows shall be determined by physical examination at least once in six months by an official representative of an approved milk inspection service; it shall be produced on dairies that score not less than seventy per cent on the dairy farm score card adopted by the department and it shall contain not more than one hundred fifty thousand bacteria per milliliter before pasteurization and not more than fifteen thousand bacteria per milliliter at the time of delivery to the consumer." Chap. 695, Stats.1933.

We must presume that the inspector performed his duty and scored the dairy in accordance with law. These score cards indicate rather clearly that during all the first and second periods the dairy received ratings that show that the cows were inspected and found healthy; that tuberculin tests had been made; that any reactor had been

removed; that the milk was at least grade A pasteurized, as defined in the statute. Under their contract plaintiffs were only required to produce grade A pasteurized milk. They were not required to produce grade A raw. O'Hare v. Peacock Dairies, supra. It follows that there is evidence in the record to support a finding that during the first and second periods the milk was of the quality required by the contract.

[7] During the third period the milk was delivered to the Wasco Creamery. George S. Robertson was its laboratory technician and Sven Helster was its production manager. Robertson testified that he tested plaintiffs' milk every week and as far as the bacteria count was concerned it was grade A milk. Helster testified that the Wasco Creamery received certificates from state inspectors which showed the plaintiffs' milk to be grade A, that all such certificates dated prior to 1936 had been destroyed but that each one of them showed the milk produced and delivered by plaintiffs was grade A. This evidence is sufficient to support a finding that plaintiffs' milk was grade A during the third period.

[8] Defendant argues that there is no finding that the milk produced by plaintiffs was grade A milk produced from tuberculin tested cows. The plaintiffs reply that the trial judge made sufficient findings on this question. They point out that a copy of the contract was attached to the second amended complaint and incorporated in the amended findings; that it was found that plaintiffs "were able, willing and ready to deliver milk according to the terms of said agreement, and in all respects to carry out the provisions thereof", and also "that plaintiffs have duly performed all the conditions of said agreement on their part to be performed". Defendant replies that these findings are mere conclusions of law and therefore no findings at all.

In a separate defense in the answer it is alleged that plaintiffs' milk did not conform to the quoted portion of the contract requiring it to be grade A. It was also alleged that the milk "failed to meet the requirements of grade A inspection and failed to comply with the condition contained in said contract". It was also alleged in the second amended complaint that after the breach plaintiffs offered to deliver and were ready, able and willing to deliver milk to defendant according to the terms of the written contract and in all respects to carry out the terms thereof. These allegations were denied in the answer. The trial court found that "all of the denials of defendant's answer thereto are untrue". This seemed to refer to all the defenses contained in the answer and may be a sufficient finding on the question of the quality of the milk. We believe the findings taken as a whole are sufficient on the question of the quality of the milk.

There is also evidence that tuberculin tests were given the cows on October 24, 1932, on December 4, 1933, on August 29, 1934, and on November 27, 1935; that one reactor was found as a result of the test on December 4, 1934, and it was immediately removed from the herd; that no other reactors were found.

[9] Defendant urges that as the tests were not made as frequently as required by law, plaintiffs were not producing grade A milk. There is evidence from defendant's expert that grade A milk cannot be produced from tuberculin infected cows. There is no evidence that additional tuberculin tests were not made. There is evidence that there were other qualified veterinarians available to make tuberculin tests other than the two shown in the evidence to have made such tests. There is the stipulation and evidence already pointed out that the milk produced was grade A. The evidence of the veterinarians making the tests that the tests were made at too great intervals, at best merely created another conflict in the evidence which the trial judge resolved against defendant.

Defendant urges that the findings are inconsistent. They argue that it was found that the plaintiffs received and were paid the exact amount of their damages when they sold their milk after the breach. This was due to a typographical error in the findings which has been corrected. See O'Hare v. Peacock Dairies, 39 Cal.App.2d 506, 103 P.2d 594.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

42 Cal.App.2d 801

REGAN v. COUNCIL OF CITY OF SAN MATEO.

Civ. 11218.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1941.

Hearing Denied April 5, 1941.

1. Municipal corporations ⇐120

Zoning ordinance must be construed as a whole.

2. Automobiles ⇐395

Where zoning ordinance provided for hearing by planning commission, on notice, of application for permit to operate gasoline service station and that planning commission should recommend granting of permit if not detrimental to the general welfare and that final decision would be made at next meeting of council without further notice, and recommendation was made without such finding, recommendation was not entitled to more weight than finding of council that granting of permit would be detrimental to the general welfare even though no hearing was had by council, since none was required by ordinance, whose refusal to grant permit was not arbitrary.

3. Constitutional law ⇐296(2)

Refusal by city council of permit to erect gasoline service station did not take applicant's "property" without "due process of law" although a second hearing was not had by council after prior hearing by city planning commission and applicant's "property" was not taken from him since he was merely denied a favor and if any property rights were affected, they were affected by the ordinance and not by refusal to grant license.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Property".

4. Constitutional law ⇐296(2)

Where city clerk gave notice as prescribed by ordinance of hearing by city planning commission of application for permit to erect gasoline service station and hearing was had pursuant thereto and the matter passed on at next regular meeting of the council as provided by ordinance, there was sufficient notice of the hearing as regards "due process."

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process".

Appeal from Superior Court, San Mateo County; Warren V. Tryon, Judge.

Mandamus proceeding by H. W. Regan against the Council of the City of San Mateo to compel the issuance of a permit for a gasoline station. From a judgment for defendant, the plaintiff appeals.

Judgment affirmed.

Carl W. Anderson, of Burlingame, and Breed, Burpee & Robinson, of Oakland, for appellant.

Ernest A. Wilson, City Atty. (Reuel R. Sutton and Kirkbride & Wilson, all of San Mateo, of counsel), for respondent.

STURTEVANT, Justice.

This is an appeal by the plaintiff from the judgment of the superior court of the state of California, in and for the county of San Mateo, denying a writ of mandate against the defendant. The plaintiff is the owner of lots 1, 2 and 3, in block B of Baywood Blocks, located in the city of San Mateo. Being desirous of erecting a gasoline service station he applied for a permit. Lots 1 and 2 are located in the fourth residential district as defined in ordinance No. 446 which is a zoning ordinance. Lot 3 is within the boundaries of the third residential district as described in said ordinance. By the terms of the ordinance the erection of gasoline stations in the fourth residential district is permissive, but within the boundaries of the third residential district such use is prohibited.

On July 28, 1937, plaintiff applied for a permit. In that permit the applicant advised the defendant that lot 3 would be included solely for landscape purposes. The application was referred to the planning commission of the city of San Mateo for hearing and recommendation. A hearing was had before the commission on the 10th day of September, 1937. Prior to that hearing a notice was given as required by the terms of the ordinance. Later a hearing was had and evidence both oral and documentary was introduced. After the hearing had been had the commission made and filed its recommendation in writing in relation thereto with the city clerk. In said recommendation it advised the granting of the application but it did not pass on the fact whether the granting of the application would or would not be detrimental to the public health, safety, morals, or general welfare of the city of San Mateo. At the regular meeting of the council of

the city of San Mateo next succeeding the filing of said recommendation, that is on September 20, 1937, the said council took up the hearing of said application. All of the documentary evidence which had been presented to the planning commission was presented to the council. In addition to the protest which had been presented to the planning commission other protests were presented to the council. The council also heard oral arguments to the effect that a gasoline station would be detrimental to the surrounding territory. Every one seeking an opportunity to be heard was granted the privilege. Neither the plaintiff nor any one acting on his behalf asked to be heard, nor was any evidence presented establishing the difference between the value of the property for a gasoline station and apartment house purposes. After a full hearing the council passed its resolution denying the application upon the ground that the granting of the application would be detrimental to the public health, safety, morals and general welfare. Being dissatisfied with the ruling of the council the plaintiff applied to the superior court for a writ of mandate. He filed a petition that is very full and complete. The defendant appeared and filed an answer that is likewise very full and complete. Therein it interposed numerous denials and pleaded some new matter. A trial was had on the issues made by the plaintiff's complaint and the answer thereto. Evidence was presented that plaintiff's lots could be most profitably used for gasoline station purposes. However, there was substantial evidence that said property could be used for apartment house purposes and for that purpose it had a value of from $4,500 to $10,000. After the trial was completed the trial court made findings in favor of the defendant. There was evidence to sustain each finding. Except by inference, we do not understand the plaintiff to contend otherwise. From the judgment entered on said findings the plaintiff has appealed.

The plaintiff contends it was the duty of the trial court to grant him a writ of mandate if the resolution of the defendant was arbitrary, discriminatory, and unreasonable. Standard Oil Co. v. City of Kearney, 106 Neb. 558, 184 N.W. 109, 18 A.L.R. 95. To that contention the defendant replies that this is an appeal from a judgment of the superior court and that all intendments are to be made in support of that judgment and every presumption is in favor of its validity. Consolidated Const. Co. v. Pac. E. Ry. Co., 184 Cal. 244, 246, 193 P. 238. Continuing it contends that the record affirmatively shows the trial court found said resolution was not arbitrary, unreasonable, or discriminatory. That reply the plaintiff argues is insufficient. He points to passages in the record showing the council did not cause any notice to be given of the hearing to be had before it. That contention brings up for consideration the real issue in the case. That issue involves a proper construction of the provisions of ordinance No. 446, supra.

Section 1 defines many words. Section 2 provides, "Excepting as authorized by the provisions of section 12 hereof, no premises shall be used * * * for any purpose other than the uses herein permitted in the district in which it is located by the provisions of this ordinance." By the terms of section 3 the city is divided into eight districts. Section 6, in defining uses permitted in the third residential district, does not mention gasoline service stations. Section 7, concerning fourth residential districts, authorizes the use for gasoline service stations "permitted with a permit from the city council". Section 12, "Non-conforming uses", provides for "A. Regulation of Use" and "B. Procedure to establish use." The last subdivision is divided into eleven subsections. In subsection 1 an application is provided for. In subsection 2 the form of the application is prescribed. In subsection 3 the exhibits required are enumerated. In subsection 4 it is provided that the city clerk will set the application for hearing. In subsection 5 the form, manner, and time of notice are prescribed. In subsection 6 it is provided that at the time set the hearing will be had. The ordinance continues (subsection 7):

"7. *Recommendation.* Thereafter the commission shall make and file its recommendations in writing in relation thereto with the city clerk. The commission may recommend the granting or denial of the application, or the granting of only part of the uses sought to be established, * * *. If said commission finds that the granting of such petition will not be detrimental to the public health, safety, morals or general welfare, it shall recommend that a permit be issued, subject to such conditions, if any, as it may deem advisable. * * * In passing on said application the planning commission shall

also consider the character of use of the adjacent and surrounding territory, and the scope and trend of the development of uses therein. * * *

"8. *Hearing by council.* At its next regular meeting after the filing of such recommendations with the city clerk, or at any time to which the matter may be continued, the city council shall proceed to pass upon same, and no other notice need be given.

"9. *Order by council.* Thereafter the city council shall make and file its resolution and order determining said application, and shall consider and determine same in accordance with the provisions hereof as to the manner of action by the planning commission.

"10. *Decision final.* The action of the city council in relation thereto shall be final and conclusive upon the applicant, and such decision shall run with the land.

[1, 2] "Section 15. *Special permits.* A. Regulation of Use. 1. Extent of Use. In all cases where a use is herein conditioned to be exercised upon obtaining a permit therefor from the city council, it shall be unlawful to exercise same without having first obtained such permit therefor." Subsection 3 provides the procedure shall be the same as under section 12. "4. *Hearing and Recommendation by planning commission.* The planning commission shall hear such application and shall make a recommendation thereon in the manner and form herein provided for establishing nonconforming uses, and in so doing may recommend the granting or denial of said application, or the temporary granting of same, in whole or in part, but it shall not recommend the granting of same as to any property when no notice has been given." Then in section 16 power is conferred on the city council to issue subpoenas, require the attendance of witnesses and the production of records and documents. The plaintiff quotes from Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, on page 85, 87 P.2d 848, 854, where the court says: "In view of these principles, it necessarily follows that the court to which the application for mandate is made to secure the restoration of a professional license must exercise an independent judgment on the facts. This does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort. As was pointed out in the St. Joseph Stock Yards case, supra, [St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033] in weighing the evidence the courts can and should be assisted by the findings of the board. *The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence.*" (Italics ours.) The plaintiff then argues that the recommendation of the planning commission should be given the greater weight because it caused notice to be given before holding a hearing; and that the city council did not cause notice to be given before it held a hearing. That argument may not be approved for two distinct but separate reasons. In the first place the recommendation of the commission did not comply with an expressed condition of the ordinance. To be complete a recommendation to grant a permit should have made a finding that the granting thereof would "* * * not be detrimental to the public health, safety, morals, or general welfare * * *" (sec. 12, subsec. 7, supra) but it did not do so. In the second place the plaintiff takes up the ordinance piecemeal. The ordinance should be construed as a whole. As so construed it does not provide for two hearings. It provides that the planning commission shall be a fact-finding body for the council and file its recommendations. It further provides that the council will have before it such recommendations and such other and additional evidence as will enable it to determine the issue before it. Furthermore the ordinance distinctly provides that the council will make the determination and that the council's determination will be final and conclusive. In other words, as we construe the ordinance it provides that the planning commission will be called upon to perform similar functions to those performed by a referee appointed by a court. The ordinance provides for one hearing and one determination. That hearing commences before the planning commission. Before the hearing commences notice of its initiation should be given as prescribed in subsection 5, supra. The hearing continues and does not end until a determination thereof is made as provided in subsection 9, supra. Although the council did not cause a sec-

ond notice to be given before it took up the hearing, its determination was not arbitrary.

[3, 4] As the ordinance did not provide for a second notice we understand the plaintiff to contend that the act of the council resulted in taking his property without due process. The point may not be sustained for several reasons. He has his property. It has not been taken from him. He has merely been denied a favor. Rubin v. Board of Directors of the City of Pasadena, Cal.Sup., 104 P.2d 1041. Again, if his property rights have been affected, that result was not caused by the determination complained of but it was caused by the enactment of the ordinance. Board of Zoning Appeals v. Waintrup, 99 Ind.App. 576, 193 N.E. 701, 705. Finally, as the provisions hereinabove set forth clearly show, at the commencement of the proceeding the city clerk gave notice as prescribed by the ordinance, later the commission filed its purported recommendation. The hearing thereof was, by the terms of subsection 8 of section 12, set for the next regular meeting of the council. That was a sufficient notice of the hearing. San Diego, etc., Co. v. National City, 174 U.S. 739, 19 S.Ct. 804, 43 L.Ed. 1154.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



43 Cal.App.2d 40

PEOPLE v. CARSON.

Cr. 3418.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1941.

Rehearing Denied Feb. 27, 1941.

Hearing Denied March 15, 1941.

1. Criminal law ⇐789(4)

The statute providing that if the statute dealing with the subjects of presumption of innocence and reasonable doubt be read, no further instruction on the subject of the presumption of innocence or "defining" reasonable doubt need be given, does not forbid any other instruction on the "subject" of reasonable doubt. Pen.Code, §§ 1096, 1096a.

2. Homicide ⇐151(1)

Under statute providing that when commission of a homicide is proven, burden of proving circumstances of mitigation, justification, or excuse is on a defendant, unless prosecution's proof tends to show crime is only manslaughter, or that defendant was justified or excused, it is necessary only that defendant produce evidence, the weight of which is sufficient to create in the minds of the jurors a reasonable doubt as to the existence of circumstances justifying the homicide. Pen.Code, § 1105.

3. Criminal law ⇐808½

The reading to jury of statute providing that when commission of a homicide is proven burden of proving circumstances of mitigation, justification, or excuse is on a defendant, unless prosecution's proof tends to show crime is only manslaughter, or that defendant was justified or excused, without explaining to jury the extent of the burden cast on defendant, tends to create in jury's minds the impression that the obligation cast on defendant is much greater than the obligation cast on him as defined by late decisions of the Supreme Court. Pen.Code, § 1105.

4. Criminal law ⇐808½

Instruction in murder prosecution that when commission of a homicide is proven in a murder prosecution, burden of proving circumstances of mitigation, justification, or excuse is on a defendant, unless prosecution's proof tends to show crime is only manslaughter, or that defendant was justified or excused, was erroneous, where it was not aided by an explanatory instruction. Pen. Code, § 1105.

5. Homicide ⇐300(3)

In murder prosecution, court erred in refusing to give instruction that a person in the exercise of his right of self-defense, not only has a right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger.

6. Criminal law ⇐770(2)

In murder prosecution, defendant was entitled to have jury instructed fully and correctly on all legal principles applicable to the facts shown in evidence, not only in evidence produced on his own behalf, but also in evidence produced by the prosecution.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Elgin Carson was convicted of murder in the second degree, and he appeals.

Judgment reversed, and new trial ordered.

Hearing denied; GIBSON, C. J., and EDMONDS and CURTIS, JJ., dissenting.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged by information with the crime of murder and was found guilty by a jury of murder in the second degree. He was also charged with a prior conviction of murder and this charge was admitted. He has appealed from the judgment of conviction.

The decedent and the defendant were twin brothers. In the evening of May 11, 1940, they were visiting at the home of their sister, Mrs. Willie Key, and as they came out of the house at "about dusk" they approached decedent's automobile which was parked at the curb and in which the wife of decedent, Mrs. Reva Carson, was sitting. Mrs. Carson testified that as the two brothers came from the house they were carrying on an "ordinary conversation" but she could not understand what they were saying. She testified: "Well, they came out of the house and walked down the steps, and I called to my husband to come on, hurry up and let's go home. So he said all right, and then they walked on to the car. And then my husband started to go around the back end of the car, to go around to the driver's seat, and just as he went around the back of the car Elgin followed him, and instead of my husband getting in the car he started backing up, and I glanced toward the back and I saw Elgin opening his knife. * * * And then he (decedent) backed to the front of the car, and then whirled and ran. * * * He ran away from the defendant, and he followed him, and he caught up with him I think on the front porch, and there was a struggle on the front porch and my husband gave a blood-curdling scream, and about that time the front door opened, and my husband said to his sister, 'Willie, he has cut me to death,' and then he fell in the door."

The two men were similar in appearance and both wore grey suits. Defendant testified that he told decedent that he wanted to ride with him to 42nd street but decedent told him that he could not do so because his wife might want to be taken somewhere. Defendant then told decedent that he wanted to go and started to open the rear door of the car. He further testified: "I started to open the door to get in and he said, 'Don't get in. I told you, don't get in, I can't take you.' And I asked him why. And in the meantime I had attempted to open the door, and he slammed the door and said—I turned around and I saw a knife in his hand, and when he slammed the door he said, 'Don't get in.' I said, 'What is the matter? You have a knife.' And he said, 'Yes, if you attempt to get in I will use it.' And in the meantime I backed up, and he was approaching me—I backed around on the sidewalk, and as we reached the sidewalk, I had in mind that I was afraid to turn my back to him—I didn't know, from the way he spoke—I hit at his wrist to try to knock the knife on the ground and run, and I missed it. So I ran myself, and when I ran I was aiming to go around my sister's house; but in the meantime we walked around together, and I jumped onto the porch, and when I did, by the time I got to the porch, he was right there with me. And between the time that I left from the sidewalk up to the porch I had opened my knife out of my own pocket, and just the instant we hit the porch I felt a strike, and I felt a sting on my neck like that (indicating), and I clinched with him." Defendant further testified that they scuffled for a minute or two during which time he struck decedent and decedent was trying to strike him. Decedent fell and died five days later. Upon his body there was a long deep cut measuring seven inches in length extending across the upper left chest and a second cut fifteen inches long across the abdomen.

After decedent fell defendant went into the kitchen of Mrs. Key's house and cut his wrists with a butcher knife. He gave as a reason for doing this that he thought he was going to die from the wound in his neck and that he wanted to die quickly.

Mrs. Beulah Pruden, who lived next door to Mrs. Key, testified that she ran to Mrs. Key's house when she heard the commotion and saw decedent lying in the doorway. She stooped to render aid and saw two knives one on each side of decedent. One of these knives was brown in color and one was black. The prosecution presented several witnesses who testified that although present they did not observe any cut on defendant's neck.

Defendant contends that the trial court erred in refusing to give to the jury his proposed instruction No. XIV, which is as follows: "You are instructed that in a criminal case the burden of proof is always upon the prosecution, and when a defendant produces evidence of self defense, it is only necessary for him to create by a preponderance of evidence a reasonable doubt as to his guilt to entitle him to an acquittal, and if you have such reasonable doubt as to his guilt in this case, it is your duty to find defendant 'not guilty'." No instruction was given by the court covering the principle involved in the proposed instruction but the court gave the following instruction which is in the language of section 1105 of the Penal Code: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable".

[1-4] Respondent contends that since the court read to the jury section 1096 of the Penal Code on the subjects of presumption of innocence and reasonable doubt the matter was sufficiently covered and cites section 1096a, which provides that if section 1096 be read no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given. It is to be noted, however, that section 1096a provides that no further instruction defining reasonable doubt need be given. It is not provided therein that no other instruction on the subject of reasonable doubt need be given in any particular case. The Supreme Court has at various times given different interpretations to section 1105 of the Penal Code. In People v. Hong Ah Duck, 61 Cal. 387, the instruction under review was the following: "When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify by a preponderance of evidence on his part. That is, the killing being proved, the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. The burden of proof changes. * * * It must be in some degree, no matter how small, stronger than the proof of the prosecution on the other side." The court held that the instruction was proper, citing several earlier California decisions. But in several later decisions the Supreme Court has withdrawn its approval of the doctrine of the Hong Ah Duck case. People v. Bushton, 80 Cal. 160, 165, 22 P. 127, 549; People v. Post, 208 Cal. 433, 437, 281 P. 618; People v. Elliott, 80 Cal. 296, 22 P. 207; People v. Roe, 189 Cal. 548, 550, 565, 209 P. 560. It is now thoroughly established that under section 1105 it is necessary only that defendant produce evidence the weight of which is sufficient to create in the minds of the jurors a reasonable doubt as to the existence of the alleged circumstances which justified the homicide. The reading of section 1105 to the jurors without explaining to them the extent of the burden cast upon defendant would tend to create in their minds the impression that the obligation cast upon defendant was much greater than the obligation cast upon him as defined by the late decisions of the Supreme Court. Since an erroneous view of section 1105 was taken by the justices in the Hong Ah Duck and other cases it cannot be successfully argued that the jurors, without the aid of an explanatory instruction, could differentiate between the view expressed in the early California cases and the view expressed in the later cases and accurately determine the extent of the obligation cast upon defendant. Our views are in accord with the decision of the Court of Criminal Appeals of Texas, where, in Cogdell v. State, 43 Tex.Cr.R. 178, 63 S.W. 645, 647, it is said that "the court, in giving substantive defensive charges, should couple them with the reasonable doubt, to wit, if the jury believe, etc., or if they have a reasonable doubt with reference to the defensive matter, to give defendant the benefit of such reasonable doubt, and acquit him". The instruction under review is not in language which is to be commended but its fault lies not in the charge that it is too favorable to the accused but rather in the charge that it is not favorable enough. The words "by a preponderance of evidence" could well have been stricken from the instruction and as so stricken the instruction could well have been given.

[5, 6] The court erred in refusing the request of defendant for the following instruction: "The Court instructs the jury that a person in the exercise of his right of self-defense not only has a right to stand

his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger." People v. Kinowaki, 39 Cal.App.2d 376, 103 P.2d 203, 204; People v. Orosco, 73 Cal.App. 580, 239 P. 82. Although many instructions were given on the subject of self-defense we find no instruction which concerns the right of one attacked to pursue his adversary until he has secured himself from danger. Defendant was entitled to have the jury instructed fully and correctly on all legal principles applicable to the facts shown in evidence, not only in evidence produced on his own behalf but also in evidence produced by the prosecution.

The judgment is reversed and a new trial is ordered.

We concur: MOORE, P. J.; McCOMB, J.



43 Cal.App.2d 35

PEOPLE v. LATHAM.

Cr. 3403.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1941.

Rehearing Denied Feb. 27, 1941.

Hearing Denied March 13, 1941.

1. Criminal law ⇐1159(2)

If circumstances reasonably justify verdict of guilty, reviewing court's opinion that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with jury's determination.

2. Criminal law ⇐1144(13)

The reviewing court must assume existence of every fact pointing to guilt which the jury could have reasonably deduced from the evidence, and determine whether there were sufficient facts to justify jury in drawing inference of guilt.

3. Larceny ⇐65

Evidence that defendant was driving automobile containing stolen property shortly after theft, that when stopped by officers he immediately fled and abandoned automobile, and that he later denied having driven automobile at any time, sustained conviction of grand theft.

4. Criminal law ⇐543(1)

A letter by investigator in district attorney's office seeking to locate traveling salesman who testified at preliminary examination, and letter from salesman postmarked from another state, and suggesting that salesman's testimony at first hearing be used, were admissible for limited purpose of showing due diligence to secure presence of salesman, as ground for admitting transcript of salesman's former testimony.

5. Criminal law ⇐543(1), 1153(6)

Determining whether district attorney used due diligence to find witness, as affecting admissibility of transcript of such witness' former testimony, is within sound discretion of trial judge, whose decision should not be reversed in absence of abuse of discretion, and what constitutes "due diligence" must depend on circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Diligence."

6. Criminal law ⇐543(2)

Where efforts by investigator for district attorney to locate traveling salesman who testified at preliminary examination resulted in letter from salesman in another state, dated three days before date set for trial, and suggesting that salesman's former testimony be used, and counsel for defendant had cross-examined such salesman at preliminary examination, admitting transcript of salesman's former testimony was not an abuse of discretion.

7. Larceny ⇐46

In prosecution for grand theft of property including check-writing machines from salesman, magistrate properly sustained objection to cross-examination of salesman at preliminary examination, designed to show how much salesman would have had to pay to replace stolen machines if they had been lost, since fair market value was controlling.

8. Larceny ⇐46

The value of stolen articles for purpose of establishing a felony charge is fair market value and not value to any particular individual.

9. Larceny ⇐45

In prosecution for grand theft, permitting officer to testify that stolen machines found in defendant's automobile, which were not available as exhibits, had particular val-

ues stamped upon them, was admissible for purpose of identifying the stolen articles, and not for purpose of fixing their value.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Hobart C. Latham was convicted of grand theft, and he appeals from judgment of conviction and order denying motion for new trial.

Affirmed.

Robert E. O'Neill, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was accused by information of the crime of grand theft and was convicted at a jury trial. He has appealed from the judgment of conviction and from the order denying his motion for a new trial.

It is now contended that the evidence is insufficient to justify the conviction. Andrew S. Thomson, a salesman for the American Check Writer Company, parked his automobile in front of his residence in the city of Los Angeles on February 28, 1940, at about 4:45 p. m. He left in the car, which he was using in his business, four checkwriters, a robe, two bathing suits, a scrapbook and a wheel and tire. When he returned to the car the next morning at 11 o'clock he found that all of these articles had been removed. Mr. Thomson valued one of the checkwriters at $107.50, another at $92.50 and the other two at $20 each. The other items taken were valued at various amounts bringing the sum total of the value of the stolen articles to well over $200. Two of the checkwriters were owned by Mr. Thomson and the other two had been consigned to him to be sold. He recovered all of his property from the police department the next day at about noon.

Officer Chase testified that at about midnight on February 28, 1940, he was working in a radio car with officer Olsen. As they drove south on Western avenue they noticed a Plymouth sedan which had just passed them having a bent license plate. They followed the sedan some distance and finally drove up to it and told the driver to pull over, that they wanted to talk to him. At this time the witness turned a flashlight on the faces of the occupants of the car. Defendant was driving the car and his companion was Joe Dillard, in whose name the car was registered. When the flash was turned on defendant's face he drove away and the officers immediately pursued him. At times during the pursuit, which continued for four or five miles, the officers' car traveled faster than sixty-five miles per hour. The car driven by defendant finally swung around a corner and into the driveway of a gasoline station, where defendant and Dillard jumped out and ran in different directions. The officers first took the ignition key from the Plymouth car and then searched the neighborhood for defendant and Dillard but did not find them. Upon returning to the Plymouth car they found that it contained a number of articles including those which had been taken from Thomson's automobile. On one of the checkwriters there was stamped the price of $107.50 and upon another there was stamped the price of $92.50. The articles belonging to Thomson were taken by the officers to the police station and later returned to Thomson.

Officer Carnahan testified that on February 29 he went to a tire shop on 12th street and there found defendant, who stated that he was operating under a secondhand license. The officer went outside the shop and talked to Joe Dillard, who was working on a tire. The officer then walked around the lot and returned to the shop to speak to defendant but defendant had gone.

Officer Eaton testified that on March 9, 1940, he and another officer went to an apartment house on West 7th street to arrest defendant. They covered the rear of the apartment house and two other officers went to the front of the house. Defendant started to walk through the back yard toward a driveway leading to an alley but he saw officer Carnahan coming toward him and said, "Well I guess this is it".

Defendant was sworn as a witness and stated that he was not in the Plymouth car which contained the stolen property.

[1-3] If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of defendant will not warrant interference with the determination of the jury. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. This court must assume the existence of every fact pointing to guilt which the jury could have

reasonably deduced from the evidence and determine whether there were sufficient facts to justify the jury in drawing the inference of guilt. People v. Hennessey, 201 Cal. 568, 258 P. 49. It appears from the evidence that defendant was driving a car containing stolen property shortly after the theft, that when stopped by the officers he immediately fled and abandoned the car, later denying that he had at any time driven the car. The evidence is sufficient to sustain the verdict.

[4] At the trial a transcript of the testimony of the witness Thomson given at the preliminary examination was read to the jury and it is now claimed by defendant that the district attorney did not show sufficient diligence to justify reading the transcript. The witness Doughty, an investigator in the office of the district attorney, testified that he had attempted to serve a subpoena on Thomson at the office of American Check Writer Company in Los Angeles, the place of Thomson's employment. The investigator was informed by Thomson's employer that he did not know Thomson's whereabouts for the reason that Thomson was traveling on business. At the employer's suggestion Doughty wrote a letter to the manager of the American Check Writer Company on May 15, 1940, asking him to mail a letter to Thomson and to ask Thomson to write and give information as to his whereabouts and whether he would be in Los Angeles on June 4, 1940, the date set for the trial. Thereafter Mr. Doughty received a letter from Mr. Thomson postmarked Roswell, New Mexico, dated June 1, 1940, in which Thomson stated that his office had contacted him regarding his absence from Los Angeles and further stating, "you may use my testimony given at first hearing". These letters were properly received in evidence for the limited purpose of aiding in the determination of the question whether the district attorney had used due diligence in attempting to secure the presence of the witness.

[5, 6] The determination of the question whether the district attorney had used due diligence to find a witness for the purpose of serving a subpoena is within the sound discretion of the trial judge, whose decision on the point should not be reversed in the absence of an abuse of discretion. People v. Land, 137 Cal.App. 196, 30 P.2d 433. What constitutes "due diligence" must depend upon the circumstances of the particular case. The trial judge was doubtless satisfied that at the time of the trial the witness Thomson was outside of the state of California. It appears from the record that defendant was represented at the preliminary examination by counsel who cross-examined the witness Thomson. We find no abuse of discretion.

[7, 8] Defendant asserts that his cross-examination of the witness Thomson was unduly restricted by the magistrate who conducted the preliminary examination and particularly complains that after Thomson had given the value of the four checkwriting machines he was not permitted to cross-examine for the purpose of showing that the value was less than the sum which had been set by Thomson. Two of the machines, according to Thomson's testimony, had been consigned to him and defendant sought to establish what Thomson would have had to pay to the company to replace the consigned machines in case they had been lost. An objection to this line of questioning was sustained and defendant offered to prove "that the fair value of those machines, in so far as he was concerned, was a price at which his company consigned them to him. * * *" The magistrate ruled correctly in sustaining the objection. The value to be placed upon stolen articles for the purpose of establishing a felony charge is the fair market value of the property and not the value of the property to any particular individual.

[9] There is no merit in defendant's contention that the trial court erred in permitting officer Chase to testify that one of the checkwriting machines which he found in the Plymouth car had the value of $107.50 stamped upon it and that the other machine had the value of $92.50 stamped upon it. One of these machines had been sold before the trial and the other had been returned to the company which owned it. The machines were not available to be offered in court as exhibits. The testimony of officer Chase was given for the purpose of identifying the stolen articles and not for the purpose of fixing their value. The testimony was admissible for the purpose for which it was received.

The judgment and the order denying a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

43 Cal.App.2d 1

In re FURTSCH'S ESTATE.

FURTSCH v. FURTSCH.

Civ. 12957.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1941.

Hearing Denied April 5, 1941.

1. Appeal and error ⇐907(3)

On appeal on judgment roll alone, findings are conclusively presumed to be supported by evidence.

2. Appeal and error ⇐907(3)

On appeal on judgment roll alone, findings are to receive, if possible, such construction as will uphold rather than defeat judgment thereon.

3. Appeal and error ⇐907(3)

On appeal on judgment roll alone, findings are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining judgment.

4. Appeal and error ⇐907(3)

On appeal on judgment roll alone, judgment will be reversed only on some fatal error appearing on face of judgment roll.

5. Appeal and error ⇐907(3)

On appeal on judgment roll alone, every presumption and intendment is resolved in favor of regularity of proceedings in trial court.

6. Trial ⇐404(1)

A finding capable of two reasonable constructions must be interpreted according to one that sustains judgment.

7. Appeal and error ⇐907(3)

Although wife's petition, to have set apart as homestead certain realty mentioned in inventory of deceased husband's estate, recited that realty had been acquired by the parties at time of their marriage, and court found that shortly before marriage parties agreed that the realty was desirable for community purposes and that they would contribute their separate funds toward purchase thereof, provision of trial court's order, reciting that the realty "having been acquired by them at the time of their marriage" was community property, was, on appeal on judgment roll alone, required to be construed so as to sustain the order, which set apart the realty as homestead, and would not be construed to mean that the realty had been acquired by the parties before their marriage.

See Words and Phrases, Permanent Edition for all other definitions of "Having Been Acquired by Them at the Time of Their Marriage".

8. Appeal and error ⇐907(3)

On appeal on judgment roll alone, from order setting apart for benefit of wife and as homestead, certain realty mentioned in inventory of deceased husband's estate, District Court of Appeal was required to assume that sufficient evidence was adduced to satisfy trial court that agreement, found to have been made by the parties before their marriage, that the realty was desirable for community purposes, ripened into a completed transaction that made the realty community property.

9. Husband and wife ⇐266

Husbands and wives have legal right to contract with each other concerning their personal interests in property, and by agreement between them the status of any property owned by them may be changed from separate to community, and vice versa.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Proceeding in the matter of the estate of George Furtsch, deceased, wherein Mary W. Furtsch filed a petition to have set aside as a homestead certain realty mentioned in the inventory of the estate of deceased. From an order setting apart the realty as homestead, George J. Furtsch appeals.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellant.

David Berniker, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal from an order in probate by which the court set apart, for the benefit of the widow of George Furtsch, and as a homestead, certain real property mentioned in the inventory of decedent's estate.

Appellant claims that Mrs. Furtsch's petition did not contain facts sufficient within section 660 of the Probate Code

to constitute a legally sufficient application for a declared homestead. He also claims inconsistencies in the findings of fact, and further, that the conclusions of law and resultant order are not sustained by the findings.

[1-6] The appeal comes before us upon the judgment roll alone. The rules governing such a situation were set forth quite recently in Chow v. City of Santa Barbara, 217 Cal. 673, 680, 22 P.2d 5, 7, where the following appears: "On such an appeal the power of the reviewing court is necessarily restricted. In such case 'the findings are conclusively presumed to be supported by the evidence; furthermore, it is also elementary that they are to receive, if possible, such a construction as will uphold rather than defeat the judgment thereon; they are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining the judgment.' * * * The judgment may be reversed only upon some fatal error appearing on the face of the judgment roll. * * * On an appeal on the judgment roll alone every presumption and intendment is resolved in favor of the regularity of the proceedings in the trial court. * * * A finding capable of two reasonable constructions must be interpreted according to the one that sustains the judgment, and a finding must be given such a construction, if a reasonable one, as will support the judgment." Authorities for the foregoing rules appear in the cited case.

With these limitations upon our powers of review, and considering the grounds of appeal set forth, we have examined the petition, the findings, the conclusions of law, and the order based thereon, with the result that in our opinion the order should stand affirmed.

The petition, with its annexed copy of a declared homestead, we find presented sufficient facts for the consideration of the trial court.

It appears from the findings in this case that the petitioner, Mary W. Furtsch, and the decedent, George Furtsch, were married in Los Angeles County on July 15, 1919; that they lived together continuously thereafter, as husband and wife, until the death of George Furtsch on June 13, 1938; that a declaration of homestead upon lot 71 of the Wiesendanger tract was recorded October 2, 1934, in the records of Los Angeles county, during the marriage of the parties and while they were residing upon the property. It was further found "that said real property was first viewed by the petitioner and the decedent shortly before June 27, 1919, and the parties at that time agreed that the said real property was desirable for community purposes, and that they would each contribute their separate funds toward the purchase of the property. That the grant deed to the property bears the date June 27, 1919. That said deed was recorded August 6, 1919. That the recorded instrument was mailed to the deceased from the office of the county recorder of Los Angeles county on August 13, 1919. That the said real property was occupied as a homestead by the decedent and his family, the petitioner herein, at the time of his death."

As a conclusion of law the court found that the property "is community property of George Furtsch, deceased, and Mary W. Furtsch, the petitioner herein", and further, "That the Declaration of Homestead recorded in Book 12944, page 328, Official Records of Los Angeles County, is a valid Declaration of Homestead and covers all of the property. That an order to set apart the said real property as a homestead to Mary W. Furtsch, widow of decedent and petitioner herein, should be granted."

The order setting apart the homestead recited "that said real property was, and is, the community property of said George Furtsch, deceased, and Mary W. Furtsch, his widow, having been acquired by them at the time of their marriage; * * *. It is Therefore Ordered that said real property * * * be, and the same is hereby set apart to the exclusive use and benefit of the widow of deceased, to-wit: Mary W. Furtsch."

In a rather exhaustive discussion of phrases used in the different documents appearing in this record, appellant indicates that various inconsistencies exist in the findings and conclusions that are incapable of reconciliation by means of an order. Appellant does not specifically state that a fatal error appears on the face of the judgment roll, but apparently that is his contention. He argues that the language of the instruments quoted precluded a determination by the trial court that the real estate in question was community property, calling attention to the statement in paragraph III of the findings that shortly before June 27, 1919, the parties, being then unmarried, agreed that the real property was desirable for community purposes and that

they would each contribute their *separate* funds toward the purchase of the property. He then notes that the order by which the homestead was set apart refers to the community property as "having been acquired by them at the time of their marriage," and contends that, since the petition itself recited that the real property "*had* been acquired by them at the time of their marriage", the language used in the order, "having been acquired by them at the time of their marriage," means in effect that the property had been acquired by the parties before marriage.

[7] In the light of the rules which we have noted, this seems a strained construction. The record shows that the marriage took place on July 15, 1919, which was eighteen days after the date of the deed, but which was also twenty-two days before it was recorded. Of course, the parties could not have been owners of community property before marriage, and there is no finding that they were, but there was a finding that they agreed at that time, namely, before marriage, that the property in question "was desirable for community purposes." The trial court having oral and documentary evidence before it was in position to determine whether the circumstances surrounding the purchase and holding of the real estate warranted the conclusion that it was community property.

[8, 9] It will be conceded that the phrase, "at the time of their marriage," is not as specific as "at the date of their marriage" would have been. Still, looking back twenty years, the period during which the parties had held the property, one could say, using a general term and without regard to an exact date, that it was in fact acquired "at the time of their marriage." This we conceive to be such liberal construction of findings as the rules enjoin upon us. We have never seen a copy of the deed, do not know its form or contents, nor do we know why it was withheld from record for more than a month, but we are bound to assume, under the rules governing our review, that sufficient evidence was adduced to satisfy the court that the agreement between Mr. and Mrs. Furtsch that the real estate was desirable for community purposes ripened into a completed transaction that made it community property. Husbands and wives had a definite legal right in 1919, as they have today, to contract with each other concerning their personal interests in property, and as is stated in Vieux v. Vieux, 80 Cal.App. 222, at page 226, 251 P. 640, at page 642, "The authorities are in accord that by agreement between husband and wife the status of any property owned by them may be changed from separate to community, and vice versa."

The order is affirmed.

We concur: YORK, P. J.; DORAN, J.



HAMMELL v. BRITTON et al.*

Civ. 11560.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1941.

Hearing Granted April 11, 1941.

1. Judgment ⇐460(4)

An amended complaint, which alleged that wife commenced an action in Colorado in 1928 to set aside Colorado divorce decree granted husband in 1891, which action was brought after husband's death and after husband had conveyed California property to plaintiff by deed of gift, that plaintiff was not made a party to the Colorado action, that thereafter wife introduced Colorado decree of 1928 setting aside divorce decree in California action to quiet title to land deeded by husband to plaintiff, and that subsequently plaintiff obtained a Colorado decree adjudging that decree of 1928 was obtained through fraud, contained sufficient allegations of extrinsic fraud of wife to authorize setting aside judgment in California quiet title action.

2. Divorce ⇐326

Where husband obtained a divorce decree in Colorado in 1891, and wife in 1928, which was after husband's death, obtained a decree setting aside divorce decree of 1891, and thereafter Colorado court in 1934 entered a decree adjudging that decree of 1928 was obtained through fraud and was of no effect, determination of the Colorado court as to marital status of parties was entitled to full faith and credit in California courts.

* Subsequent opinion 119 P.2d 333.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by D. C. Hammell against John H. Britton and others to set aside a judgment in a former action to quiet title to certain real property in state. From a judgment for defendants, after sustaining a demurrer to plaintiff's amended complaint without leave to amend, the plaintiff appeals.

Reversed with directions to overrule the demurrer.

Thos. H. Hearn, of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff appeals from a judgment in favor of defendants, which judgment was entered after the trial court had sustained a demurrer to plaintiff's amended complaint without leave to amend.

This action was brought to set aside a judgment in a former action numbered 202490 in the files of the superior court in the county of Los Angeles. Said action, hereinafter called the former California action, was originally brought in 1926 by Sophie Britton against her former husband, John Henry Britton, and against the plaintiff herein, D. C. Hammell, to quiet title to certain real property in this state. During the pendency of said former California action, said John Henry Britton died in 1927 and said Sophie Britton died in 1932 and their representatives were duly substituted. The cause was first tried in 1928 and it was again tried in 1933 and each of said trials was followed by an appeal. See Britton v. Bryson, 216 Cal. 362, 14 P.2d 502; Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221. The facts which form the background of this litigation are fully set forth in the opinions on said appeals and need only be briefly summarized.

Sophie Britton and John Henry Britton were married in 1873 and were residing in Colorado when said John Henry Britton obtained a decree of divorce in that state in 1891. He remarried thereafter and it was not until 1926 that further litigation started between the parties by the filing of said former California action. Said Sophie Britton sought thereby to quiet title to certain real property which said John Henry Britton had conveyed in 1926 to D. C. Hammell, the plaintiff herein, by deed of gift. After the filing of that action, and after the death of John Henry Britton in 1927, said Sophie Britton commenced an action in Colorado in 1928 to set aside the Colorado divorce decree of 1891. The defendants in that action were the administrator of the estate of said John Henry Britton and the heirs of said John Henry Britton. Plaintiff herein was not a party to said Colorado action to set aside the divorce decree. In that action Sophie Britton obtained a decree in 1928 setting aside the Colorado divorce decree of 1891 and she introduced said decree on the first trial of the former California action in 1928. Said former California action was based upon the theory that she and said John Henry Britton were at all times husband and wife; that the real property was community property; and that the conveyance thereof by way of gift to D. C. Hammell in 1926 was invalid as she had not consented thereto. Judgment went against her on the first trial of the former California action but said judgment was reversed on appeal. Britton v. Bryson, 216 Cal. 362, 14 P.2d 502. After her death in 1932, the former California action was again tried in 1933 and a judgment was entered in favor of her administrator, which judgment was affirmed on appeal. Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221. It is this last mentioned judgment which plaintiff, D. C. Hammell, now seeks to set aside.

In addition to the facts above set forth, plaintiff D. C. Hammell alleged in his amended complaint that he had no knowledge or notice of said 1928 decree setting aside the divorce decree or of the pendency of the action in which said decree was entered until said decree was introduced at the first trial of the former California action; that thereafter he commenced an action in Colorado against the administrator of the estate of Sophie Britton and the administrator of the estate of John Henry Britton and certain other defendants to set aside the Colorado decree of 1928 upon the ground that said decree had been obtained by the fraud and collusion of said Sophie Britton and the other parties to the action in which said decree had been obtained; that on July 6, 1934, a decree was entered in plaintiff's Colorado action whereby it was adjudged that the Colorado decree of 1928 setting aside the divorce decree was obtained through the fraud and collusion of the said Sophie Britton and other parties and that said Colorado decree of 1928 was of no force and effect and that the Colorado

divorce decree of 1891 in favor of John Henry Britton was a valid and binding decree from and after the day of its entry; that an appeal was taken from said Colorado decree in plaintiff's favor and that said decree was thereafter affirmed. Plaintiff therefore prayed that the judgment in the former California action, which was based upon the Colorado decree of 1928, be set aside.

Plaintiff contends that his amended complaint stated a cause of action and that the trial court erred in sustaining the demurrer thereto and in entering judgment in favor of defendants. In our opinion, this contention must be sustained. To hold otherwise would mean that the decree in the former California action quieting the title of Sophie Britton to the real property standing in the name of plaintiff, D. C. Hammell, would be permitted to stand despite the fact that it was based upon the 1928 decree of the Colorado court setting aside the Colorado divorce decree of 1891, which decree of 1928 has in turn been set aside in the later Colorado action in which it was adjudged that the 1928 decree of the Colorado court was obtained by fraud and collusion of said Sophie Britton and others and that said Sophie Britton was not the wife of said John Henry Britton at any time after the entry of the Colorado divorce decree of 1891. This would be a strange and unusual result at which to arrive in this prolonged litigation.

[1] Defendants take the position that the allegations of the amended complaint show only intrinsic fraud rather than extrinsic fraud on the part of said Sophie Britton. We do not believe this position to be tenable. While our attention has not been directed to any case directly in point, the authorities have frequently discussed the nature of the fraud which constitutes extrinsic fraud justifying the setting aside of a judgment in a former action. Perhaps the cases most frequently cited are Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St. Rep. 159, and United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93. See, also, 15 Cal.Juris. 14, § 123; 23 Cal.Law Rev. 79; 9 Cal.Law Rev. 156 and cases cited. Some of the acts which constitute extrinsic fraud are set forth in Pico v. Cohn, supra, but "any attempted recital of the means or manner in which extrinsic fraud may be perpetrated is necessarily incomplete and not intended as a statement of all the devices which may be employed". 15 Cal. Juris. 16; see, also, Milekovich v. Quinn, 40 Cal.App. 537, 547, 181 P. 256. Under the general principles set forth in said authorities, we are of the view that the allegations of the amended complaint were sufficient to show extrinsic fraud on the part of said Sophie Britton.

[2] The facts here were quite different from the facts in the ordinary case wherein it is sought to set aside a judgment in a former action. Related litigation was being conducted in the courts of two jurisdictions. The litigation in Colorado involved the marital status of said Sophie Britton and said John Henry Britton and the litigation in California involved the rights of said parties and plaintiff D. C. Hammell in the real property situated in California. The determination of the Colorado courts, however, relating to the marital status of said Sophie Britton and John Henry Britton was entitled to full faith and credit in the California courts (Britton v. Bryson, 216 Cal. 362, 14 P.2d 502), and under the circumstances, such determination would be the decisive factor in the California litigation. With these considerations in mind, we may consider the conduct of said Sophie Britton as shown by the allegations in the amended complaint. After filing the California action and after the death of said John Henry Britton during its pendency but prior to the trial thereof, said Sophie Britton, without notice to and without the knowledge of said plaintiff D. C. Hammell, commenced a fraudulent and collusive action in Colorado to set aside the Colorado divorce decree of 1891 and to have it determined that she and John Henry Britton were husband and wife at all times including the time when the property was acquired and the time when the deed of gift was delivered to plaintiff D. C. Hammell by said John Henry Britton in 1926. She succeeded in obtaining such a decree through such fraud and collusion and she introduced said decree in the former California action as the basis for her judgment therein. Plaintiff learned of such decree for the first time when it was so introduced upon the trial of the former California action and, under the circumstances, he had no real opportunity to defend against it. It therefore appears from the allegations of the amended complaint that the fraud of said Sophie Britton in obtaining the Colorado decree of 1928 permeated the entire litigation and that such

fraud prevented any real contest or adversary trial in either the Colorado trial of 1928 or the trial of the former California action. In so far as said former California action is concerned, the alleged fraud was in our opinion extrinsic fraud which would warrant the setting aside of the judgment therein.

The judgment is reversed with directions to the trial court to overrule the demurrer.

We concur: NOURSE, P. J.; STURTEVANT, J.



43 Cal.App.2d 26

CRUDO v. GUIDA.

Civ. 11390.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1941.

1. Partnership ⇐120

In action between former partners for money had and received, based on theory that final settlement had been had, under which plaintiff was entitled to half of broker's commission owing to the partnership, and that commission had been paid to defendant but defendant had failed to turn over plaintiff's share to plaintiff, complaint in form of common count need not allege that there had been an accounting or settlement of the partnership affairs.

2. Partnership ⇐120

Where complaint alleges facts showing formation of a partnership and it appears that subject-matter of the action involves a partnership transaction, accounting and settlement of partnership affairs must be alleged.

3. Partnership ⇐120

In action between former partners for money had and received, based on theory that final settlement had been had, defendant claiming that debt sued upon was part of an unsettled partnership transaction may raise the issue by way of special defense or cross-complaint, or both.

4. Appeal and error ⇐882(3)

Where absence of accounting as set forth in cross-complaint was not denied by answer thereto, but both sides and the court treated the issue as an open one, defendant could not urge for the first time on appeal that absence of accounting was admitted by the pleadings.

5. Partnership ⇐121

Evidence *held* to authorize recovery from former partner of share in commission owing to the partnership, and paid to former partner, in action for money had and received, on theory that final settlement of partnership was made under which plaintiff was entitled to share in such commission.

6. Appeal and error ⇐1011(1)

The finding of trial court on conflicting evidence is binding on appeal.

7. Appeal and error ⇐1051(3)

Hearsay testimony pertaining only to a matter admitted by defendant was not prejudicial to defendant.

8. Appeal and error ⇐1058(2)

Sustaining objection to a question propounded to defendant, concerning his "understanding" of scope of agreement, was not harmful to defendant where defendant had already testified quite fully with reference thereto.

9. Costs ⇐19

Where cause brought in justice's court was properly certified to superior court for trial upon filing of cross-complaint and answer thereto, superior court did not err in allowing plaintiff, who prevailed, all court costs incurred by him in prosecution of the action, including costs in justice's court.

Appeal from Superior Court, of San Mateo County; A. R. Cotton, Judge.

Action by Joseph Crudo against Vincent Guida, for money had and received, wherein defendant filed cross-complaint for accounting between partners. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ephraim Adams, of San Francisco, for appellant.

Frank V. Kington, of Redwood City, for respondent.

KNIGHT, Justice.

Defendant appeals from a judgment for plaintiff based on an indebtedness growing out of the dissolution of a partnership. The principal questions involved relate to matters of pleading and proof.

The action was filed in the justice's court, the complaint being in the form of a common count, alleging that defendant became indebted to plaintiff in the sum of $200 for money had and received from one Harry Friend, for plaintiff's use and benefit. Answering, defendant denied the allegations of the complaint, and by way of special defense and cross-complaint alleged that plaintiff and defendant were partners in the real estate business in Redwood City; that there had been a dissolution of the partnership, but no accounting or settlement between the partners; that the claim sued upon by plaintiff arose out of partnership business, and that in fact plaintiff was indebted to defendant in a sum exceeding that claimed by plaintiff; wherefore defendant prayed "that an accounting be had between the parties settling their respective rights and obligations; [and] that until such accounting is had this action be dismissed. * * *" Plaintiff's answer to the cross-complaint consisted merely of a denial that he was indebted to defendant in any sum. Upon the filing of said answer the cause was certified to and subsequently tried in the superior court. Judgment was entered in plaintiff's favor for the sum for which he sued, and denying the relief prayed for in the cross-complaint. The basic findings were: That the partnership was dissolved by the parties on June 22, 1938; that "as a part of the transaction dissolving said partnership, said defendant and cross-complainant sold his rights in said business together with the furniture and good will thereof, excepting therefrom one desk which became the sole property of said defendant; and said parties then and there divided and distributed between them the remaining assets of said business excepting the claim or right to real estate broker's commission of Four Hundred ($400.00) owing and to be paid by the Friend Realty Company, Incorporated, to said partnership; that upon said dissolution and division of assets, it was agreed between said parties that when paid by said Friend Realty Company, Incorporated, said sum of Four Hundred ($400.00) Dollars should be divided between said parties hereto; that all the affairs of said partnership have been and were on said June 22, 1938, fully accounted for and settled, except as hereinabove found respecting said sum of Four Hundred ($400.00) dollars."

[1-3] Defendant's first contention is that the complaint failed to state a cause of action in that it contained no allegation that there had been an accounting or settlement of the partnership affairs. There is no merit in the contention. Where, as in the case of Dukes v. Kellogg, 127 Cal. 563, 60 P. 44, cited by defendant, the complaint alleges facts showing the formation of a partnership and it appears that the subject-matter of the action involves a partnership transaction, it is then essential to allege also that there has been an accounting and settlement of the partnership affairs. But obviously that rule has no application to a case such as this, where the action is based on the theory that a final settlement has been had and the complaint is in the form of a common count for money had and received. If under such circumstances a defendant claims that the debt sued upon is part of unsettled partnership transactions he may, as was done here, raise the issue by way of special defense or cross-complaint, or both.

[4] The second point made by defendant, as stated by him, is "that the absence of an accounting as set forth in the cross-complaint was admitted by the pleadings in that the same was not denied by the answer thereto". Doubtless that is true, but defendant fails to point out wherein he was prejudiced by the failure so to deny. Quite to the contrary, the record shows that when the cause came on for trial before the superior court the issue of whether or not there had been an accounting was treated by both sides and the court as an open one; evidence was introduced by the respective parties on that issue, and findings were made thereon. Under such circumstances defendant is not in a position to complain for the first time on appeal.

[5] Defendant's next contention is that the evidence does not support the findings. In this connection it may be stated that neither party explained in detail the circumstances attending the dissolution and the alleged accounting and settlement, so that the evidence in this regard is somewhat vague. Moreover, it appears contrary to the implication conveyed by a portion of the findings, that the disputed $400 commission was actually paid to defendant prior to and not after the dissolution, and

that plaintiff was aware of such fact at the time of the sale of defendant's interest in the business to plaintiff. Considering the evidence as a whole, however, and in the light most favorable to the trial court's decision, it is our opinion that it is legally sufficient to sustain the controlling finding that on June 22, 1938, an accounting and settlement was had between the partners of all the partnership affairs except as to the commission on the sale of the Friend property. Among the facts and circumstances supporting this view are the following: Defendant, having become dissatisfied with the manner in which the business was being operated, told plaintiff he was "going to quit"; and on June 22, 1938, the parties met for the purpose of dissolving the partnership. After some discussion, they computed the amount of money each had drawn, and divided the assets, including some land and outstanding notes; thereupon plaintiff paid defendant $100, in acknowledgment of which defendant executed and delivered the following so-called bill of sale: "June 22, 1938. I, the undersigned, Vincent Guida of the city of San Mateo, County of San Mateo, State of California, do hereby sell, deliver, and transfer to Joseph Crudo of San Carlos, San Mateo County, State of California, all my interest in that certain real estate office known as 751 El Camino Real, Redwood City, California together with all the fixtures (except one desk), maps and good will for the consideration of one hundred dollars ($100.00). Vincent Guida." However, the evidence affirmatively shows that at the time of the signing of said instrument, the matter of the commission on the sale of the Friend property was brought up and discussed, and at that time defendant admitted to plaintiff that he had received the commission, but stated that he did not then "have the money, that he would pay it later"; and that subsequent to the dissolution and settlement defendant requested plaintiff to accept a lot in payment of his half of the Friend commission, which plaintiff refused to do. And plaintiff testified that other than the matter of said commission "all * * * transactions were closed up by reason of this bill of sale. * * *"

Testifying in his own behalf defendant admitted having received said commission; and he did not deny having asked plaintiff to accept a lot in payment of plaintiff's half; but he argues that it is inconceivable that plaintiff would pay him $100, knowing at the time that he then owed plaintiff $200 on the Friend commission. While there would seem to be much force in this argument, the record discloses that testimony was given to that effect; and since the trial court, as the exclusive judge of the weight of the testimony and the credibility of the witnesses, evidently accepted the testimony as true, its conclusion is controlling.

[6] In further support of his claim that there was no accounting or settlement, defendant testified that there was an outstanding judgment for $200 in favor of the partners, about which nothing had been said at the time of the dissolution. But this testimony obviously conflicted with that given by plaintiff to the effect that other than the matter of said commission all partnership transactions were closed by virtue of the execution and delivery of the bill of sale; and the trial court in substance so found; therefore, in view of such conflict, the finding on that issue is binding on appeal.

[7-9] As his fourth point, defendant assigns as error several rulings made by the trial court on the admissibility of testimony, all but one of which relate to matters of hearsay. However, it appears that the hearsay testimony pertained only to the question of whether defendant actually received said commission, and since he admitted having received it, it cannot be said that the hearsay testimony operated to his prejudice. The remaining assignment involves a ruling sustaining plaintiff's objection to a question propounded to defendant as to his "understanding" of the scope of the partnership agreement. The record shows, however, that the ruling was not harmful because defendant had already testified quite fully with reference thereto. Nor is there any merit in defendant's final contention that the trial court erred in allowing plaintiff the costs incurred by him in the justice's court. Upon the filing of the cross complaint and the answer thereto the cause was properly certified to the superior court for trial; therefore in giving judgment for plaintiff the court did not exceed its authority in allowing plaintiff all court costs incurred by him in the prosecution of the action.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

POWERS FARMS, Inc., v. CONSOLIDATED IRR. DIST.

Civ. 2568.

District Court of Appeal, Fourth District, California.

Jan. 30, 1941.

Hearing Granted March 31, 1941.

1. Eminent domain ⇐266

An irrigation district may be sued under constitutional provision against taking or damaging property without just compensation, whether right to sue is predicated on absence or presence of negligence. Const. art. 1, § 14.

2. Eminent domain ⇐277

The filing of claim within period fixed under irrigation district liability law was a prerequisite to the maintenance of action against irrigation district for damages from seepage, though such action was grounded on constitutional provision against taking or damaging of private property for public use rather than on statute. Gen.Laws 1937, Act 3886*l*, § 2; Const. art. 1, § 14.

3. Action ⇐34

Where statute or Constitution creates a right of action but is silent as to the remedy, party entitled to the right may resort to any common-law action which will give him adequate redress.

4. Constitutional law ⇐29

Even though a constitutional provision is self-executing, Legislature may enact legislation to facilitate its operation and provide convenient remedies for protection of the right established, for determination thereof and for regulation of claims thereto.

5. Constitutional law ⇐26

Legislation to facilitate operation of constitutional provision and provide remedies for protection and enforcement of the right established must be in furtherance of the purposes of the constitutional provision, and if reasonable, is enforceable.

6. Eminent domain ⇐277

Damage to crops and lands caused by seepage from irrigation canal was the result of defective condition of property owned or operated and under control of the irrigation district, so as to require filing claim within statutory period as prerequisite to maintenance of action for such damages. Gen.Laws 1937, Act 3886*l*, § 2; Const. art. 1, § 14.

7. Municipal corporations ⇐723½, 741(3)

The requirement that claim must be filed with clerk of legislative body before a person may maintain an action for damages against political subdivision of the state is valid and may not be waived by officials of the legislative body. Gen.Laws 1937, Act 3886*l*, § 2.

8. Statutes ⇐211

The section heading of a statute as it appears in compilation is not to be held part of the statute or as controlling in its interpretation when it is not part of the statute as adopted by the Legislature, but merely heading preferred by the editor. Gen.Laws 1937, Act 3886*l*, § 2.

9. Statutes ⇐109

The main object of constitutional provision requiring subject of act to be expressed in title is to prevent Legislature as well as public from being deceived and injured by false, misleading and deceitful titles whereby legislation relating to one subject might be obtained under title of another. Const. art. 4, § 24.

10. Statutes ⇐105(1)

The constitutional provision with reference to subjects and titles of legislative acts should be liberally construed to effectuate its object. Const. art. 4, § 24.

11. Statutes ⇐105(1)

The constitutional provision governing subjects and titles of statutes should be so applied as to permit Legislature to include in an act all matters germane to main purpose of the enactment, and title is only required to contain a reasonably intelligent reference to the subject to which the legislation is addressed. Const. art. 4, § 24.

12. Statutes ⇐123(6)

The title of "An act relating to the liability of irrigation districts, their officers and employees" was sufficiently comprehensive to embrace all matters stated in the act, including requirement that claim against irrigation district be filed within specified time, and act was not invalid as having heterogeneous and misleading title. Gen.Laws 1937, Act 3886*l*; Const. art. 4, § 24.

Appeal from Superior Court, Fresno County; B. C. Hawkins, Judge.

Action by Powers Farms, Inc., against the Consolidated Irrigation District, for damages to realty from seepage. From a judgment for plaintiff, defendant appeals.

Reversed.

Hearing granted; PETERS, Justice pro tem., took no part in the consideration or decision of this matter.

Harris, Willey & Harris, Ronald Harris, and Everett G. Harris, all of Fresno, for appellant.

Christopher M. Bradley and Lucius Powers, Jr., both of San Francisco, for respondent.

GRIFFIN, Justice.

The respondent Powers Farms, Inc., a California corporation, as the owner of 160 acres of improved land, planted principally to mature orchard and vineyard, brought this action for damages against the defendant and appellant Consolidated Irrigation District, a public corporation, relying upon the constitutional guarantee that private property shall not be taken or damaged for public use without just compensation having been made. Constitution of California, Art. 1, Sec. 14. After trial without a jury a judgment was rendered in favor of plaintiff in the sum of $14,000. From this judgment defendant has perfected this appeal.

The complaint, filed Nov. 30, 1938, alleges generally that during the years 1937 and 1938, appellant district permitted large and excessive quantities of water to seep or escape from the Fowler Switch Canal, owned and operated by the district in and onto the lands of the respondent, whereby such excessive seepage waters caused respondent's orchards, vineyards, growing crops and lands to be severely damaged and destroyed.

On Feb. 27, 1940, the court found generally that the Fowler Switch Canal, running in a general southwesterly direction, passes in its course approximately one-fourth of a mile northerly of respondent's lands, and at an elevation approximately 14 feet higher than the northerly boundary of respondent's lands; that the channel of the Fowler Switch Canal extends in and through an aquifer, consisting of porous material, and the lands south of the Fowler Switch Canal, including the lands of the respondent, slopes southerly and southwesterly from the canal; that water freely escapes from the canal during all times when water is carried in the canal and, more particularly, when water flows at high stages and for extended periods of time in the canal; that as a proximate result of such flow of water under these circumstances there was, in 1937 and 1938, a great and destructive seepage from the canal into and through the soil contiguous to the canal and into and through the lands of the respondent, and that the appellant at all times well knew that in the years 1937 and 1938 the flow of water in that canal was causing great and destructive rises of surface water on the lands of respondent; that early in the year 1937, the respondent advised and warned appellant in writing that large quantities of seepage waters were escaping from its canal and causing damage to respondent's lands and crops; that the lands of respondent, beginning about April 1, 1937, began to be damaged and continued to be damaged by reason of the water flowing in the canal and escaping therefrom and through the aquifer underlying the canal and underlying respondent's lands during the years 1937 and 1938, which caused the lands of respondent to become water-logged and flooded and permanently damaged and rendered impossible of cultivation, so that to a large extent the trees and vines on the lands were severely damaged and a greater part killed and destroyed; that this caused the respondent to suffer damage in the years 1937 and 1938 in the sum of $14,000 in addition to and exclusive of any damage to the land and improvements thereon occurring in prior years and particularly, occurring in the year 1932; that the damage suffered by respondent and proximately caused by the appellant was much greater in 1937 and 1938 than theretofore, and the ground was more completely saturated and new and greater areas were affected; that subsequent to the year 1932 there occurred substantial changes in the Fowler Switch Canal adjacent to the lands of respondent, which increased the seepage therefrom; that among other changes was the construction of a check drop in the canal immediately north of the respondent's property in the winter of 1932 and 1933, which increased the hydraulic pressure of the water in the canal above the check drop; also that such change resulted in increased seepage in the sides of the canal for a considerable distance; that there was a gradual increased flow of water in the canal in the years 1937 and 1938; that the water from the Fowler Switch Canal was the proximate cause of the damage caused by the respondent in the years 1937 and 1938; that it is not true that the cause of action of respondent is barred by the provisions of section 343 or section 338, subdivisions 1 and 2 of the Code of Civil Procedure;

that no verified claim for damages was made nor required to be made by the respondent as provided by the General Laws of California, Act 3886*l*, sec. 2, Deering's Gen.Laws 1937, vol. 1, p. 1932, Stats.1935, p. 2250; that said statute has no application in this case; that appellant, by its use and operation of the canal, has not acquired any prescriptive right as against the respondent and has not acquired, nor is appellant entitled to enjoy, any easement against the rights of the respondent; that said canal has not been maintained as originally constructed but has been materially altered and changed by natural causes and by the appellant.

The evidence clearly establishes that after respondent sustained the damage in 1932, appellant immediately thereafter made many changes in the Fowler Switch Canal and the aquifer underlying the adjacent land which greatly increased the seepage. As was pointed out by the trial court, among the probable causes of the additional seepage may be listed the following: (1) Increased hydrostatic pressure above the drop; (2) further erosion of the original hardpan bottom of the canal; (3) possible opening of channels in the aquifer itself suggested by testimony of water pouring into test wells in streams; (4) possible widening of cracks and fissures in the roofing of the aquifer or caving in thereof making it easier for the confined water to reach the surface; (5) a probable raising of the water table in the aquifer itself; and (6) the greatly increased flow of water in the Fowler Switch Canal in 1937 and 1938, as compared to the flow of water subsequent to 1932. The evidence also indicates that the canal was an earthen ditch approximately 60 feet wide and 10 feet deep with a carrying capacity of about 1,200 second feet of water at high flow stages. There was evidence that the bed of the canal below the check drop and north of respondent's property was disturbed by a drag line. One witness called by appellant, who was characterized by it as an authority on ground water and geology and who was engaged by it to investigate the ground water and seepage conditions on respondent's ranch and to make recommendations in respect thereto, discovered, quoting him, "a serious seepage condition." This witness testified that he advised the appellant to line the Fowler Switch Canal to cure the serious seepage condition and that the appellant took his advice and thereafter lined the canal, and that this work was done subsequent to the year 1938. He also testified that in his professional opinion when the lining of the canal was completed that it would cure the serious seepage condition and would prevent any further seepage from damaging respondent's land. From an examination of the record it becomes apparent that the injury to respondent's land for which recovery of damages was sought must have been as a result of a defective condition of the property owned by the irrigation district and was an injury which resulted from the performance of certain work on the canal which caused an extraordinary seepage of water from the canal onto respondent's land.

Appellant first challenges the sufficiency of the evidence to support the findings that the changes made in the canal materially increased the seepage condition on respondent's land and that the seepage from the canal north of respondent's land caused the damage of which complaint is made; secondly, that the action was barred by the statute of limitations; and thirdly, that the court had no jurisdiction to hear the action, because no verified claim for damages was filed with the district under Act 3886*l*, section 2, Deering's General Laws 1937, vol. 1, p. 1932, Stats.1935, p. 2250, which reads in part: "Whenever it is claimed that any person or property has been injured or damaged as a result of any dangerous or defective condition of any property owned or operated and under the control of any irrigation district or its officers or employees and/or the negligence or carelessness of any officer or employee of an irrigation district, a verified claim for damages shall be presented in writing * * * within ninety days after such accident or injury has occurred. * * * The foregoing shall be a condition precedent to the filing or maintaining of any action for said injury or damages."

If the third contention is tenable, i. e. that a verified claim should have been presented, then it becomes unnecessary to discuss the remaining points. It will be noted, as pointed out by appellant, that this provision requiring the claim to be filed is quite similar to the provision requiring the filing of a written claim for damages against a county or municipal corporation based on a claim for damages resulting from a dangerous or defective condition of any public street, property, etc., as set

forth in section 1, Act 5149, Deering's General Laws 1937, vol. 2, p. 2204, Stats.1931, p. 2475 (hereinafter referred to as Act 5149), and the provision requiring the filing of a written claim for damages based on the negligence of a public officer as set forth in section 1, Act 5150, Deering's General Laws 1937, vol. 2, p. 2205, Stats.1931, p. 2476, as amended (hereinafter referred to as Act 5150).

Appellant specifically relies upon Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102 (hearing denied by the Supreme Court), which was an action for damages caused by flood waters which were diverted by a county's erection and maintenance of a storm ditch. It was there held that under the act relating to the liability of cities, counties and school districts for damages resulting from a dangerous or defective condition of public streets, works or property, a verified claim must be presented within 90 days after the accident occurred and that compliance with the ninety-day provision was mandatory. It was also held that the right to sue a county is conferred by statute and the procedure set forth in the statute giving claimants a right to sue must be followed and that where the plaintiff's cause of action rests on the provisions of such statutory act relating to the liability of counties for such injuries a verified claim must be filed within ninety days after the injury.

Respondent points out that the right to sue the appellant herein, Consolidated Irrigation District, is not predicated upon any statutory right but is a right directly given by virtue of the constitutional provision above referred to; that there is no statutory right given to respondent to sue the district as is conferred by the provisions of Act 5619, section 2, Deering's General Laws 1937, Stats.1923, p. 675, as against the counties or municipalities; that it is only where a cause of action has arisen under the irrigation district liability law, supra, that a verified claim for damages must be presented and filed within ninety days after "such accident or injury has occurred."

[1] The right to sue an irrigation district under the constitutional provision has been often declared whether such right is predicated on the absence or presence of negligence. Hume v. Fresno Irrigation District, 21 Cal.App.2d 348, 354, 69 P.2d 483; Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, 567, 203 P. 814; Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 P. 908.

[2] The only question here presented resolves itself into this: If the acts alleged resulted in the "taking or damaging of private property for public use" in violation of the constitutional provision, would we be compelled to hold that the requirement of the filing of a claim within the period fixed by the legislature under the irrigation district liability law, supra, was a prerequisite to the maintenance of this action by respondents?

In Young v. County of Ventura, supra [39 Cal.App.2d 732, 104 P.2d 105], the plaintiffs, as they did here, argued that a claim was not a prerequisite to the filing of an action where it was claimed that the property taken or damaged was so taken or damaged in violation of section 14 of Article 1 of the Constitution of California. In disposing of this argument the court said: "Even if it be assumed that defendant's action resulted in the 'taking or damaging of private property for public use' in violation of the constitutional provision, we would still be compelled to hold that the requirement of the filing of the claim within the period fixed by the legislature would be prerequisite to the maintenance of an action by plaintiffs. The constitution declares the right but does not provide the procedure by which the right may be enforced, and the legislature acted within its province in establishing the procedure necessary for the enforcement of the right. 'When a state Constitution such as ours provides neither the mode for the taking or for the payment of private property, the mode of procedure may be provided by either statutory or charter provisions.' Crescent Wharf, etc., Co. v. City of Los Angeles, supra (207 Cal. 430, 278 P. 1028, 1030). By failing to comply with the procedure established by the legislature plaintiffs are deemed to have waived their right to enforce payment." (Citing cases.)

[3-6] It is a well-settled rule of law in this state that where a statute or the constitution creates a right of action but is silent as to the remedy, the party entitled to the right may resort to any common-law action which will give him adequate redress (Rose v. State of California, Cal. Sup., 105 P.2d 302), and even though a constitutional provision is self-executing, the legislature may, and in many instances must, enact legislation to facilitate its operation and provide convenient remedies

for the protection of the right established, and for the determination thereof and the regulation of claims thereto. Such legislation must be in furtherance of the purposes of the constitutional provisions, and if reasonable, it is enforceable. Chesney v. Bryam, 15 Cal.2d 460, 101 P.2d 1106. The purpose of the law requiring the early filing of a claim is fully discussed in Young v. County of Ventura, supra, 39 Cal.App.2d page 737, 104 P.2d 102, and such requirement was held to be a reasonable provision. It would be impossible, under the evidence and the findings of the court in the instant action, to hold that the damage complained of was not the result of a defective condition of property owned or operated and under the control of the irrigation district. Young v. County of Ventura, supra; Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29; Crescent Wharf, etc., Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028; Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712; Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516; Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185. Therefore, if it was a damage to respondent's property as a result of a defective condition of property owned or operated and under the control of the irrigation district or its officers or employees, section 2 of the irrigation district liability law, supra, is applicable.

In view of the cited cases and their application to the law and facts here presented, we are unable to justify the finding that section 2 of said act requiring the filing of a claim within ninety days "after such * * * injury occurred" was not a necessary prerequisite to the filing or maintaining of any action for said injury or damages.

[7] The requirement that a claim must be filed with the clerk of a legislative body before a person may maintain an action for damages against a political subdivision of the state of California has been upheld by a number of decisions of California reviewing courts. Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345; Myers v. Hopland U. E. School Dist., 6 Cal.App.2d 590, 44 P.2d 654; Thompson v. County of Los Angeles, supra. This statutory requirement may not be waived by the officials of the legislative body. Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035.

Respondent contends in support of trial court's adjudication that the filing of a claim was not necessary, that although the act is entitled "An act relating to the liability of irrigation districts, their officers and employees," section 2 thereof applied only to "an action for a tort" committed by an employee or officer whom it is sought to hold liable for the accident and that under section 4 thereof there is an express limitation on the applicability of the particular act and that that is the whole scope of the statute, and that it is only intended to apply to procedural provisions of the statute upon the subject matter with which it deals, citing Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 57 P.2d 226, and Raynor v. City of Arcata, 11 Cal.2d 113, 77 P.2d 1054. We have examined the cited cases. The Jackson case was an action based on the negligence of an employee and against the city alone for damages sustained by a passenger while riding in a bus. It was there held that no claim was required to be filed by the plaintiff because act No. 5150, supra, relates only to claims for negligence of officers, and that act No. 5149, supra, relates to filing claims of liability arising out of injuries to persons or property resulting from the dangerous or defective conditions of streets, public property and buildings. The damage being the result of an automobile accident where the city vehicle was not driven by an officer, but an employee, it was held that, under the law as it then existed, no claim was required to be filed under either section. This case does not support respondent's contention.

The Raynor case was an action against the city for damages resulting from a collision between plaintiff's automobile and an automobile being driven by a fire chief in response to a fire call. The right of action against the city for negligence of the driver of its automobile was given by section 1714½ of the Civil Code, now secs. 400 and 401 of the Vehicle Code, St.1935, pp. 152, 153. The plaintiff was not required to file a claim under the facts related because the law at that time did not require such action. Act 5149, supra, treated with claims for damages resulting from the defective or dangerous condition of public streets, etc. It was therefore held not applicable. Act 5150, supra, treated of the claims based on the negligence of public officers. It was there held that act 5150 did not relate to the liability of the city or other governmental agency.

The reasoning applied in the two cited cases upon which respondent relies cannot be held applicable to the construction of the irrigation liability act here discussed. We therefore must conclude that the property of respondent was damaged as a result of a defective condition of property owned or operated and under the control of the Consolidated Irrigation District, and that before any action for damages could be maintained against the district a claim for such damages should have been presented in writing as required by section 2, Act 3886*l*, Deering's General Laws 1937, p. 1932.

[8, 9] Respondent further contends that if the act is applicable to the facts in the instant case it is unconstitutional because the title omitted to relate that certain procedural requirements are contained in the body of the act, citing Jackman v. Patterson, 1 Cal.Dec. 540, 108 P.2d 682; Jackson v. City of Santa Monica, supra; Brunson v. City of Santa Monica, 27 Cal.App. 89, 148 P. 950. The original act (Stats.1935, chap. 833, p. 2250) is entitled "An act relating to the liability of irrigation districts, their officers and employees." The heading of section 1 of the act, "Liability of directors," as it appears in Deering's General Laws, is not to be held part of the statute or as controlling in its interpretation when it is not part of the statute as adopted by the legislature, but merely the headings preferred by the editor thereof. It is no part of the act as enacted and does not control its interpretation. Kahrs v. County of Los Angeles, supra.

The Constitution, Art. IV, sec. 24, provides that "Every act shall embrace but one subject, which subject shall be expressed in its title." The main object of the constitutional provision is to prevent the legislature as well as the public from being deceived and injured by false, misleading and deceitful titles whereby legislation relating to one subject might be obtained under the title of another. Abeel v. Clark, 84 Cal. 226, 24 P. 383.

[10-12] It is well settled that the constitutional provision with reference to the subjects and titles of legislative acts shall be liberally construed with the view to effectuating its object. Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845; In re Maginnis, 162 Cal. 200, 121 P. 723. Accordingly, the provision should be so applied as to permit the legislature to include in an act all matters which are germane to the main purpose of the enactment, and so far as the title is concerned, all that is required is that it shall contain a reasonably intelligent reference to the subject to which the legislation in the act is addressed. Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42; In re Estate of Wellings, 192 Cal. 506, 221 P. 628. It is apparent from the title of the act involved that the act or some of its provisions relates "to the liability of irrigation districts" as well as to the liability of officers and employees thereof.

Under the rules above mentioned it cannot be held that there is a substantial variance between the title and the subject expressed in the body of the act or that the title is of a heterogeneous character and would mislead the public or the members of the legislature as to the subjects embraced in the act. Park v. Pacific Fire Extinguisher Co., 37 Cal.App. 112, 173 P. 615. We therefore conclude that the title is sufficiently comprehensive to embrace all matters stated in the act. Regardless of the merit or lack of merit of the other contentions, for the reasons expressed, the judgment must be reversed.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.



42 Cal.App.2d 773

PARIGIAN et al. v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES et al. (LYON, Intervener).

Civ. 12266.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1941.

1. Appeal and error ⇐1071(2)

An alleged erroneous holding by trial court that contracts for subleases were self-executing and that default occurred automatically was not material in action by sublessees to recover amounts paid under the contracts, where sublessors took no action relative to the alleged default and did not ask to terminate the contracts, but offered

at trial to reinstate the contracts if sublessees would make delinquent payments due thereon.

2. Landlord and tenant ⇐184(2)

Where contracts for subleases, conforming to sublessor's contract with owner, recited that sublessees should make specified payments "solely as a bonus for and in consideration of" execution and delivery of lease which should not constitute any part of the rentals, and might be retained as liquidated damages for sublessees' breach of contract, and that under certain conditions sublessor should be relieved of liability upon repayment of the bonus or consideration, sums thus paid by sublessees constituted "bonus" or "consideration" for execution of subleases, and their payment amounted to direct "payment" rather than deposit of "security", and hence sublessees could not recover such sums when sublessees' conduct terminated the agreement without wrongful act of sublessor.

See Words and Phrases, Permanent Edition, for all other definitions of "Bonus", "Consideration", "Payment", and "Security".

3. Landlord and tenant ⇐184(2)

Where money was paid as bonus or consideration for execution of subleases, and hence belonged to sublessor and could be retained by sublessor upon sublessees' breach of contract, provision in contracts for subleases that such moneys should be forfeited as liquidated damages upon breach was immaterial, and hence its invalidity under statute did not enable sublessees to recover such money after sublessees defaulted. Civ.Code, § 1670.

4. Landlord and tenant ⇐80(4)

Where sublessor had not abandoned contracts for subleases or defaulted therein, sublessees could not elect to consider the contracts at an end and recover what they had paid thereunder.

5. Landlord and tenant ⇐80(4)

Under contracts for subleases providing for payment of specified sums as bonus or consideration for execution of subleases, payment of final installment amounts due under the contracts, at time and in manner agreed upon, was a "condition precedent" to sublessees' right to demand subleases.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

6. Trusts ⇐348

Where owner of building contracted to permit another to make subleases, and sublessor, with knowledge of sublessees, assigned contracts for subleases to bank as trustee to insure performance of the contract with owner, bank was not bound by any negotiations or agreements between sublessees and sublessor for rescission or waiver of sublessees' forfeiture.

7. Evidence ⇐441(4)

In action by sublessees to recover amounts paid under contracts for subleases, evidence of conversations and promises allegedly made to sublessees by sublessor at time of and before execution of the contracts was inadmissible.

8. Evidence ⇐397(1), 441(1)

In absence of fraud, mistake, misrepresentation, or accident, negotiations and agreements prior to making of contract are deemed merged in the contract, and evidence thereof is inadmissible.

9. Evidence ⇐441(4), 445(3), 455

Where contracts for subleases were complete on their face and there was no charge of fraud, mistake, or accident, parol evidence was not admissible to explain terms of the contracts and alleged understanding concerning meaning and effect of such terms, either before or after execution of the contracts.

10. Landlord and tenant ⇐80(4)

In action by sublessees to recover amounts paid under contracts for subleases, wherein sublessor and administrator of owner's estate at all times agreed to go through with the contracts and deliver the subleases if sublessees would pay amounts due on their contracts, exclusion of evidence that sublessor told sublessees that he himself had not been able to obtain master lease was not error.

11. Appeal and error ⇐782

An attempted appeal from order granting motion for nonsuit was dismissed.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Dick Parigian and others against the Citizens National Trust & Savings Bank of Los Angeles and another, to recover amounts paid under contracts for subleases, wherein Beach D. Lyon,

as administrator with the will annexed of the estate of Homer Laughlin, deceased, filed complaint in intervention. From a judgment entered upon an order granting a nonsuit, and from the order granting a nonsuit, plaintiffs appeal.

Appeal from order granting nonsuit dismissed, and judgment affirmed.

Y. B. Arsen, of Los Angeles, for appellants.

Russ Avery and Harmel L. Pratt, both of Los Angeles, for respondents, Citizens Nat. Trust & Savings Bank and Beach D. Lyon, administrator of estate of Homer Laughlin, deceased.

William B. Gilroy, of Los Angeles, for respondent C. A. Goss.

WHITE, Justice.

This appeal is prosecuted from a judgment entered upon an order granting a nonsuit at the conclusion of plaintiff's case. There is also an attempted appeal from the order granting such nonsuit. The pertinent facts necessary for an understanding of the issues in this case are that Homer Laughlin was the owner of a certain building in downtown Los Angeles, the ground floor and basement of which was in the main occupied by the Grand Central Public Market. On March 11, 1929, a contract was executed between Mr. Laughlin and defendant C. A. Goss, under the provisions of which the latter was empowered to enter into contracts for subleases of stalls in the aforesaid market, the terms of which subleases, however, were not to commence until November 1, 1939, more than ten years after the execution of the Laughlin-Goss contract. Pursuant to the terms of the main contract, each prospective sublessee was required to pay what was characterized as a "bonus" or "consideration" for such sublease, which amounts were specified in a schedule attached to the Laughlin-Goss contract, in which was also contained the respective interests of Laughlin and Goss in such payments.

The contracts with which we are here concerned, being three in number, were executed in May and June, 1930, between plaintiffs herein and defendant Goss, the latter of whom was acting under the rights and authority conferred upon him by and through his contract with Mr. Laughlin, owner of the real property in question. These contracts were each denominated "agreement and obligation for lease", and attached to each contract was a sublease for the particular stall named therein, which said sublease was to take effect upon November 1, 1939. At the outset the contracts recited that "as a bonus and in sole consideration of the execution and delivery in escrow, as hereinafter stipulated, by C. A. Goss, hereinafter called the Lessor, of that certain lease whereby the Lessor has leased unto the maker hereof, that certain stall or floor space designated as follows * * * (there is then set forth a description of the demised floor space) * * * we or either of us promise to pay to the Lessor, at the Citizens National Trust & Savings Bank * * * the sum of * * *" (Then follows a schedule of payments to be made until the total sum agreed upon was paid.) Then we find in the agreement the following pertinent paragraphs:

"Said lease so executed shall be deposited with this agreement in the aforesaid Bank and said Bank shall deliver the same to the maker hereof upon full payment of all amounts of principal and interest to become due hereunder.

"In the event of the failure of the maker hereof to make the payments of principal and interest strictly in the time and manner hereinbefore stipulated or to comply with any of the provisions hereof, this agreement shall forthwith terminate and all money paid hereunder prior thereto shall be retained by the Lessor as liquidated damage for the breach hereof and the lease executed and delivered to said Bank hereunder shall be returned to the Lessor by said Bank for cancellation. Time is expressly made the essence hereof.

"In case the Lessor shall be unable to deliver possession of the leased premises at the time fixed in said lease because of fire, inevitable accident or other casualty he shall have a reasonable time in which to rebuild or repair the premises, during which time all rental under said lease shall be abated, or he may, at his option, be relieved from any and all liability hereunder upon repayment to the maker, without interest, of the amount of the bonus and consideration paid hereunder; in case the Lessor shall fail to deliver possession of the premises for any reason not hereinbefore stated, without fault of the maker hereof, he shall be relieved from any and all liability hereunder upon repayment to the maker, without interest, of the amount

of bonus and consideration paid hereunder.

"No sale, assignment, hypothecation, pledge or other transfer of the interest of the maker hereunder, by operation of law or otherwise, shall be made without the written consent of the Lessor, in each case first had and obtained, and any such sale, assignment, hypothecation, pledge or other transfer shall be null and void, and shall ipso facto act as a forfeiture of all rights granted by the Lessor hereunder. Neither this agreement and obligation, nor any interest in the premises hereunder, shall be deemed an asset in any Bankruptcy or Receivership proceedings, and all rights of the maker hereof shall forthwith terminate upon the institution of any such proceedings.

"* * *

"It is distinctly understood and agreed that all amounts paid by the maker under the terms hereof are and shall be solely as a bonus for and in consideration of the execution and delivery of the said lease and do not and shall not be or constitute any part or portion of the rentals to be paid by Lessee under the terms and conditions of said lease. * * *"

Each "agreement and obligation for lease", with its accompanying sublease, was assigned in writing to the defendant bank, and all payments designated in the agreement as "bonus" or "consideration" payments were made to the bank. The bank in turn was required to dispose of these funds in accordance with the provisions of the contract between defendant Goss and Homer Laughlin above referred to, that is, the bank was to pay these funds over to Mr. Laughlin until he had received a certain sum from all the prospective tenants in the market, whereupon the balance of the bonus or consideration payments was to be divided between Mr. Laughlin and Mr. Goss. If Mr. Goss was able to procure contracts and subleases for a certain specified proportion of the market by a certain time, his interest in the market and in the contracts and leases he obtained was to continue in accordance with the terms of his contract with Mr. Laughlin; otherwise, his interest was to cease and terminate. In either event, the parties who entered into the various contracts for subleases would be protected; and if they paid the full amount of the required bonus or consideration, their subleases would thereupon be delivered to them by the defendant bank.

Under their contracts the plaintiffs were obligated to pay, between the date of execution thereof in May and June, 1930, and the delivery to them of the subleases, the sum of approximately $18,000, upon which they actually paid $2,400, the last payment having been made on February 26, 1932. After plaintiffs ceased making instalment payments on their contracts, no action was taken by defendants, and the matters remained in statu quo until the instant action was commenced.

The complaint, which was filed in February, 1936, contained four counts. In the first thereof it was alleged that within four years last past defendants became indebted to the plaintiffs for money had and received by the former as trustees for the use and benefit of plaintiffs; that the terms of said trust enjoined upon defendants the duty and obligation of repaying to plaintiffs on demand the sum of $3,070, but that notwithstanding such demand defendants refused to repay any part of said sum. By the second count plaintiffs sought a recovery as for money had and received. The third count alleged an indebtedness of $3,070 "on an open and current book account"; while the fourth and final count claimed the amount of money previously mentioned upon the basis of an account stated. Defendant bank by its answer denied the material allegations contained in each count of the complaint. Epitomizing the defendant bank's affirmative defenses, it was by it alleged that plaintiffs' cause of action was one for the recovery of payments made as a bonus or in consideration of the execution and delivery in escrow of the subleases of stalls in the market; further, that plaintiffs having made payment to defendants totaling $2,400 and the bank having fully performed all the conditions precedent required of it, while plaintiffs had breached the covenants of the contract, the latter were in default. In other words, that while the plaintiffs had paid part of the consideration called for by their agreements, they had failed to pay the balance amounting to approximately $16,000. It was also set forth in the answer of the bank, and undenied, that the contracts to enter into the subleases provided as follows: "It is understood that this agreement and obligation will be assigned by

Lessor to the Citizens National Trust & Savings Bank, as trustee, and that all payments made by the maker under the terms hereof shall be made to said Bank in the City of Los Angeles, State of California, at the Broadway Branch."

Also at the bottom of said contracts there appeared a printed form of assignment, as follows: "For value received, I hereby assign all my right, title and interest in the within and foregoing obligation and agreement to the Citizens National Trust & Savings Bank of Los Angeles, California, as Trustee, to be held by such trustee under the terms and conditions of a certain contract between Homer Laughlin and Lessor of date March 11, 1929."

It was also alleged that the subleases executed by plaintiffs contained similar provisions, to-wit, that the subleases should be assigned to the defendant bank as trustee, to be held by it under the terms and provisions of the contract between Mr. Laughlin and Mr. Goss. Defendant bank further alleged that all payments made by the plaintiffs were accepted by defendant bank in its capacity as trustee and were disbursed by it according to the terms of the contract between Laughlin and Goss dated March 11, 1929, with full knowledge thereof on the part of the plaintiffs; and that none of said moneys so paid by plaintiffs was in the possession of defendant bank. The bank further pleaded that the cause of action set forth in the complaint was barred by virtue of section 337, subdivisions 1 and 2, section 338, subdivision 4, section 339, subdivision 1, and section 343 of the Code of Civil Procedure.

By his answer defendant Goss denied the allegations of plaintiffs' complaint, and by way of further answering the same denied that either he or his codefendant bank as trustee or otherwise were indebted to plaintiffs in any sum whatsoever, and alleged that the only agreements between himself and plaintiffs were the "agreements and obligations for leases" copies of which were attached to defendant Goss' answer. Finally, he pleaded that plaintiffs failed to separately state their separate and distinct causes of action, by reason of which the court was without jurisdiction of any of the alleged causes of action.

The complaint in intervention filed by Beach D. Lyon as administrator with the will annexed of the estate of Homer Laughlin, deceased, is the same as the answer of defendant bank.

[1, 2] The first ground of appeal urged by appellants is that the court erred in holding that the contracts were self-executing and that default occurred automatically. We perceive no such ruling in the record, but if we assume the existence of such a ruling it does not appear to us to be material, because respondents took no action relative to the appellants' default, nor did the former ask to terminate the contracts. In fact there is contained in the record an offer made by respondents at the trial to reinstate the contracts if appellants would pay the delinquent payments due thereon. Therefore the question presented is whether the covenants of the agreements with which we are here concerned contemplated the payment of the moneys as a mere deposit by way of security to insure the faithful performance of appellants' covenants under the subleases, or whether such sums were paid by appellants as a bonus or an independent consideration to induce the lessor to make the subleases. A mere reading of the terms of the agreement irrefutably establishes the fact that the money was paid as a bonus or consideration for the execution of the subleases. In plain and unequivocal language the agreements so provide, and further direct that the subleases, after execution, be placed with respondent bank to be delivered by the latter to appellants only "upon full payment of all amounts of principal and interest to become due hereunder". The money having been paid as a separate consideration and to induce the lessor to enter into the subleases, it amounted to a direct payment of money and was not a deposit of security. Therefore, when termination of the agreement was brought about by the conduct of the sublessees, and without any wrongful act of the lessor, the advance payments made by the sublessees cannot be recovered by them. Wetzler v. Patterson, 73 Cal.App. 527, 238 P. 1077; Curtis v. Arnold, 43 Cal.App. 97, 184 P. 510.

[3-5] Appellants assert that the terms of the contracts providing that in case of default the money paid was to be retained as liquidated damages, are void under section 1670 of the Civil Code, and that therefore in case of default the sum so paid cannot be retained. But we think it clear that when examined in connection with the explicit provisions of the contracts hereinbefore set forth, coupled with the fact that the subleases were not to be delivered until the contracts were fully performed, it must

be held that the money was paid as a bonus or consideration for the execution of the subleases, and consequently, when the lessees defaulted in their payments the moneys already paid in belonged to the lessor. Furthermore, after the lessees' breach of their contract to pay under the aforesaid agreements, the lessor had the right, resting upon the contract, to remain inactive and yet retain the moneys theretofore paid by the lessees. Consequently, it is of no moment whether or not the contracts declare that such moneys should upon breach be forfeited as liquidated damages. Where, as here, the lessor had not abandoned the contracts or defaulted therein, the lessees could not elect to consider the contracts at an end and recover what they had paid. In the case at bar the payment of the final instalment amounts under the contracts, at the time and in the manner agreed upon, was a condition precedent to the right of the lessees to demand the subleases. The parties hereto have made their agreements in clear and definite terms. Appellants contracted with respondent Goss as lessor that they would pay into respondent bank certain sums of money at certain times, and the agreement of the lessor is equally explicit that after full and due performance of such covenants on the part of appellant lessees, the subleases attached to the contracts would be delivered to appellants. Nowhere do we find in the contracts anything to indicate that the money paid was intended as security for the performance of the sublessees, but on the contrary, in plain and understandable language as well as by the object sought to be achieved by the contracts, viz., delivery to appellants of the subleases, the conclusion is inescapable that the moneys paid were intended and regarded as a bonus or consideration for the subleases. The case of Bacciocco v. Curtis, 12 Cal.2d 109, 82 P.2d 385, relied upon by appellants, in reality at pages 114 and 387 respectively thereof lends support to respondents' contentions.

[6] Appellants' claim that the court erred in rejecting evidence to prove a mutual rescission between appellants as lessees and respondent Goss as lessor, cannot be upheld. The record reveals no evidence or proffered evidence of a rescission of the contracts between appellants and respondent Goss. The only evidence we find in the record of any settlement between the last-mentioned parties had to do with another transaction between them, wholly apart from the contracts forming the basis of the instant litigation. Moreover, appellants knew and understood from the provisions of their agreements that the contracts had been assigned to respondent bank, and certainly the latter was not bound by any rescission negotiations or agreements between appellants and the bank's assignor, respondent Goss. Neither was the respondent bank interested or involved in or bound by any negotiations between appellants and respondent Goss upon which appellants attempted to offer evidence in support of their claimed waiver of forfeiture. Moreover, as heretofore pointed out, respondents never sought cancellation or forfeiture under the contracts, but stood squarely upon the same, and based their right to retain the moneys paid thereunder upon its terms, covenants and conditions, indicating and offering at all times, even up to and during the progress of the trial, to go through with the contracts if appellants would bring the delinquent instalment payments up to date.

[7, 8] The court did not err in refusing to permit appellants to introduce evidence of conversations and promises allegedly made to them by respondent Goss at the time of and prior to the execution of the contract. It requires no citation of authority for the statement that in the absence of fraud, mistake, misrepresentation or accident, the negotiations and agreements prior to making the contract are deemed merged in the contract, and evidence of such prior negotiations is not admissible.

[9] The trial court was also correct in denying to appellants the right to explain by parol evidence the terms of the contracts and an alleged understanding between the parties concerning the meaning of such terms and the effect of the same, either before or after the execution thereof. What this court said in County National Bank & Trust Co. v. Investment Corp., Cal.App., 109 P.2d 368, 371, is controlling here: "Both the agreement of the broker and the lease and option contract appear upon their face to be a complete statement of the undertakings of the respective parties thereto, without any ambiguity or uncertainty as to their several legal obligations. In the absence of any charge of fraud, mistake or accident, the language of each contract being clear, explicit, certain, and not involving an absurdity, the trial court was justified in interpreting it and ascertaining the intention of the parties from the language

thereof. Civ.Code, §§ 1638, 1639, 1640. The instant case does not present circumstances which justify the application of any exception to the parol evidence rule."

[10] Appellants' contention that they should have been permitted to introduce evidence that subsequent to the execution of the contracts respondent Goss told appellants that he himself had not been able to obtain the master lease upon which his subleases to them were predicated, finds a complete answer in the fact, heretofore set forth, that respondents, including Goss and the administrator of the estate of the owner of the premises, at all times before and during the trial agreed to go through with the contracts and deliver the subleases to appellants if they would pay the amounts due on their contracts.

[11] The attempted appeal from the order granting the motion for a nonsuit is dismissed.

For the reasons herein stated the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



42 Cal.App.2d 783

WREAD v. COFFEY–MURRAY, Inc., et al.

Civ. 11555.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1941.

1. Licenses ⇐39

Where commissioner of corporations delivered permit authorizing corporation to issue ten shares of stock to each of three persons for $10 per share, such sums to stand against debts of the applicant, and ten shares were issued to party who paid nothing for his stock, issuance of stock at variance with the terms of the permit was void. St.1931, pp. 941, 949, 950, §§ 3, 16–18; Civ.Code, § 1598.

2. Licenses ⇐39

Where commissioner of corporations delivered permit authorizing corporation to issue stock to be paid for in cash or by the payment of corporate debts in the full sum of $10 per share, and stock was issued to a party who paid nothing for it, and who notified other stockholders that he elected to declare void the certificate evidencing the issuance of the stock to him, for the reason that the stock was not issued in conformity with the authorization granted by the commissioner, and the officers and stockholders of the corporation acted on his letter, party could not thereafter take a contrary position. Code Civ.Proc. § 1962, subd. 3; Civ. Code § 1598.

3. Judgment ⇐595

Where corporation, its president and secretary brought action for accounting against treasurer and vice-president, who withdrew from corporation on ground that issuance of stock to him was void, and treasurer filed an answer and cross-complaint but did not claim an accounting, judgment was "res judicata" in a subsequent action for accounting brought by the treasurer against the corporation and its officers, since the parties were not entitled to split action of accounting into several actions.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

4. Contracts ⇐105

A purported agreement in direct violation of the terms of the express prohibitions contained in a statute is void. Civ.Code, §§ 1598, 1599.

5. Licenses ⇐39

The main purpose of the statute providing that every security not issued in substantial conformity with the authorization of the commissioner of corporations shall be voidable at election of the holder, was to prevent the issuance and sale of spurious documents purporting to be securities, and word "voidable" which was inadvertently used for "void" was not intended as a repeal or modification of the common law rule or statutory provisions, that a purported agreement in direct violation of terms of the express prohibitions contained in a statute is void. St. 1931, pp. 937, 949, § 16; Civ.Code, §§ 1598, 1599.

See Words and Phrases, Permanent Edition, for all other definitions of "Voidable".

6. Licenses ⇐39

Where, by terms of permit issued by commissioner of corporations, a corporation

was entitled to issue stock against the indebtedness of the corporation and to issue to each stockholder not to exceed 50 shares of its stock at par for cash, and trial court found that subsequent to issuance of permit secretary of the corporation paid in certain sum, finding was not required that stock issued in a sum exceeding the amount paid in was invalid, in absence of showing that stock was not issued in accordance with permit.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action for an accounting by W. E. Wread against Coffey-Murray, Inc., and others. From a judgment for the defendants after granting of a motion for nonsuit, plaintiff appeals.

Affirmed.

Arthur F. Larrabee and David H. Cannon, both of Los Angeles, for appellant.

Faries & McDowell and Robert S. Burns, all of Los Angeles, for respondents.

STURTEVANT, Justice.

From an order granting the motion of the defendants for a nonsuit in an action for an accounting the plaintiff has appealed. The pleadings were copious. On the trial counsel stipulated in open court minutely regarding the issues. The judgment roll in a former action between the same parties was freely used by each of them. After the case had been so presented the defendants made a motion for a nonsuit, their motion was granted, judgment thereon was entered, and from that judgment the plaintiff has appealed.

On October 17, 1932, and prior thereto, W. E. Wread had been engaged in installing overhead doors. The record does not disclose that he had a factory, shop, or any equipment. At all times he referred to his overhead doors as an "invention" but as will hereinafter appear he held no patentable rights. On October 17, 1932, Wread, J. T. Coffey and F. B. Murray entered into a written contract. In substance that contract recited that W. E. Wread was the inventor and designer of a useful invention, the overhead door; that he had applied for and would apply for letters patent; that the parties to said contract intended to organize a corporation to manufacture and sell overhead doors; that the parties would form a corporation having a capital stock of $24,000 divided into 2,400 shares of the par value each of $10; that the corporation should have three directors; and that the corporation would take over said invention; that upon its organization an application would be made to the commissioner of corporations for a permit to sell stock; that upon receipt of the permit Wread would assign to the corporation his invention and improvements thereof; that Coffey and Murray, as soon as the permit issued, would advance to the corporation the sum of $500 as working capital, and that they would promote the said business; that the capital stock authorized by the permit would be issued to said persons in equal amounts, and that Wread should receive a salary of not less than $200 per month.

[1] At about the same time a corporation, the defendant, was formed under the name of "Easy Overhead Door Corporation". On November 18, 1932 the commissioner of corporations delivered a permit authorizing the corporation to issue to Coffey, Wread, and Murray, ten shares of stock each for $10 per share, such sums to stand against debts of the applicant theretofore paid by said persons. On or prior to December 5, 1932, Murray paid to the corporation, or for its use, $350, Coffey paid $445, but the record does not show that Wread paid in anything. On December 5, 1932, the corporation issued twenty shares to each of said persons. Each of said persons was elected a director. Coffey was elected president, Murray was elected secretary, and Wread was elected treasurer and vice-president. On or about November 10, 1932, Easy Overhead Door Corporation engaged in the business theretofore conducted by Wread, and since has continued to install overhead doors. He participated until May 17, 1933, when he left the organization and ceased to take part in its operations. He has never assigned to said corporation his right, title and interest in and to said invention and in and to any letters patent issued under said or any subsequent applications. In another action, hereinafter more particularly referred to, the trial court made a finding that the device was not patentable. Hence Wread paid nothing for his stock. But, as we have stated, the permit provided that it should have been paid for in cash or by the payment of corporate debts in the full sum of ten dollars per share. An issue of stock at variance with said terms of said permit was prohibited and made a felony by the express provisions of

the statute. §§ 3, 16, 17 and 18, Stats.1931, p. 937. Such issue was void. Civ.Code, § 1598. On September 21, 1933, Wread resigned as director, treasurer, and vice-president, and established a separate place of business. On January 31, 1934, he wrote defendants: "You and each of you will please take notice that I have elected to declare void that certain stock and the certificate evidencing the same, issued to me in Easy Overhead Door Corporation, a corporation, for the reason that the stock was not issued in conformity with, or in substantial conformity with any authorization granted to the corporation by the commissioner of corporations of the state of California, and I hereby offer to do each and everything required of me to be done to void the said stock and the certificate evidencing the same. Please govern yourselves accordingly."

[2] He does not claim he is a "stockholder" but he asserts that since December 5, 1932, he has been the owner of a one-third interest in Easy Overhead Door Corporation and as owner of such interest he asks an accounting. When he wrote the letter dated January 31, 1934, he knew all of the facts and he knew that the officers and stockholders of Easy Overhead Door Corporation knew all of the facts. Nevertheless he caused them to act, and they did act, on his letter. He may not now take a contrary position. Code Civ. Proc. § 1962, sub. 3.

[3] Prior to January 31, 1934, an action was commenced by Easy Overhead Door Corporation, F. B. Murray and J. T. Coffey against W. E. Wread. On the date last mentioned a third amended complaint was filed. It contained four counts. The first and second counts sought to have the contract dated October 17, 1932, reformed. The third count asked that the defendant render an account. The fourth count asked for declaratory relief. The defendant in that action, Wread, filed an answer and cross-complaint. In neither pleading did he make any claim for an accounting. The judgment in that action is res judicata in this action. Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 655, 101 P.2d 497. In other words the parties were not entitled to have an accounting of the obligations of one of the parties taken in the first action and an accounting of the obligations of the other parties taken in the second action—they could not split an action of accounting into pieces.

[4, 5] In presenting his case the plaintiff bases much of his argument on the fact that in his letter dated January 31, 1934, he had used the word void and that the statute, Stats.1931, pp. 937, 949, § 16, uses the word voidable and therefore his letter should not be accepted as an admission that the issue of stock to him, without any payment being made therefor, was void. We think he errs in construing said section. Before said section was enacted it was settled law that a purported agreement in direct violation of the terms of the express prohibitions contained in a statute was void. Civ.Code, §§ 1598, 1599; 13 C.J. 412 "Contracts", § 342; 17 C.J.S., Contracts, §§ 192, 193. The main purpose in the enactment of the statute, Stats.1931, p. 937, was to prevent the issuance and sale of spurious documents purporting to be securities. It is obvious that the legislature did not intend by enactment of that statute to make the rule less drastic, but if anything to make the statutory rule more drastic. Therefore when it wrote section 16 using the word voidable we think it is clear the word was inadvertently used for void. No doubt on certain occasions persons may unintentionally violate the terms of a permit theretofore issued by the commissioner of corporations. Such violation may arise by reason of the permit being unduly narrow. Recognizing that fact, the legislature provided in section 16 that under certain circumstances the commissioner might issue a new permit in effect validating the prior invalid issues. Such we believe to be the meaning of section 16, Statutes 1931, page 937. However we are clearly of the opinion that said section, read in connection with all of the other provisions of the statute, was not intended as a repeal of the common law rule nor a modification or repeal of the provisions of sections 1598 and 1599 of the Civil Code.

[6] In the first action the trial court made a finding that, subsequent to the date of the issue of the permit, Coffey and Murray paid in $195. The plaintiff argues that therefore stock issued in a sum exceeding $195 was invalid. It is sufficient to state that the trial court made no finding to that effect. According to the clear terms of the permit the corporation was entitled to issue stock against the indebtedness of the corporation whether the payment thereof was made by the stockholders prior or subsequent to the issue of the

permit. Furthermore it was entitled to issue to each stockholder not to exceed fifty shares of its stock at par for cash. There is no finding that the moneys paid in by Murray and Coffey were not paid in accordance with said permit.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



RANCHO SANTA ANITA, Inc. v. CITY OF ARCADIA.

Civ. 11548.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1941.

Rehearing Denied March 15, 1941.

Hearing Granted April 11, 1941.

1. Statutes ⇐51

Generally, the "adoption of a statute by reference" is construed as an adoption of the law as it existed when adopting statute was passed and therefore is not affected by any subsequent modification or repeal of statute adopted, but where reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof, the reference includes the law as it stands when it is sought to be applied, with all changes made from time to time so far at least as changes are consistent with purpose of adopting statute.

See Words and Phrases, Permanent Edition, for all other definitions of "Adoption of a Statute by Reference".

2. Statutes ⇐51

Generally, irrespective of whether adopted statute is referred to generally or specially in an adopting statute, intention of legislature as disclosed in adopting statute is basis for determining whether "adoption of a statute by reference" is to be construed as an adoption of the adopted statute as it existed when adopting statute was passed or as an adoption of adopted statute as it exists when it is sought to be applied.

3. Municipal corporations ⇐956(1)

In view of statement found in ordinance, it was contemplated that, in matters of revenue and taxation, city should be governed by general rules found in Political Code as experience and economic conditions required changes and modifications from time to time. Gen.Laws 1937, Act 5233, § 871; Pol. Code, §§ 3607 et seq., 3714, subd. 5.

4. Municipal corporations ⇐977

In taxpayer's action against sixth class city to recover taxes paid, a complaint alleging that city did not comply with provisions of Political Code concerning levy and assessment of taxes stated a good cause of action where city had adopted an ordinance which contemplated that in matters of revenue and taxation city should be governed by general rules found in Political Code as experience and economic conditions required changes and modifications from time to time. Gen.Laws 1937, Act 5233, § 871; Pol.Code, §§ 3607 et seq., 3714, subd. 5.

5. Pleading ⇐8(2)

Where pleading of an ordinance was in conformance with statute, an allegation that no other ordinance was in conflict with ordinance pleaded was not a "conclusion of law" but was a pleading of fact as well. Gen. Laws 1937, Act 5233, § 871; Pol.Code, §§ 3607 et seq., 3714, subd. 5; Code Civ.Proc. § 459.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

6. Pleading ⇐193(6)

In taxpayer's action against city to recover taxes paid, a complaint which allegedly pleaded 32 asserted irregularities of city council in computing and levying taxes was not demurrable on ground that complaint contained several causes of action which were not separately pleaded where irregularities related to asserted noncompliance by city with statute, and applicability of statute was main issue of litigation. Gen.Laws 1937, Act 5233, § 871; Pol.Code, §§ 3607 et seq., 3714, subd. 5.

7. Pleading ⇐12, 225(2)

Sustaining a special demurrer to complaint without leave to amend was an abuse of discretion where demurrer was based upon ground that complaint was ambiguous and uncertain because of plaintiff's failure to plead certain details, and details, if any, omitted from complaint were within defendant's special knowledge.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Rancho Santa Anita, Incorporated, etc., against the City of Arcadia, to recover taxes levied by defendant for municipal purposes. From a judgment for defendant after a general and special demurrer to the complaint was sustained without leave to amend, plaintiff appeals.

Reversed.

Stater & Dawson, Williamson, Hoge, Sargent & Judson, and Williamson, Hoge & Judson, all of Los Angeles, for appellant.

James C. Bone, of Arcadia, and Burke, Hickson, Burke & Marshall, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover taxes levied by the defendant for municipal purposes for the fiscal year 1937-8. The cause was tried on the second amended complaint to which the defendant had interposed a general and special demurrer. This was sustained without leave to amend, and the order recites that the plaintiff did not request such leave. The plaintiff's appeal from the judgment resulting from this order is based upon a bill of exceptions, and the main issue is whether the complaint states a cause of action.

It is the contention of appellant, as outlined in its pleading, that the taxes were illegally levied because the city failed to comply with the provisions of the Political Code requiring the adoption of a budget antecedent to the levy; that the taxes levied were aimed to produce a revenue far in excess of its needs for municipal purposes, and that the rates were fixed without regard to available cash and known incoming revenues; that a portion of the taxes was levied ostensibly to meet interest and principal on outstanding municipal bonds, but actually provided a revenue far in excess of the needs for those purposes and designed for purposes other than those contemplated by the law under which the bonds were issued.

The argument in support of the first contention presents a question of statutory construction. The defendant is a municipal corporation of the sixth class having no independent charter, and hence one governed by the general laws. Section 871 of the Municipal Corporations Act (Deering, Gen.Laws, Act No. 5233) provides that the city council "shall have the power, and it shall be its duty, to provide by ordinance a system for the assessment, levy and collection of all city taxes not inconsistent with the provisions of this chapter." Acting under this authority the city of Arcadia, in 1913, adopted ordinance No. 33 in which section 68 reads as follows: "All provisions of Title IX of the Political Code of the State of California in regard to revenue and taxation which are not inconsistent with the provisions of this Ordinance shall apply to and govern all matters of revenue and taxation which are not herein specifically provided for, substituting where necessary the proper city officer for any county officer therein referred to." In this connection the complaint alleges that there are no provisions of said ordinance inconsistent with the provisions of Title IX of the Political Code, that the city has continuously operated under the provisions of that title, and has not adopted any other ordinance or system contrary thereto. The respondent concedes these facts, but the parties differ on this question—whether the reference to Title IX of the Political Code is an adoption of the provisions of that title as they read in 1913, or whether it includes the amendments made in the intervening time. If the ordinance be interpreted as adopting the title with all its amendments it must be conceded that the complaint states a good cause of action.

Particular attention is directed to section 3714 of the code, which is a part of Title IX. The last amendment to that section prior to the adoption of the ordinance was in 1895. At that time it consisted of ten lines in the printed code. Since the adoption of the ordinance it has been amended five times until it has now reached six and one-half pages of printed matter covering a complete system for the preparation and adoption of an annual budget showing the probable revenues and required expenditures of each office and department. Subdivision five provides that the annual tax rate shall be fixed in such amount as will "raise the amount of the estimated expenditures as finally determined"; and that all taxes shall be levied in specific sums, and "shall not exceed the amount specified in the budget." It is appellant's contention that the taxing body disregarded all these provisions of the amended section. Respondent concedes this but argues that it is bound by the provisions of the section as they read when

the ordinance was adopted, and that none of the subsequent amendments are controlling.

[1] A clear statement of the general rule of the effect of the adoption of a statute by reference is found in 59 Corpus Juris, p. 1060, reading: "As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent modification or repeal of the statute adopted. * * * A well-established exception to, or qualification of, the general rule exists, however, where the reference in an adopting statute is *to the law generally which governs the particular subject, and not to any specific statute or part thereof;* in such case the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, so far at least as the changes are consistent with the purpose of the adopting statute." (Italics ours.) To the same effect see 25 R.C.L., p. 908; 23 Cal.Jur., p. 685; Sutherland, Statutory Construction, 2d Ed., p. 789.

[2] The exception to the general rule was recognized in the early case of Kirk v. Rhoads, 46 Cal. 398, 402, which involved a provision of an act to incorporate the city of Sacramento reading: "All the provisions of law and force regulating elections * * * shall apply to the election of city officers." It was held that each city election was to be governed by the general election laws as they existed at the time of the election, and not merely by those existing at the time the incorporating act was passed. In Ramish v. Hartwell, 126 Cal. 443, 446, 58 P. 920, the court had under consideration provisions of a street improvement act which declared that sales of lots upon delinquent assessments should be conducted "in all respects the same as are provided by law for the collection of delinquent State and county taxes." St. 1893, p. 33, § 5. The court held that the amendments to the general tax laws requiring sales to the state were so inconsistent with the street improvement act that they would entirely defeat its purposes. For that reason it was held that the adopting act included the tax statute as it read at the time of adoption, and not as amended. In Vallejo, etc., R. R. Co. v. Reed Orchard Co., 177 Cal. 249, 254, 170 P. 426, the rule and the exception stated are both recognized and approved. There the adopting statute referred specifically to section 1254 of the Code of Civil Procedure, and it was held not to have contemplated amendments to that section. Bolton v. Terra Bella Irr. Dist., 106 Cal. App. 313, 321, 289 P. 678, 682, involved section 3785b of the Political Code which authorized a tax deed whenever a sale had been made "in pursuance of section 3771 of this code." The court reviewed numerous authorities on adoptive legislation and followed the rule of Ramish v. Hartwell, supra, in holding that, though a specific statute had been referred to, the entire purpose of the adopting statute would be defeated if the specific statute were to be held to have been adopted in haec verba. Many of these decisions rest on the question of legislative intent and that seems to be the purport of the decisions generally, that whether the adopted statute is referred to generally or specifically, the intention of the legislature as disclosed in the adopting statute is the basis upon which the decision must be made.

[3, 4] With this in mind we may turn to section 68 of the ordinance. It reads: "All provisions of Title IX of the Political Code of the State of California in regard to revenue and taxation which are not inconsistent with the provisions of this ordinance shall apply to and govern all matters of revenue and taxation which are not herein specifically provided for, substituting where necessary the proper city officer for any county officer therein referred to." It makes *all provisions* of the title applicable which are not inconsistent. It includes the entire title, which in turn includes everything in the Political Code relating to revenue and taxation. The title begins with section 3607 and ends with section 3900a. It was first enacted in 1872 and has been amended at every regular session of the legislature since that date. The amendments to section 3714 requiring a budget are not inconsistent with any of the provisions of the ordinance. Hence the case does not call for any fine distinctions of judicial interpretation. There is no basis upon which a court could rule that the city council did not know of these periodical amendments to the code and that, knowing them not, it intended to take *the whole title* just as it read in 1913. For these reasons the conclusion follows that the ordinance contemplated that, in matters of revenue and taxation, the city was to be

governed by the general rules found in the Political Code as experience and economic conditions required changes and modifications from time to time. The complaint alleges that none of the provisions of section 3714 of the Political Code was complied with, and for that reason alone it states a good cause of action. Otis v. Los Angeles County, 9 Cal.2d 366, 70 P.2d 633.

The respondent refuses to defend the special demurrer because appellant has not assumed the burden of attacking it. We have examined all the grounds urged, and we find no merit in them.

[5, 6] The pleading of the municipal ordinance was in conformance with the terms of section 459 of the Code of Civil Procedure. The allegation that no other ordinance was in conflict with the one pleaded was not strictly a conclusion of law, but was a pleading of a fact as well. It was urged in this demurrer that the complaint contained several causes of action which had not been separately stated in that it pleaded thirty-two asserted irregularities and illegalities of the city council in computing, fixing and levying the taxes for eight named general and special funds. Generally speaking these irregularities all related to this asserted noncompliance with the provisions of section 3714 of the Political Code. The respondent freely confesses that "If that section, as it existed in 1937, when the disputed levies were made, is applicable to defendant, * * * it has 'most flagrantly violated its mandate,' because neither in the year in question or in any other year since this section was amended to include budget provisions has it ever made any pretense of following such budget provisions." This being so, we are unable to perceive how the issue could be presented to the trial court any better by segregation of the complaint into separate causes of action for every one of the acts of noncompliance with the section. The applicability of this section is the meat of the litigation and that issue can be determined without useless and repetitious pleading.

[7] The asserted grounds of ambiguity and uncertainty relating to the failure to plead the statute under which certain funds were created by the city, the unpaid principal and annual interest required on bonds and sinking funds issued and maintained by the city, and the balances existing in the various general and specific funds, all relate to matters which are primarily within the knowledge of the city and require no more specific pleading. Other grounds urged in the special demurrer relate to the form and manner of pleading the thirty-two asserted irregularities and admitted failures of the city council to comply with the terms of the code section. If any detail in the pleading of these irregularities is omitted, it is within the special knowledge of the respondent, and the charge of ambiguity and uncertainty is not well founded. For these reasons if the judgment appealed from is based upon the ruling upon the special demurrer it was a plain abuse of discretion upon the part of the trial court to sustain the demurrer without leave to amend. McCune v. Harris, 9 Cal.App.2d 719, 721, 50 P.2d 837; 21 Cal.Juris. 120.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



43 Cal.App.2d 846

PINEGAR v. FIRST NAT. BANK OF CLOVIS (WAKEFIELD, Intervener).

Civ. 2612.

District Court of Appeal, Fourth District, California.

Feb. 14, 1941.

Appeal and error ⇐554(2), 627(2)

Where only papers before Court of Appeal were those filed on motion to dismiss appeal and an order was entered in trial court terminating proceedings for preparation of a transcript which order recited that no undertaking was filed and no personal arrangements were made for compensation of stenographic reporter and that no extension of time had been granted and no bill of exceptions had ever been presented or filed, appeal was dismissed.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Georgia K. Pinegar against the First National Bank of Clovis, wherein C. K. Wakefield, etc., intervened. From an adverse judgment, plaintiff appeals.

Appeal dismissed.

No appearance for appellant.

Conley, Conley & Conley, of Fresno, for respondent Bank.

BARNARD, Presiding Justice.

This is a motion to dismiss this appeal from the judgment. Nothing has been filed in this court except the papers on this motion.

From the certificate of the county clerk it appears that the judgment was entered on June 28, 1940; that notice of appeal and notice to prepare transcript were filed on August 28, 1940, and that on October 26, 1940, an order was entered in the trial court terminating proceedings for the preparation of a transcript, which order recites that no undertaking was filed and no personal arrangements were made for the compensation of the stenographic reporter; that no extension of time had been granted; and that no bill of exceptions had ever been presented or filed.

The showing being sufficient (Foster v. Carey, 33 Cal.App.2d 543, 92 P.2d 444), the motion must be granted. The appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.



HAIGLER et al. v. DONNELLY et al.*

Civ. 12802.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1941.

Rehearing Denied March 6, 1941.

Hearing Granted April 11, 1941.

1. Brokers ⇐71

Where contract of listing provided that broker should receive as commission amount for which she could sell apartment house furnishings in excess of a specified net price to owners, but owners entered into contract to sell to buyer procured by broker for less than specified net price, the sale upon different terms constituted a "waiver" of conditions for payment of commission provided for in contract of listing and rendered sellers liable to broker for reasonable value of services rendered in procuring buyer.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

2. Damages ⇐89(2)

In action against broker to recover portion of purchase price of apartment house furnishings withheld by broker as her commission, where there was evidence that amount withheld approximated reasonable compensation on basis of rates prevalent in the city to which broker was entitled on theory of implied contract because conditions for payment of commission provided for in contract of listing had been waived by sellers, sellers were not entitled to recover punitive damages, since the statutory provision therefor is by its terms expressly made applicable to breach of an obligation not arising from contract. Civ.Code, § 3294.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by C. F. Haigler and others against Dottie Delphy Donnelly, and others, for money received by the named defendant, a real estate broker, for the use and benefit of plaintiffs. From a judgment for plaintiffs, defendants appeal.

Judgment reversed.

W. W. Comstock and Harry A. Finkenstein, both of Los Angeles, for respondents.

Henry S. Cohen and Bernard B. Cohen, both of Los Angeles, for appellants.

WOOD, Justice.

Plaintiffs commenced this action upon a common count for money received by defendant Donnelly, a real estate broker, for the use and benefit of plaintiffs. A judgment was rendered in favor of plaintiffs in the sum of $3,908.35, of which $500 was awarded by the court as punitive damages. The appeal is from the judgment.

Plaintiffs listed their apartment house with defendant in March, 1939, for the purpose of negotiating a lease for a term of years at a rental of $250 per month and also listed the furniture and furnishings of

* Subsequent opinion 117 P.2d 331.

the apartment house for sale for $3,000 cash. These amounts were to be net to the plaintiffs. The listing card was not produced at the trial and its contents were established by plaintiff C. L. Haigler, who testified that defendant "should get his commission from the other party that he sold to". On April 7, 1939, plaintiffs signed a listing card in which defendant was authorized to sell the apartment house together with the furniture and furnishings for the sum of $27,500 and in which plaintiffs agreed to pay a commission of 5 per cent "if they find a buyer for said property at the price or terms above indicated, or any lower price I may later accept". Thereafter defendant procured Mrs. Silva as lessee of the apartment house and on May 11, 1939, plaintiffs entered into a written contract with Mrs. Silva by which Mrs. Silva purchased the furniture and furnishings for the sum of $2,500 and leased the apartment house for the term of ten years at a rental of $250 per month. She paid to defendant the sum of $2,500 in cash for the furniture and furnishings and also the sum of $1,000 to apply on the rent. Later plaintiffs authorized defendant to repay to Mrs. Silva the sum of $91.65 in making a pro-ration of the rent. In the contract between plaintiffs and Mrs. Silva it is provided: "It is hereby agreed that so much of said down payment or any other money collected by Donnelly & Co. as is necessary shall be retained by Donnelly & Co., to pay the seller's commission and the balance if any, after said payment, shall be paid by said Donnelly & Co., to said party of the first part or held by agent subject to first parties order". Defendant deducted from the sum which she had received from Mrs. Silva the sum of $1,150, which she claimed to be due her as commission, and tendered to plaintiffs a check for $2,258.35. This tender was refused as being insufficient in amount, plaintiffs claiming that they should receive the entire sum of $3,500, less the small sum which had been repaid to Mrs. Silva. At a later date plaintiffs cashed the check under the stipulation of the parties that it could be done without prejudice to the rights of either of them.

The judgment in favor of plaintiffs, which was entered on May 9, 1940, for the sum of $3,908.38, required that defendant pay interest on the sum of $1,150 from May 26, 1939, to the date of the entry of the judgment. There is a marginal note on the judgment record showing that satisfaction of the judgment to the extent of $2,258.35 was filed on June 20, 1940.

[1] The contract which plaintiffs made with Mrs. Silva contains in effect the terms upon which defendant had been authorized to sell the furniture and lease the property except that the purchase price of the furniture was changed from $3,000 to $2,500. Plaintiffs were not compelled to enter into this agreement, not having authorized defendant to sell the furniture at the price of $2,500, but since they agreed finally to accept the lower price they became liable to pay to defendant the reasonable value of the services which she had rendered in procuring the purchaser. They had the right to stand upon their original proposition to sell the furniture for $3,000 net to them with the understanding that defendant would receive as commission any sum for which the furniture could be sold over and above that price. Their acceptance of the new terms constituted a waiver of the conditions which had been agreed upon for the payment of the commission. Since the amount to be paid under the conditions under which the sale was actually made had not been agreed upon, the rule to be applied is that defendant is entitled to reasonable compensation. Hall v. Douglas Aircraft Co., 23 Cal.App.2d 498, 73 P. 2d 668; Moore v. Borgfeldt, 96 Cal.App. 306, 273 P. 1114; Wetzell v. Wagoner, 41 Mo.App. 509. The record discloses that defendant presented evidence to establish the reasonable value of her services but the trial court erroneously failed to make a finding thereon.

[2] The trial court erred in ordering defendant to pay the sum of $500 as punitive damages. It is provided in section 3294 of the Civil Code that "in an action for the breach of an obligation not arising from contract" the plaintiff may recover punitive damages in addition to actual damages where the defendant has been guilty of oppression, fraud or malice. The relations between plaintiffs and defendant were contractual. Under the first listing plaintiffs agreed to pay a commission over and above a definite amount which was set as the purchase price of the property, and under the second listing they agreed to pay a specified commission upon a specified selling price. When no sale was effected under either of these listings and a sale was actually effected under terms different from the terms set forth in the list-

ings plaintiffs became liable under an implied contract to pay for the services rendered. Plaintiffs recognized their obligation to pay the commission by signing the contract with Mrs. Silva containing a provision that defendant could retain from the purchase price a sufficient sum to pay her commission. Defendant at all times claimed the right to retain the sum which was not tendered to plaintiffs and presented evidence to the effect that the sum retained by her approximated the rates prevalent in the city. There was an implied contract on her part to deliver to plaintiffs any sum received by her over and above the reasonable value of her services. The record contains no evidence to justify an award of punitive damages.

The judgment is reversed.

We concur: MOORE, P. J.; McCOMB, J.



43 Cal.App.2d 20

MOTOR TRADING CO. et al. v. INGELS et al.

Civ. 11308.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1941.

1. Automobiles ⇐29

The purpose of statute requiring dealers to register used motor vehicles brought from foreign state for sale or resale in California and to execute title bond was to protect purchasers of used or secondhand vehicles brought from other states against risk of failure of title due to fact that vehicle has been stolen or is subject to mortgage or contract in another state. St.1937, pp. 1978, 1979, §§ 1, 2.

2. Commerce ⇐31

When goods come to rest and become intermingled with general property in destination state, they become subject to laws of that state. U.S.C.A.Const. art. 1, § 8.

3. Commerce ⇐48, 54

When matters affect interstate commerce only incidentally, the state may act in behalf of interests of the state, but may not under guise of local regulation discriminate against property having its origin in another state. U.S.C.A.Const. art. 1, § 8.

4. Commerce ⇐54, 77

The statute requiring dealers to register used motor vehicles brought from foreign state for sale or resale in California, to execute title bond, to pay a $5 fee with filing of each bond, and to deliver to purchaser within 24 hours certificates of ownership and registration is unconstitutional as burdening "interstate commerce" since statute discriminates against dealers in interstate commerce by arbitrary classification and imposition of onerous conditions based solely upon origin of vehicle in another state. St. 1937, pp. 1978, 1979, §§ 1, 2; U.S.C.A.Const. art. 1, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Suit by the Motor Trading Company and others against Ray Ingels and others to enjoin defendants from enforcing an act relating to used motor vehicles. From an adverse judgment, plaintiffs appeal.

Affirmed.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellants.

Tripp, Penney & Callaway and George Penney, all of Los Angeles, for respondents.

WARD, Justice.

Appeal by officials of the Department of Motor Vehicles from a decree enjoining them from enforcing the provisions of Chap. 705, p. 1978, Stats.1937 of the State of California against six different plaintiffs who joined in bringing the suit, setting up separately the same cause of action. Three of the plaintiffs are California corporations; one, a co-partnership with its principal place of business in this state, and two are individuals, residing in this state. The sole occupation of all plaintiffs is the business of buying, selling and trading used motor vehicles.

The statute requires that "Every dealer in used, or secondhand, motor vehicles who is a nonresident of this State or who does

not have a permanent place of business in this State, and every other dealer who brings any used, or secondhand motor vehicles into this State for the purpose of sale or resale except as a trade-in on a new motor vehicle or another used motor vehicle, shall within ten days from the date of entry of said motor vehicle into the limits of this State, register such motor vehicle with the Department of Motor Vehicles * * * and shall before said * * * vehicle is sold, or offered for sale, execute a bond with a surety company * * * as surety thereon, payable to the Department of Motor Vehicles for the use and benefit of the purchaser and his vendees, and conditioned to pay all loss that may be occasioned by reason of the failure of the title of such vendor or by reason of any fraudulent misrepresentations or breaches of warranty as to freedom from liens of the motor vehicle being so sold." A fee of $5 is payable on the approval and filing of each bond. The statute further provides: "Every person, firm or corporation upon the completed sale and delivery of any used, or secondhand, motor vehicle shall within 24 hours thereof deliver to the vendee, and indorsed according to law, a certificate of ownership, and a certificate of registration, issued for said vehicle by the Department of Motor Vehicles of this State." Violation of the above provisions of the act constitutes a misdemeanor, and in addition no action may be maintained to recover the vehicle or any part of its selling price. Stats.1937, p. 1979.

Respondents contend "That Chapter 705, Statutes of 1937, of the State of California is violative of (1) the 'equal protection' and 'due process' clauses of the Fourteenth Amendment of the Constitution of the United States, (2) Article 1, Section 21 of the Constitution of the State of California, and (3) the 'commerce' clause of Article 1, Section 8, of the Constitution of the United States."

Whatever niceties of distinction in classification there may be between certain groups of dealers, between dealers and nondealers, and between used or secondhand motor vehicles for sale and for trade-in purposes, there is still a clear and certain distinction as a basis of classification between local and out of the state used or secondhand cars for sale or resale. We do not find it necessary, so far as resident dealers or those having a place of business in this state are concerned, to go beyond the "Commerce Clause" to decide this appeal.

[1] The evident purpose of the statute is to protect purchasers of used or secondhand cars brought from other states against the risk of failure of title due to the fact that the car has been stolen or is subject to mortgage or contract in another state.

Appellants first contend that the legislature was attempting to deal with a class which caused the evil. However, the trial court found: "The number of instances of failure of title in the motor vehicles brought into this State by dealers thereof for the purpose of resale are extremely few and there is no evidence that the instances of such failure of title in the vehicles brought in by dealers are as great or greater than in the cases of motor vehicles either brought into the State by individuals for the purpose of resale or by automobile dealers for the purpose of trade-in on new or used motor vehicles. On the contrary, there is evidence of a considerable number of cases of failure of title in new automobiles sold in this State whether brought into this State from outside thereof or not and also in the case of the sale of used automobiles brought into this State by individuals. A large number of used automobiles are brought into this State for the purpose of resale by individuals other than dealers. The peculiar danger sought to be alleviated by the instant legislation is not peculiar to the business of bringing in used automobiles by dealers for the purpose of resale but extends to the business of selling new automobiles of intrastate origin and to the sale of used automobiles of both intrastate and extrastate origin by individuals." The correctness of this finding is not attacked.

The trial court also found the fee was arbitrary, excessive and bore no reasonable relation to the expressed purpose of reimbursing the Department of Motor Vehicles for expenditures necessary in the administration of the act; that the provisions requiring the dealer to deliver to the vendee within twenty-four hours of sale and delivery of any used vehicle brought into the state for the purpose of sale or resale, a certificate of ownership endorsed according to law, also a certificate of registration issued by the Department, was an unreasonable requirement in that it prescribed so short a period for performance that it was impossible for plaintiffs to comply there-

with, and that its enforcement would greatly damage plaintiffs' lawful business; that the bond requirement discriminates against plaintiff dealers who bring used cars into the state for the purpose of resale in favor of dealers who bring them in for purposes of trade-in, and of individuals who bring them in for resale; finally, that "Such requirements constitute protective barriers against the interstate traffic in which the plaintiffs are engaged."

[2, 3] In support of appellants' contention that the state statute is not in contravention of the commerce clause, reliance is placed upon State ex rel. Leathers v. Coleman, 123 Fla. 23, 166 So. 226. We agree with the holding in that case, based as it is on the often-declared principle that when goods come to rest and become intermingled with general property in the destination state they become subject to the laws of that state. It is likewise true that when matters affect interstate commerce only incidentally, the state may act in behalf of the interests of the state, but may not under the guise of local regulation discriminate against property having its origin in another state. In Best & Co., Inc., v. Maxwell, 61 S.Ct. 334, 335, 85 L.Ed. 275, the court stated: "The commerce clause forbids discrimination, whether forthright or ingenious." While it is true, however, that there is language in the Florida case (State ex rel. Leathers v. Coleman, supra) supporting appellants' position, there is a factual and basic difference in the cases. In the instant case, the requirement of the bond was found to be burdensome and the fee excessive; in the Florida case the imposition of the bond, the fee, etc., was not found to be unreasonable or burdensome.

The Florida case, decided in 1936, was not followed in 1937 in Park McLain, Inc., v. Hoey, D.C., 19 F.Supp. 990, wherein the Florida case was considered in connection with a similar North Carolina statute. In the Park McLain case, the court (19 F. Supp. page 993) said: "As both the bond and the fee required by the statute here under consideration constitute a clear discrimination against used automobiles of foreign origin, the provisions requiring them must be held invalid under the commerce clause of the Constitution. * * * If it is thought that the sale of such cars furnishes peculiar opportunities for fraud, the answer is that if regulation of interstate commerce in used cars is deemed desirable, it must be remembered that it is Congress, and not the State Legislatures, to whom the people have delegated the power of regulating such commerce." In Welton v. State of Missouri, 91 U.S. 275, 281, 23 L.Ed. 347, the court said: "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens."

In the Park McLain case (19 F.Supp. page 993), the court quoted from Howe Machine Co. v. Gage, 100 U.S. 676, 678, 25 L.Ed. 754, as follows: "'A law which requires a license to be taken out by pedlers who sell articles not produced in the State, and requires no such license with respect to those who sell in the same way articles which are produced in the State, is in conflict with the power of Congress to regulate commerce with foreign nations and among the several States. This power applies to articles taken from one State into another, until they become mingled with and a part of the property of the latter, and thereafter protects such articles from any burden imposed by reason of their foreign origin.'"

Bender v. Connor, D.C.Conn., 28 F.Supp. 903, 907, was dismissed for want of jurisdiction. The court stated that the proceeding should have been started in the state court "where it belongs". The case involved a similar statute providing for fees to be paid on registration of used cars brought into the state of Connecticut for the purpose of sale or resale, those brought in for "trade-in" purposes being excepted. The court, citing the Park McLain case, referred to the situation as presenting "a substantial, even grave, constitutional issue".

In Ingels v. Morf, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653, the caravaning act of California requiring a fee of $15 was held unconstitutional in that it was an excessive charge and imposed an unconstitutional burden upon interstate commerce. In Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001, the court upheld a second California Caravan Act, but upon lack of proof that the fees were excessive. In the present case, respondents' claim of excessiveness of the fee is not challenged by appellants, their contention being that when the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers.

[4] In its practical operation, the provisions of the statute in question discriminate against dealers in interstate commerce by arbitrary classification and the imposition of onerous conditions based solely upon the origin of vehicles in another state. They are therefore in contravention of the "Commerce Clause". Const. of the United States, Art. I, sec. 8; Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147; Buck v. Kuykendall, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623, 38 A.L.R. 286; Baldwin v. G. A. F. Seelig, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55; Asher v. Ingels, D.C., 13 F.Supp. 654; Park McLain, Inc., v. Hoey, supra; Welton v. State of Missouri, supra; Morf v. Ingels, D.C., 14 F.Supp. 922, affirmed in 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653; Sproles v. Binford, 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167; Traveler's Ins. Co. v. Connecticut, 185 U.S. 364, 22 S. Ct. 673, 46 L.Ed. 949; Fox, etc., v. Standard Oil Co., 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780; Bender v. Connor, supra; Howe Machine Co. v. Gage, supra.

In Best & Co., Inc., v. Maxwell, supra, the court said: "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language."

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.



43 Cal.App.2d 47

HILL et al. v. DONNELLY.

Civ. 11309.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1941.

Rehearing Denied March 17, 1941.

Hearing Denied April 16, 1941.

1. Deeds ⇐56(2), 66

Whether there has been a "delivery" of a deed in a legal sense is dependent upon whether grantor intended that the deed should be presently operative, and the intention of the grantor is a "question of fact" dependent upon the circumstances surrounding the transaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery" and "Question of Fact".

2. Deeds ⇐194(2, 5)

Acknowledgment and recordation of deed create a presumption of "delivery", while continued possession of the deed by the grantor raises a presumption of nondelivery.

3. Appeal and error ⇐1071(1)

Where trial court found that there was no valid delivery of deed, and likewise found that there was a valid delivery subject to a trust, and in so far as the trust was concerned it was doubtful whether evidence would support the finding, the findings were in irreconcilable conflict and judgment was required to be reversed.

4. Trusts ⇐43(2)

If there was valid delivery of deed placing title to land in decedent and her brother in joint tenancy, statements subsequently made by the brother to third persons, not agents or representatives of the decedent, to the effect that the brother would hold the property subject to a trust, would not create a "trust" enforceable against the brother.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

5. Appeal and error ⇐1071(1)

Where there are contradictory and irreconcilable findings on a material issue, and the determination of one of them is essential to the correctness of the judgment, the judgment cannot stand.

6. Appeal and error ⇐931(1)

Findings must be liberally construed to support the judgment if possible.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Marie Hill and others against Fred B. Donnelly, to have a deed declared to be void. From an adverse judgment, the defendant appeals.

Reversed.

Henry L. Walleck, of Van Nuys, and Scott McReynolds, of Los Angeles, for appellant.

Roscoe R. Hess, of Los Angeles, for respondents.

PETERS, Presiding Justice.

Defendant appeals from a judgment determining that a deed naming him as a joint grantee of certain real property is "void for failure of legal delivery thereof", and that he holds the real property in trust for the benefit of the estate of Emma E. Donnelly, deceased, or for the residuary legatees named in her will. The two plaintiffs are executrices of the will of Emma E. Donnelly, and bring this action in their representative capacities. The defendant is executor of the will of deceased, and is sued both as executor and in his individual capacity. The questions presented to the trial court, and now presented on this appeal, center around the validity and legal effect of a deed naming the deceased and defendant as joint tenants of the real property in question. According to the complaint, and a supplement to the complaint filed after the trial, it is the theory of the plaintiffs that this deed was never validly delivered, or, if validly delivered, it was subject to a trust in favor of the estate of Emma E. Donnelly, or of the four residuary legatees named in her will. Defendant claims ownership of the property by virtue of the joint tenancy deed free of any claim of the plaintiffs or of the residuary legatees. The trial court found in favor of plaintiffs on both theories alleged in the complaint, and the supplement thereto.

The plaintiffs are a sister and a niece of the deceased. The defendant is a brother of the deceased. These three, together with another brother, Ben Donnelly, are named as residuary legatees in the will of deceased. During her lifetime, the deceased, unmarried, owned the property and resided on it. On June 8, 1933, she executed a deed to the property to Elizabeth Kessler, her friend and companion, who, as part of the same transaction, executed a deed conveying the property to deceased and her brother, the defendant herein, as joint tenants. Both deeds are grant deeds containing no reservations or limitations. The deed to Kessler was recorded June 16, 1933, and the joint tenancy deed was recorded the next day. Both deeds were recorded at the request of the deceased, and both were returned to her. Upon her death on September 12, 1936, the joint tenancy deed was found in a safety deposit box to which the deceased and plaintiff Alta D. Maltby had keys.

The evidence as to whether there was an operative delivery of the deed to the defendant was highly conflicting, and would support a finding either way on that issue. Defendant testified that he did not know of the deed until nearly two years after it was executed, but he admitted that the deceased had talked the matter over with him prior to the execution of the deed. The evidence of plaintiffs also shows that the deeds were executed as part of a plan on the part of the deceased to save the costs of probate; that she remained in physical possession and control of the property and of the deeds until her death; that it was the belief of the testator that she could thus deed the property to her brother the defendant, retain complete control over it during her lifetime, and, upon her death, that he would be obligated to divide it according to the provisions of her will; that after the defendant learned of the deed he made various promises to the plaintiffs and others that he would hold the property in trust to be divided according to the provisions of the will. The testimony offered in behalf of the defendant is reasonably susceptible of the interpretation that the deceased intended to deed the property to defendant without limitation, and intended that the deed should become operative at the time of its execution.

[1, 2] Whether a deed has in fact been delivered, in a legal sense, is dependent upon whether the grantor intended that the deed should be presently operative. This intent is a question of fact dependent upon all the circumstances surrounding the transaction. See cases collected and commented on in 9 Cal.Jur., p. 153, sec. 52. Acknowledgment and recordation create a presumption of delivery, while continued possession of the deed by the grantor raises a presumption of nondelivery. See cases collected and commented on in 9 Cal.Jur., p. 184, sec. 73, et seq. The trial court was thus presented with conflicting evidence and conflicting presumptions on the vital question of delivery. The theory upon which the trial court resolved this conflict is not clear. It found (finding V) that when the deeds were executed the deceased "desired and intended to retain control of said real property during her lifetime and to save expenses incident to the transfer of her property at

time of her death, and that she further desired and intended that her brother, the defendant Fred B. Donnelly, at her death, should divide the same, or the proceeds of the sale thereof, or convey the same, to and for the benefit of the persons entitled to her property as provided in her will that she might leave at the time of her death. That it was not at said or any other time the desire or intent of said deceased to make a gift of said real property to said defendant as his own." Whether that finding is based on the theory of a valid delivery subject to a trust, or an invalid delivery, does not clearly appear.

In finding VI the court found: "That in furtherance of said intent, said deceased conceived the plan of executing a deed thereof to a third party, and causing to be executed by said third party, a joint tenancy deed thereof to herself and the said Fred B. Donnelly, *without the delivery of such joint tenancy deed to the said Fred B. Donnelly.*"

Finding VII is to the effect that the deeds were prepared at the request of deceased by a real estate broker and notary public, while finding VIII sets forth the execution and recordation of the deeds. Finding IX is to the effect that after recordation the deeds were returned to the deceased and were found in her safety deposit box at the time of her death. Finding X sets forth that the defendant furnished no consideration for the deed in question. Finding XI reads as follows: *"That neither of said deeds was ever in fact delivered to,* or in the possession of, *the defendant Fred B. Donnelly,* or any agent of said defendant, prior to the death of said deceased. That about two years after the execution of said joint tenancy deed, the said deceased informed defendant that she had placed said property in the names of herself and the said defendant, but that said defendant Fred B. Donnelly did not know at that time that there was a conveyance in the form of a joint tenancy deed and did not know of the existence of a joint tenancy deed until about May 1936, at which time said deceased obtained information from Marie Hill, a sister of deceased, to the effect that said joint tenancy deed was recorded as aforesaid. That at the time of the first knowledge of the said defendant of the existence of said joint tenancy deed, conveying said real property to the said deceased and to the said defendant in joint tenancy, the said defendant indicated no acceptance of said joint tenancy deed or any intention with respect to the same except to convey said real property in the manner directed by the Will of said deceased. That on no occasion did the said deceased ever inform the said defendant that she had any intention of giving said real property to said defendant as his own, or that she had accepted delivery of said joint tenancy deed as an agent of said defendant for his individual benefit. That said deceased accepted delivery of said joint tenancy deed only with the intention that any interest conveyed by it to the defendant should be held by the said defendant for the benefit of her estate at time of her death and the persons entitled thereto under the terms of her Will."

It is further found that it was the intention of deceased *"and the defendant so promised the deceased"* to divide the property among the persons entitled thereto under the will of deceased; that at no time prior to the death of deceased did defendant accept a conveyance to himself; that deceased remained in possession of the property until her death; that in May, 1936, it was the intent of defendant to divide the property as set forth in the will.

The same confusion disclosed by the findings is carried into the judgment. In paragraph 1 of the judgment it is ordered, adjudged and decreed that "any claim of the defendant, Fred B. Donnelly, in his individual capacity" to the property arising by reason of the deed "is held by said defendant Fred B. Donnelly for the benefit of the estate of said deceased, Emma E. Donnelly, and the persons entitled thereto under her Will". Paragraph 2 of the judgment reads as follows: "That said joint tenancy deed is void for failure of legal delivery thereof to the said defendant Fred B. Donnelly and for failure of the acceptance thereof by the said Fred B. Donnelly." By paragraph 3 defendant is ordered in his individual capacity to execute a deed to the property to himself as executor and to the plaintiffs as executrices of the will of the deceased.

[3, 4] We are thus faced with a situation where the trial court found, on conflicting evidence, that there was no delivery of the deed. If that is all the court had found, that would be the end of the case, inasmuch as that finding is supported by the evidence. But then the court found, in effect, that defendant held the property

in trust for those mentioned in the will of the deceased. This finding is based on the theory of a valid delivery subject to a trust. The two findings are in irreconcilable conflict. It is impossible to ascertain what the trial court decided. If there was a valid delivery, as implied by the findings relating to the trust, then we would be faced with the question as to whether such delivery was subject to the trust. There is no evidence that the deeds were executed in reliance on the promise of the defendant to hold the property in trust for those named in the will, nor, in fact, is there any direct evidence that he promised the deceased, after the deeds were executed, that he would hold the property subject to the trust. Statements made to third persons not the agents or representatives of the deceased certainly could not create the trust. Thus, had the court simply found that there was a delivery, and that there was a trust, we would be compelled to hold that there is no evidence to support the trust. The result would be that there would be an absolute delivery.

[5, 6] The result of this analysis leads to the conclusion that the judgment must be reversed. The trial court has found, and adjudged, that there was no valid delivery. It has likewise found there was a valid delivery subject to a trust. In so far as the trust is concerned, it is very doubtful if the evidence will support the finding. Where there are contradictory and irreconcilable findings on a material issue, and the determination of them one way or the other is essential to the correctness of the judgment, the judgment cannot stand. The rule is thus stated in Hollywood Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 131, 137, 17 P.2d 712, 714: "Although it is true that findings must be liberally construed to support the judgment if possible, it is equally true that, where there are contradictory, irreconcilable findings about matters material to a proper disposition of the case, the appellate court can do nothing but reverse the case. Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; Estep v. Armstrong, 91 Cal. 659, 27 P. 1091; Los Angeles, etc., Land Co. v. Marr, 187 Cal. 126, 200 P. 1051; Clavey v. Loney, 80 Cal. App. 20, 251 P. 232; Meyer v. White, 54 Cal.App. 293, 201 P. 801." See, also, Mohun v. Timm, 20 Cal.App.2d 136, 66 P.2d 701; Vuich v. Smith, 140 Cal.App. 453, 35 P.2d 365; Darrah v. Lang, 119 Cal.App. 552, 6 P.2d 989; Boyle v. Boyle, 97 Cal. App. 703, 276 P. 118; Huling v. Seccombe, 88 Cal.App. 238, 263 P. 362; Reak v. Borsi, 55 Cal.App. 169, 202 P. 951; Johnstone v. Gloster, 49 Cal.App. 750, 194 P. 504.

For the foregoing reasons the judgment should be, and hereby is reversed.

We concur: KNIGHT, J.; WARD, J



42 Cal.App.2d 796

In re CAZAURANG'S ESTATE.
HOFFMAN et al. v. THOMAS.

Civ. 2607.

District Court of Appeal, Fourth District, California.

Feb. 10, 1941.

Hearing Denied April 11, 1941.

1. Wills ⇐196

Where holographic will was revoked by later witnessed will, and testator subsequently made an addition to the holographic will, testator thereby intended to adopt the original holographic will as subsequently modified, and such will was his last will and testament to the exclusion of the witnessed will. Probate Code, § 25.

2. Appeal and error ⇐1054(1)

Any error in reception of evidence was harmless where record disclosed that such evidence was not considered by the trial court and that it could not have affected the result.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Proceeding in the matter of the estate of Jean Cazaurang, deceased, wherein different wills were offered for probate. From judgment admitting to probate the will in favor of Marie Lees Thomas, Win E. Hoffman, etc., and others appeal.

Judgment affirmed.

Hearing denied; CURTIS and TRAYNOR, JJ., dissenting.

A. M. Thompson, H. J. Bischoff and Luce, Forward, Lee & Kunzel, all of San Diego, for appellants.

Marion P. Betty and Porter C. Blackburn, both of Los Angeles, and Dempster McKee, of San Diego, for respondent.

BARNARD, Presiding Justice.

On June 11, 1927, Jean Cazaurang executed a will leaving nine-tenths of his estate to his second cousin, Marie Lees, now Marie Lees Thomas. On January 2, 1929, immediately to the right of and below his signature on that will he wrote that date and provisions leaving $1 to the son of his niece and $1 to his wife, and beneath that he again signed his name. Between his signature to the original will and the new date he made a rough bracket. It was stipulated that both this original will and this addition thereto were entirely in the handwriting of the deceased. Both portions were written in French, and the English translation of the entire document is as follows:

"Los Angeles,
"11th of June, 1927.

"If my soul and my body are separated before Marie Lees, my parent and employee, I wish that she would have ninety parts of my property in America and France, and the tenth remaining divided between the children of my two sisters, Marie and Catherine; and Annie Marie Vignau, one-quarter of said tenth, and the other three-fourths in equal parts between the children of sister Catherine.

"J. Cazaurang) January 2,
) 1929

"To Jean Casadoumecq, son of my niece, I leave $1.00 and to my wife $1.00.

"Jean Cazaurang."

In the meantime, on April 25, 1928, the deceased executed a witnessed will in which he left his undivided one-half interest in a large ranch, which constituted the bulk of his estate, to his wife, Marie Cazaurang, pointing out that the other half of this ranch already belonged to her. In that will he revoked all former wills by him made.

Both wills were offered for probate and the admission to probate of the first of these wills, with the addition thereto dated January 2, 1929, was contested by the estate of the decedent's widow and by Jean B. Ganchou. Among other things, the court found that the instrument dated June 11, 1927, with the addition dated January 2, 1929, constituted the last will of said decedent; that the purported will dated April 25, 1928, was revoked by the other will; that the holographic writing dated June 11, 1927, was revived, republished and re-executed as the will of the deceased by the holographic writing dated January 2, 1929; and that the two writings together constituted one will and the last will of said deceased. An order and judgment was accordingly entered admitting to probate the first of these wills, with the addition thereto, as the last will of the deceased, and this appeal followed.

The appellants contend that since the will dated June 11, 1927, had been revoked by the witnessed will of April 25, 1928, it could not have been republished or revived by the addition made on January 2, 1929, since that addition did not expressly refer to or adopt the language of the will of June 11, 1927. It is argued that the addition made on January 2, 1929, is a codicil but since it does not refer to the will of June 11, 1927, it necessarily must be taken as a codicil to the will executed on April 25, 1928.

Section 25 of the Probate Code provides that the execution of a codicil referring to a previous will has the effect of republishing the will, as modified by the codicil. In Re Estate of Plumel, 151 Cal. 77, 90 P. 192, 193, 121 Am.St.Rep. 100, an attempted holographic will, which was invalid because not properly executed, was held to have been incorporated into and made a part of a valid will by a codicil properly executed which was on the reverse side of the same paper. While the writing on the reverse side of the paper was labeled "codicil" that writing did not otherwise refer to the invalid will on the other side of the paper. In that case, the court said:

"But we think that in the present case there was a sufficient reference in the codicil to identify the will upon the obverse of the same sheet of paper as the instrument referred to. The later paper is designated by the testator as a 'codicil' a term which in itself implies that it is an addition to or modification of some existing testamentary paper. 'A codicil is some addition to or qualification of a last will and testament. A codicil is part of a will to which it is attached or referred, and both must be taken and construed together as one instrument.' Proctor v. Clarke, 3 Redf.Sur. (N.Y.) 445, 448. By its very definition, the word 'codicil' imports a reference to some prior paper as a will. And the fact that the codicil is written upon a sheet of paper containing a writing which purports to be testamentary in character is sufficient to justify the inference that

such writing is the will referred to by the codicil.

"In Jarman on Wills, *153, it is said: 'It seems to have been considered, in the ecclesiastical courts at least, that the fact of the codicil being written on the same piece of paper as the prior will (though it does not in terms refer to such will) sufficiently indicates an intention to treat that as the subsisting will.' In Hobart v. Hobart, 154 Ill. 610, 39 N.E. 581, 45 Am. St.Rep. 151, the court said: 'Where the codicil is written on the same paper as the will, or clearly and unmistakably refers to the will, so as to preclude all doubt of its identity, proof of the codicil establishes the will without further proof, except such portions thereof as are revoked or altered by the codicil.'"

In Re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149, it was held that interlineations in a holographic will were to be given effect though not accompanied by a redating, re-execution and republishing of the instrument.

[1] While the addition with which we are here concerned is not, strictly speaking, an interlineation, with respect to the prior will to which it was attached, no reason appears why it should not be given an equal effect. Moreover, while the word "codicil" was not used in connection therewith the addition was not only written on the same sheet of paper as the prior will and on the same side, but it immediately follows the prior will with a rough bracket between the new date and the signature on the prior will. The addition is dated and signed and attached to the prior will not only physically, but by means of a rough bracket.

In addition to the instrument itself, Marie Lees Thomas testified that this original will of June 11, 1927, was handed to her by the deceased in June, 1927; that he took it back from her some time in December, 1928; that he again handed it to her on January 4, 1929, at which time the portion following the bracket had been added; and that she then retained it after the testator's death.

Whether we call this a codicil or a republication and re-execution, the deceased meant something by the words he added to this instrument on January 2, 1929. The added words disclose a testamentary intent and he meant to make some change in the disposition of his estate. He could hardly have intended it merely as a change in his 1928 will because he made no reference to that instrument by attachment or otherwise, and the provision leaving his wife $1 was inconsistent with the 1928 will in which he left the bulk of his estate to her. It is a justifiable inference and we think the most reasonable inference both from the instrument itself and the surrounding circumstances, that the testator, in making the addition on January 2, 1929, and in redating and resubscribing the same, intended thereby to adopt the provisions of the instrument to which it was attached, as modified by the addition, and to republish and re-execute the entire instrument as his last will. The manner in which the addition was made was a sufficient reference to, and adoption of, the language of the original will of June 11, 1927. The evidence sufficiently supports the inference and conclusion drawn by the trial court.

[2] The appellants further contend that certain evidence offered by the respondent was improperly received. Not only does the record disclose that this evidence was not considered by the trial court, but it clearly appears that it could not have affected the result.

The order appealed from is affirmed.

We concur: MARKS, J.; GRIFFIN, J.



43 Cal.App.2d Supp. 854

PEOPLE v. LOPEZ et al.
SAME v. FAGAN.
Cr. A 1757, A 1760.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 8, 1941.

1. Criminal law ⇐1001

In absence of a denial of probation, the suspension of a sentence or a part thereof is recognized as the "granting of probation" although not accompanied by any other evidence that that was court's purpose. Pen. Code, § 1203.

See Words and Phrases, Permanent Edition, for all other definitions of "Granting of Probation".

2. Criminal law ⇐1134(10)

If trial court desired to avoid referring matter to probation officer and thereafter having to consider his report before granting probation, there was an error of procedure in disregarding mandatory provisions of statute which error occurred before judgment and hence was reviewable on appeal from the judgment. Pen.Code, §§ 1203, 1469.

3. Criminal law ⇐1001

While probation may be summarily denied, it is error summarily to grant it. Pen. Code, § 1203.

4. Criminal law ⇐1001

Where attorney for defendants who pleaded guilty to charge of petty theft stated that defendants desired to apply for probation prior to imposing of sentences, court's denial of applications for probation constituted a "denial of probation", and hence court had no authority to suspend part of sentences, and, tested on habeas corpus, suspension would be held a nullity and sentences would be regarded as straight jail sentences. Pen.Code, § 1203.

See Words and Phrases, Permanent Edition, for all other definitions of "Denial of Probation".

5. Criminal law ⇐1134(10)

Where trial court because of denial of applications for probation was unauthorized to suspend a part of the sentences but it appeared that court did not intend to require defendants to serve 180 days in jail, defendants were entitled to relief on appeal from the effects of trial court's misapprehension as to its power. Pen.Code, §§ 1203, 1469.

6. Criminal law ⇐1144(17)

The reviewing court could not take account of severity of sentences on two counts charging that defendant drove without a license, since it would not be presumed that trial court was taking advantage of such counts to inflict punishment in addition to that authorized by law for offense of driving while intoxicated. Vehicle Code, §§ 250, 502, St.1935, pp. 128, 174; § 332, St.1939, p. 2320.

7. Criminal law ⇐984

Two punishments may not be imposed for one offense charged twice.

8. Criminal law ⇐984

A count charging that defendant drove a motor vehicle on a public highway without having a valid operator's or chauffeur's license, and count charging that defendant drove motor vehicle on the public highway after his operator's and chauffeur's license and his driving privilege had been suppressed or revoked, charged but one offense, and hence two punishments could not be imposed for such offense. Vehicle Code, § 250, St.1935, p. 128; § 332, St.1939, p. 2320.

9. Criminal law ⇐1209

Where one act violates two separate statutory provisions, ingredients of offense under each provision being essentially the same, two punishments cannot be imposed.

10. Criminal law ⇐984

Where first count charged driving a vehicle upon a public highway while under influence of intoxicating liquor, and second count charged defendant with being in a state of drunkenness upon a street contrary to municipal code, judgment on second count was not erroneous on ground that second count was included within first count where acts covered by first count did not necessarily include the act charged in second count. Vehicle Code, § 502, St.1935, p. 174.

11. Criminal law ⇐1001

Alleged "orders of probation" which consisted merely in suspension of only two days of each 180 days sentence, which were made in attempt to deprive county board of parole commissioners of authority vested to grant parole, and which were made without reference to and report from probation officer, were required to be set aside. Pen.Code, § 1203.

12. Criminal law ⇐1023(3)

An appeal from order made before judgment denying defendants' requests for permission to file applications for probation was unauthorized and hence was dismissible. Pen.Code, § 1466, subd. 2(a–c).

13. Criminal law ⇐1023(10)

An appeal to Superior Court from a "judgment" in criminal prosecution in a municipal court is regarded as an appeal from a "final judgment of conviction". Pen. Code, § 1466, subd. 2(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment of Conviction" and "Judgment".

14. Criminal law ⇐1023(11)

Where an appeal is from the judgment and sentence, appeal from sentence may be dismissed without any prejudice to the appellant if appellate court considers the appeal from judgment as unaffected by dis-

missal of appeal from sentence and as presenting an appeal on its merits. Pen.Code, § 1466, subd. 2(a–c).

15. Criminal law ⇐1023(11)

In determining whether appeal from sentence should be dismissed, reviewing court would consider fact that, if appeal were dismissed, erroneous judgment would be left standing and defendant might have to serve an imprisonment of an additional 180 days not because of authority of law but because trial court erred and irregular notice of appeal left the reviewing court helpless to right the wrong. Pen.Code, § 1466, subd. 2(a–c).

16. Criminal law ⇐1134(1)

The Appellate Department of the Superior Court will not permit a prejudicial error to survive if there is a legitimate way open to correct it.

17. Criminal law ⇐1023(11)

An appeal lies from a "sentence" in a criminal case because it lies from the "final judgment of conviction", "sentence" being synonymous with "judgment" and "final judgment of conviction", and being the judgment of the court before which trial in criminal case is had formally declaring to accused legal consequences of the guilt. Pen. Code, §§ 1191, 1203.1 to 1203.3, 1445, 1461a; § 1466, subd. 2(a–c).

See Words and Phrases, Permanent Edition, for all other definitions of "Sentence".

18. Criminal law ⇐1081

Notices on appeal to the Superior Court should not be construed more strictly in criminal cases than they are in civil cases where rule is that notices of appeal are liberally construed to preserve right of review unless it appears that respondent has been misled by misdescription. Pen.Code, § 1466, subd. 2(a–c).

19. Criminal law ⇐1023(11)

An appeal from a "sentence" is not dismissible even if a distinction may legitimately be made between "judgment" and "sentence" in view of policy to hear appeals upon the merits and to avoid forfeiture of substantial rights upon technicalities. Pen. Code, §§ 1191, 1203.1 to 1203.3, 1445, 1461a; § 1466, subd. 2(a–c).

20. Criminal law ⇐1081

A notice of appeal was not insufficient because it was from "the order and sentence", whereas there were four counts as to each of which there was an order and a sentence, where the four judgments were introduced in statement on appeal with the words "The Court thereupon immediately pronounced sentence, as follows". Pen.Code, § 1466, subd. 2(a–c).

21. Criminal law ⇐1081

A notice of appeal was not insufficient because it was from "the order and sentence" whereas there were four counts as to each of which there was an order and sentence, where appellant could treat separate sentences which were to run consecutively as constituting in substance a single judgment. Pen.Code, § 1466, subd. 2(a–c).

Appeals from Municipal Court of City of Los Angeles; Joseph L. Call, Judge.

Manuel Lopez and others, in one case, were convicted of petty theft in the municipal court, and they appeal from such conviction and from an order; and Bernard J. Fagan, in another, was convicted of offenses relating to driving on the public highway while under influence of intoxicating liquor, and he appeals from an order and sentence made by the municipal court.

Appeal from order in first case dismissed and judgment and sentence reversed, and in second case sentence on one count reversed with directions and order reversed with directions.

Ben L. Blue, of Los Angeles, for appellants in first case.

Frederick M. Hall, City Public Defender, Kenneth E. Lynch, Deputy Public Defender, and Baldo M. Kristovich, Deputy Public Defender, all of Los Angeles, amici curiae in first case.

Joseph Henry Wolf, of Los Angeles, for appellant in second case.

Ray L. Chesebro, City Atty., W. Joseph McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent in both cases.

Frederick M. Hall, City Public Defender, and Baldo M. Kristovich, Deputy Public Defender, both of Los Angeles, amici curiae in second case.

BISHOP, Judge.

For convenience we shall refer to the first of the above cases, with its three defendants, as the Lopez case, and the second one, with its sole defendant, as the

Fagan case. There was no trial in either case; all of the defendants pleaded guilty, judgment following immediately without the taking of any evidence and without any reference to or report from a probation officer.

Proceedings in Lopez Case.

In the Lopez case the three defendants were charged with petty theft of personal property of the approximate value of $15. Represented by counsel, they entered a plea of guilty, and then the following dialogue took place between the trial judge and Mr. Lynch, the attorney for the defendants:

Mr. Lynch: "These defendants desire at this time to apply for probation prior to the imposing of sentence by the court." (At this time each of the defendants stated "Yes" and nodded his head affirmatively.)

Mr. Lynch: "If your Honor please, I am informed that this is the first offense for these three young men, and I therefore move the court that they be permitted to file application for probation."

The Court: "Permission to file application for probation denied."

Mr. Lynch: "Does your Honor mean that these defendants will not be permitted to file for probation?"

The Court: "That is the order of the court."

The defendants then waived the statutory time for sentence and the trial court announced: "The sentence will be as follows: As to each defendant I hereby sentence the defendants and each of them to 180 days in the City Jail; 90 days of said sentence is ordered suspended; 90 days to be served."

Proceedings in Fagan Case.

The defendant Fagan was charged in four counts with the following offenses: first, with driving a vehicle upon a public highway while under the influence of intoxicating liquor, in violation of section 502, Vehicle Code, St.1935, p. 174; second, with being and appearing in a state of drunkenness and intoxication in and upon a street, sidewalk, highway and railroad depot and in a place open to public view, contrary to section 41.27 of the Los Angeles Municipal Code; third, with driving a motor vehicle on a public highway without then and there holding a valid operator's or chauffeur's license, an act made a misdemeanor in section 250 of the Vehicle Code, St.1935, p. 128; and fourth, with driving a motor vehicle on a public highway after his operator's and chauffeur's license and his driving privileges had been suspended or revoked, contrary to section 332, Vehicle Code, St.1939, p. 2320. All these acts were done, according to the allegations of the complaint, on or about the 26th day of October, 1940, and the three offenses that involved driving a vehicle were committed on Hollywood Boulevard.

Appearing for arraignment on these charges without counsel, the defendant pleaded guilty to each count and waived postponement of sentence. "The Court thereupon," we read in the settled statement on appeal, "immediately pronounced sentence as follows: Count One: One hundred and eighty days, suspended two years; probation granted, defendant to serve one hundred and seventy-eight days; Count Two: One hundred and eighty days, suspended two years; probation granted, defendant to serve one hundred and seventy-eight days; Count Three: One Hundred and eighty days, suspended two years; probation granted, defendant to serve one hundred and seventy-eight days; Count Four: One Hundred and eighty days, suspended two years; probation granted, defendant to serve one hundred and seventy-eight days. The sentences on each count to run consecutively."

Discussion of Lopez Case.

[1-3] In the absence of a denial of probation, the suspension of a sentence or a part thereof has been recognized as in fact the granting of probation, although not accompanied by any other evidence that that was the Court's purpose. In re Herron, 1933, 217 Cal. 400, 19 P.2d 4. The proceedings just preceding the imposition of the sentence in this case, viewed in the light of the immediate subsequent action taken by the trial court, may possibly be explained as not a denial of probation, but as expressive of a desire on the part of the trial court to avoid referring the matter to the probation officer and thereafter having to consider his report, before granting probation. If this explanation is the correct one, then we have an error of procedure, which occurred before judgment and so is reviewable on an appeal from the judgment. Section 1469, Penal Code. The error of procedure consists in disregarding the mandatory provisions of section 1203, Penal Code, which, after providing that probation may be

summarily denied, continues: "* * * if probation is not denied, the court must immediately refer the matter to the probation officer to investigate and to report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant and his prior record * * *. At such time or times fixed by the court, the court must hear and determine such application and in connection therewith must consider any report of the probation officer, and must make a statement that it has considered such report * * *." We are of the opinion, in view of these clear provisions, that while probation may be summarily denied, it is erroneous summarily to grant it.

Usually a defendant granted probation, even irregularly, does not feel aggrieved and does not complain. But the defendants here do feel aggrieved and are complaining. They represented to the trial court, after he had taken the action complained of, that, if the matter were referred to the probation officer as required by law, it would be made to appear that all three of the defendants were seniors in one of the City's high schools; that one was manager of the school's football team, one of the others was president of the school's student body and quarter-back on the team; and that none of the three had ever before been involved in any legal difficulties. This showing is mentioned not because we deem such a showing necessary in order to bring the requirement of the code—that the matter be referred to the probation officer—into effect, but to illustrate in this case the theory of the code section, that an enlightened judge is the better able to grant probation wisely than one who acts summarily.

[4, 5] We are of the opinion, however, that the replies of the trial judge, to the defendants' statement that they desired to apply for probation and their formal motion to be permitted to file their applications, are most reasonably understood as a denial of probation. But if probation was not being granted, then the trial court had no authority to suspend a part of the sentence (Ex parte Howard, 1925, 72 Cal. App. 374, 237 P. 406 and cases cited), and tested on habeas corpus the suspension would be held a nullity and the sentences would be regarded as straight jail sentences of 180 days each. In re Collins, 1908, 8 Cal.App. 367, 97 P. 188; In re Clark, 1925, 70 Cal.App. 643, 234 P. 109; In re Eyre, 1934, 1 Cal.App.2d 451, 36 P.2d 842. The trial court did not intend, however, we must assume from its complete action, to require the defendants to serve one hundred eighty days in jail. They should, therefore, and in our opinion may have relief on appeal from the effects of the trial court's misapprehension as to its power. See People v. Mendosa, 1918, 178 Cal. 509, 173 P. 998. The result of our judgment will be to grant relief to the defendants without prejudice to the rights of the People.

Discussion of the Fagan Case.

[6-9] As already noted, defendant Fagan was sentenced to serve one hundred and eighty days on each of the four charges made against him, the sentences to run consecutively. Of the seeming severity of the sentences on the two counts charging that the defendant drove without a license, we can not take account—it is not to be presumed that the trial court was taking advantage of these counts to inflict punishment, in addition to that authorized by law, for the offense of drunk driving—but we must take account of the fact that the third and fourth counts actually charge but one offense, although approached from different view points. As two punishments may not be imposed for one offense, charged twice, the judgment on Count IV should be reversed. People v. Ryan, 1925, 74 Cal.App. 125, 131, 239 P. 419; People v. Horowitz, 1933, 131 Cal.App.Supp. 791, 795, 19 P.2d 874; and see People v. Twedt, 1934, 1 Cal.2d 392, 398, 35 P.2d 324. The same rule is applied where one act violates two separate statutory provisions, the ingredients of the offense under each provision being essentially the same, as they are here. State v. Masnik, 1939, 123 N.J.L. 335, 8 A.2d 701, 705; Weaver v. State, 1906, 74 Ohio St. 53, 77 N.E. 273, 275.

[10] It is also argued that the offense stated in the second count (being drunk in a public place) consisted only in appearing drunk on a public street at the time of driving while under the influence of liquor, in which event there should be no judgment on Count II because it is, in fact, included within Count I, as is held in such cases as People v. Buchanan, 1929, 106 Cal.App.Supp. 765, 288 P. 50; People v. Twedt, 1934, 1 Cal.2d 392, 35 P.2d 324; and People v. Kynette, 1940, 15 Cal.2d 731, 104 P.2d 794 (but see People v. Burkhart, 1936, 5 Cal.2d 641, 55 P.2d 846). The trial

court, in considering the matter of probation on its merits, or the County Board of Parole Commissioners, if the problem is ever presented to it, should give due weight to the fact, if it be a fact, that the public appearance incident to Count I was the only public appearance while drunk that falls within Count II. Not having the facts before us, we cannot so determine; the acts covered by Count I may, but do not necessarily, include the act charged in Count II.

[11] Turning to the orders made after the imposition of the sentences, we find that the trial court has clothed them in the guise of probationary orders; the sentences are suspended for two years and "probation granted." What has actually been ordered, of course, is the suspension of only two days of each one hundred and eighty days sentence, and if we recognize this as the "act of grace and clemency" which the granting of probation is supposed to be (People v. Hainline, 1933, 219 Cal. 532, 534, 28 P.2d 16) and not as an attempt to deprive the County Board of Parole Commissioners of the authority vested in it to grant parole, then we alone of all those charged with responsibilities in the matter, are blind to the true state of things. These "orders of probation," moreover, were made without a reference to and report from the probation officer, and for this reason, too, should be set aside.

The Wording of Notices of Appeal.

The work of appellate courts is taken up to too great an extent with questions of procedure which would never arise if counsel would take the slightest pains to ascertain and follow the plain directions of the codes. The notices of appeal in both these cases serve to illustrate our observation, although the notice of appeal in the Lopez case is not so glaring an example.

I. Appeals in Lopez Case.

[12, 13] In the Lopez case the three defendants gave notice that they and each of them appealed "from the order made denying the defendants; (sic) and each of them, requests for permission to file an application for probation, and from the judgment and sentence made and entered in the above-entitled case on the 28th day of September, 1940." Section 1466, Penal Code, determines what appeals may be taken from municipal courts in criminal cases. It authorizes appeals by the defendant "(a) From a final judgment of conviction. (b) From any order made after judgment affecting his substantial rights. (c) From an order denying a motion for a new trial." As the order the defendants have appealed from was made before judgment, the appeal from it was unauthorized and must be dismissed. People v. Jones, 1927, 87 Cal.App. 482, 495, 262 P. 361. Instead of following the language of the code, by taking their appeal from the "final judgment of conviction," the defendants appealed from the "judgment and sentence." In at least twenty-four cases (beginning with People v. Dunlap, 1936, 12 Cal.App.2d 333, 55 P.2d 522, and continuing down to People v. Dutton, Cal.App., 1940, 107 P. 2d 937), appeals from "judgments" have been regarded as appeals from the final judgments of conviction, but appeals from "sentences" have been dismissed. These decisions were all written by the two divisions of the District Court of Appeal of this (the second) Appellate District (two of the cases being taken over by the Supreme Court, which made no change in the ruling). Deferentially, but for reasons about to be given, we are not dismissing the appeal from the sentence.

II. Appeals in Fagan Case.

[14-16] Where an appeal is from the judgment and sentence, the appeal from the sentence may be dismissed without any prejudice to the appellant if, as has always been the case, the appellate court considers the appeal from the judgment as unaffected by the dismissal of the appeal from the sentence and as presenting an appeal on its merits. But a different situation is presented where, as in the Fagan case, the appeal is "from the order and sentence of this Court heretofore made and entered on the 28th day of October, 1940." If the appeal from the sentence is dismissed, as the People argue that it should be, and as the procession of cases referred to would warrant (to which procession should be added People v. Sepulveda, Cal.App., 1940, 106 P.2d 18, where there was an appeal from the "sentence" but not from the judgment), then the erroneous judgment will be left standing, and the defendant may have to serve an imprisonment of an additional one hundred eighty days, not because the law authorizes it, but because the trial court erred and the irregular notice of appeal leaves us helpless to right the wrong. We are not willing ourselves to act with-

out legal authority in order to correct a similar act, but neither are we willing to let a prejudicial error survive if there is a legitimate way open to us to correct it.

III. An Appeal Lies from a "Sentence".

Although our decisions in such cases as these are not ordinarily reviewable by any of the higher courts of the state, nevertheless, because we recognize the desirability of uniformity of decision and realize that that is to be obtained by our following the paths marked by our courts of greater wisdom, our practice is not to deviate from the course they have indicated, even though we would have preferred another. We are presuaded that we should make a detour in the present instance, however, because, we respectfully submit, the trail marked by the decisions referred to was neither surveyed nor adopted with deliberation, is not justified by either authority or logic, but is contrary to both, and may, as in the instant case, lead to a door closed to all effort to correct a harmful error. We are further persuaded to depart from precedent in this case because the problem is one of our jurisdiction on appeal, and so it lies within the power of the courts whose decisions we are declining to follow to set our judgments aside, if, after weighing the matter, they are of the opinion that we are wrong.

So far as we have been able to find, the first case in which an appeal from a "sentence" was dismissed, was, as already stated, People v. Dunlap, 1936, 12 Cal.App.2d 333, 336, 55 P.2d 522, 523, 524. It appears from the opinion that the defendant had appealed from an order denying him a new trial, from the judgment, the verdict and sentence. The question of the appeal from the sentence is disposed of as follows: "Since no appeal lies from either 'the verdict' or 'the sentence,' the attempted appeal therefrom is dismissed." No authority was cited and no consideration whatever was given to the possible scope of the word "sentence." This first decision has been succeeded, as already noted, by twenty-four cases, in each of which an appeal from a "sentence" was dismissed, but in not one of them was there a case cited, other than one or more of the twenty-five, and in not one of them was there any consideration given to the possible meaning of "sentence." Without discussion, the word "judgment" was assumed to mean "final judgment of conviction"; without comment, the word "sentence" was assumed to mean something from which an appeal was unauthorized just because that particular word did not appear in the code provisions concerning appeals.

[17] Because of the respect we entertain for the learned justices to whose decisions we have just been referring, we make bold to state our confidence that, when they do consider what a "sentence" is, they will conclude that an appeal from it will lie. An appeal lies from a "sentence" in a criminal case, because it lies from the final judgment of conviction; the two terms are synonymous. "A sentence is the judgment of the court before which the trial in criminal case is had, formally declaring to the accused the legal consequences of the guilt. * * * Briefly, it is the judgment against the accused." 16 C.J. 1265, 1266, 24 C.J.S., Criminal Law § 1556. The law dictionaries define "sentence" as follows: "A judgment of conviction in a criminal case; it is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." Ballentine (1930) Law Dictionary. "The judgment formally pronounced by the court or judge upon a defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted. The word is properly confined to this meaning." Black's Law Dictionary, 3rd Ed. "In the common law, sentence is exclusively used to denote the judgment in *criminal* cases. 4 Bl.Comm. 376." Burrill's Law Dictionary (1951). "A judgment, or judicial declaration made by a judge in a cause. The term judgment is more usually applied to civil, and sentence to criminal, proceedings." 3 Bouvier's Law Dictionary, Rawle's 3rd Revision, 3042. Webster's New International Dictionary joins the chorus with this definition of "sentence": "2. A decision or judgment pronounced by a court. * * * 9. Law. In its broadest sense, a judicial determination, judgment, or decree; * * * b. In criminal and ecclesiastical courts, a judgment passed by a court or judge on a person on trial as a criminal or offender; as commonly used, the order by which the court imposes punishment or penalty upon a person found guilty, or the punishment or penalty so imposed." For a multitude of decisions to the same conclusion see "Sentence" in 38 Words and Phrases, Permanent Edition, 597. See also Ex parte Shrader, 1867, 33 Cal. 279, 283.

There is nothing in the codes or decisions of California (other than the twenty-five cases which have caused us to stop, look and listen) that require or suggest that the word is used with a different meaning in this state. Section 1191, Penal Code, places limits upon the time to be fixed for "pronouncing judgment," but provides that in case the court entertains a doubt as to the defendant's sanity, "the time for pronouncing sentence" may be extended. Section 1203.1, Penal Code, provides: "The court, judge or justice thereof, in the order granting probation, may suspend the imposing, or the execution of the sentence * * *." In section 1203.2, Penal Code, we find: "* * * the court may, if the sentence has been suspended, pronounce judgment * * * but if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension." Again in section 1203.3, Penal Code, we note the expression: "* * * if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment * * *." Section 1445, Penal Code, made applicable to the municipal court by section 1461a of the same code, provides: "When the defendant pleads guilty, or is convicted, * * * the court must render judgment thereon of fine or imprisonment, or both, as the case may be."

Many more illustrations from the code sections could be given; we add a few found in the opinions of our appellate courts. In People v. Stokes, 1907, 5 Cal. App. 205, 214, 89 P. 997, the court argued: "Pronouncing judgment, which is the formal declaration of sentence, is not the trial, nor any part thereof." In Ex parte Robbins, 1915, 27 Cal.App. 677, page 679, 151 P. 14, the court, speaking of a defendant convicted in a justice's court, stated: "He now insists that the judgment of sentence is null and void." Later (27 Cal.App. page 682, 151 P. page 15) the court referred to the "rendition of judgment of sentence." From the opinion in People v. Ryan, 1925, 74 Cal.App. 125, page 132, 239 P. 419, page 422, a case involving at least thirty-one counts, we quote: "The court below pronounced a separate sentence on each count, under which the defendant was convicted, and provided that the sentences run consecutively. Appellant has treated these separate sentences as constituting, which they do, in substance, a single judgment, and has appealed 'from the final judgment of conviction' in the action." From In re Phillips, Cal.Sup., 1941, 109 P.2d 344, 346, we quote: "In the former situation, however, where the court suspends the imposition of the sentence, that is, the rendition of a judgment of conviction, there is no judgment from which the defendant can prosecute an appeal * * *."

In the following cases the opinions refer one or more times to the final judgment of conviction as the "judgment and sentence": In re Bateman, 1928, 94 Cal.App. 639, 640, 271 P. 757, 758; People v. Hartman, 1913, 23 Cal.App. 72, 76, 137 P. 611; People v. Tedesco, 1934, 1 Cal.2d 211, 213, 34 P.2d 467 ("judgment of conviction and sentence"); People v. Bermijo, 1935, 2 Cal. 2d 270, 272, 40 P.2d 823; People v. Wallach, 1935, 8 Cal.App.2d 129, 133, 47 P.2d 1071; People v. Smith, 1939, 36 Cal.App.2d 361, 362, 97 P.2d 867; People v. Kynette, 1940, 15 Cal.2d 731, 737, 762, 104 P.2d 794, (In the opinion in this case "judgment" and "sentence" are frequently used interchangeably.)

It would seem to be demonstrated beyond question that "judgment" and "sentence" are regarded as synonymous terms, in the vocabulary of the criminal law, both elsewhere and in the legal literature of this state. Therefore, the trial court did not misdescribe the judgment rendered when in the statement on appeal in the Fagan case it declared: "The Court thereupon immediately pronounced sentence, as follows." Nor did the defendant fail to appeal from the final judgment of conviction because he referred to it as the "sentence."

[18, 19] But if a distinction may legitimately be made between "judgment" and "sentence," it does not follow that an appeal from a sentence should be dismissed. In People v. Bryant, 1929, 207 Cal. 450, page 452, 278 P. 1025, our supreme court stated, "It is the policy of this court, of course, to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technicalities," and in People v. Appellate Department, 1936, 8 Cal.2d 56, 60, 63 P.2d 812, the supreme court recognized, as we do, that the same policy governs this court. Notices on appeal should not be construed more strictly in criminal cases than they are in civil cases, where the rule is that "notices of appeal are liberally construed to preserve the right of review unless

it appears that the respondent has been misled by the misdescription." Kellett v. Marvel, 1936, 6 Cal.2d 464, 471, 58 P.2d 649, 653; and see cases cited in 2 Cal.Jur. 316–319, including Kimple v. Conway, 1886, 69 Cal. 71, 10 P. 189, 190, where an appeal from an order "overruling and denying plaintiff's motion to set aside said judgment * * * and for granting a rehearing therein" was recognized as an appeal from an order denying plaintiff a new trial. Any meaning that "sentence" can with any reason be said to bear in either notice of appeal before us, is so nearly akin to that which must be ascribed to "final judgment of conviction" that the appeal from the "judgment and sentence" in the Lopez case and the "sentence" in the Fagan case should be given effect as applying to their respective final judgments of conviction. To give to "sentence" a meaning (or lack of meaning) that requires the dismissal of the appeal, is not an observance of the policy pronounced by the supreme court, supra, "to hear appeals upon the merits."

[20, 21] The People further question the sufficiency of the notice of appeal in the Fagan case because it is from "the order and sentence," whereas there were four counts, as to each of which there was an order and a sentence. As we have already noted, these four judgments are introduced in the statement on appeal with the words: "The Court thereupon immediately pronounced sentence, as follows." The point is further disposed of by People v. Ryan, supra, 74 Cal.App. 125, page 132, 239 P. 419, page 422, where, as the court observed: "The court below pronounced a separate sentence on each count, under which the defendant was convicted, and provided that the sentences run consecutively. Appellant has treated these separate sentences as constituting, which they do, in substance, a single judgment, and has appealed 'from the final judgment of conviction.'" The appellate court proceeded to strike from the judgment the sentences based on certain counts, affirming the others.

We therefore, in the Lopez case, dismiss the appeal from the order denying the defendants' motion; we reverse the judgment and sentence with directions to the trial court to rearraign the defendants for judgment, not overlooking the possibility of probation. Ex parte Maguth, 1930, 103 Cal.App. 572, 284 P. 940. In the Fagan case, we affirm the judgment as to Counts One, Two and Three; we reverse the judgment as to the fourth count, with directions to the trial court to dismiss the fourth count; we reverse the orders purporting to grant probation, with directions to take any further steps respecting probation in accordance with the law.

We concur: SHAW, P. J; FOX, J.

17 Cal.2d 411

S. A. GERRARD CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.

L. A. 17668.

Supreme Court of California.

Feb. 19, 1941.

1. Workmen's compensation ⇐308

An "independent contractor" not entitled to a compensation award is one who renders service in the course of an independent employment or occupation following his employer's desires only in the results of the work and not in the means whereby it is to be accomplished.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

2. Workmen's compensation ⇐235

The "master and servant relationship" or "employer and employee relationship" exists for purposes of awarding compensation whenever the employer retains the right to direct how the work shall be done as well as the result to be accomplished, the right to control rather than the amount of control exercised being the determinative factor, and the rule requires that the right to exercise complete or authoritative control rather than mere suggestion concerning details must be shown.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee Relationship" and "Master and Servant Relationship".

3. Workmen's compensation ⇐1939

Where there is a substantial conflict in the evidence regarding the status of a person claiming compensation, the finding of the Industrial Accident Commission will not be disturbed.

4. Workmen's compensation ⇐1461

Evidence that lessee under its contracts with lessor had no right to do anything with melon crop from planting to sale without lessor's consent and that lessor's right to control lessee's operations extended to all persons who worked for lessee in raising and picking crop showed that lessee was in effect an "employee", though in form he was an "independent contractor", and supported finding that picker who was injured was lessor's "employee" entitled to compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

Proceeding on a writ of certiorari by the S. A. Gerrard Company and another to review an award of the Industrial Accident Commission of the State of California in favor of Macerio Valdez.

Award affirmed.

For prior opinion see 105 P.2d 159.

Donald Gallagher, of San Francisco, and Marguerite Arnold, of Los Angeles, for petitioners.

Everett A. Corten and Dan Murphy, Jr., Asst. Atty., both of San Francisco, for respondents.

EDMONDS, Justice.

The proceedings in which the Industrial Accident Commission made an award of compensation in favor of Macerio Valdez are before this court upon the return to a writ of certiorari issued by the District Court of Appeal. The only question for decision is whether Valdez, at the time he was injured, was an employee of the petitioner S. A. Gerrard Company. The award against the petitioner and State Compensation Insurance Fund, its insurance carrier, is based upon findings that it was the special employer of Valdez.

At the time of the accident, the respondent W. Hanaoka had leased land from the Gerrard company and was growing melons upon it. He employed Valdez as a picker. The agreement between the Gerrard company and Hanaoka for the use of this land was stated in three written contracts. One of these was a lease which provided that the land was to be used for the purpose of growing crops of cantaloupes, honeydews or honeyballs as the Gerrard company might direct, and that the provisions of a contemporaneously executed "distributing agreement" and of a "crop mortgage", were a part of it.

By the distributing agreement, W. Hanaoka appointed the Gerrard company as his exclusive agent to perform all engine work necessary to prepare the fields for planting; to haul the melons to its packing shed; to sort, pack and load the melons on cars and trucks; and to market and distribute them. Hanaoka agreed to prepare the premises for planting; to plant the same with the kind and variety of melons as directed by the Gerrard company; to care for the melons until their maturity; to pick and gather them into field centers; and to load them on the Gerrard company's trucks. Another provision was that all

picking should be done under the supervision of and in accordance with the directions of the Gerrard company. Hanaoka agreed, also, to hire from the Gerrard company any mules he needed and to purchase all feed from it. He also agreed to furnish all labor, materials, and equipment; to care for equipment of the Gerrard company; to purchase all seed necessary for the growing of the crops from it; and to pay a proportionate part of its advertising costs.

The Gerrard company agreed to sell the seed without warranty or guarantee; to furnish field crates for picking purposes; to advance the grower actual harvesting cost during the harvest season; to make loans to the grower, as in its opinion, were necessary to defray the operating expenses; and to use its best efforts to sell the melons. The agreement further stipulated that if, in the opinion of the Gerrard company, marketing conditions indicated a probable loss in the handling of the melons, it was not obligated to accept, pack, load or make any advances while such conditions existed. Another provision of the contract was that if a proration plan was in effect the company was not obligated to accept melons in excess of the allowed quantity, and it should have the sole right to determine whether the melons were subject to prorate control. It was also given the right to vote and represent the melons, or the acreage thereof, and to act to the same extent as if it were the sole owner of the crop.

The mortgage made the crops security for the payment of land rental amounting to $3,200 and all sums loaned under the terms of the distributing agreement. It provided that in the event of any litigation affecting the crop the Gerrard company might enter the premises and take all necessary measures to protect the crop; also, it might at any time enter to view the crop or take measures to protect it; and might sell and dispose of it at such time and for such sum as it may deem proper.

The decisive question in the case is the relationship between the Gerrard company and W. Hanaoka. If he was an employee of the Gerrard company, then Valdez was also. On the contrary, if W. Hanaoka was an independent contractor then Valdez, as his employee has no rights against the Gerrard company or its insurance carrier.

[1-3] An independent contractor is "one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work and not in the means whereby it is to be accomplished". Moody v. Industrial Acc. Comm., 204 Cal. 668, 670, 269 P. 542, 60 A.L.R. 299; Restatement, Agency, § 2. On the other hand, the relationship of master and servant or employer and employee exists whenever the employer retains the right to direct how the work shall be done as well as the result to be accomplished. Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820; Winther v. Industrial Acc. Comm., 16 Cal.App.2d 131, 60 P.2d 342; Restatement, Agency, § 2. But this rule requires that the right to exercise complete or authoritative control, rather than mere suggestion as to detail, must be shown. Moody v. Industrial Acc. Comm., supra; Winther v. Industrial Acc. Comm., supra. Also, the right to control, rather than the amount of control which was exercised, is the determinative factor. Hillen v. Industrial Acc. Comm., 199 Cal. 577, 250 P. 570; Moody v. Industrial Acc. Comm., supra; Restatement, Agency, § 2. And if there is a substantial conflict in the evidence regarding the status of the person claiming compensation, the finding of the Industrial Accident Commission will not be disturbed. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721; Carlson v. Industrial Accident Commission, 213 Cal. 287, 2 P. 2d 151.

[4] Under Hanaoka's contracts with the Gerrard company, he had no right to do anything with the melon crop, from planting to sale, without its consent. In form he was an independent contractor; in effect he was an employee of the Gerrard company and its right to control his operations extended to all of the persons who worked for him in raising and picking the crop. This evidence clearly supports the finding that Valdez was an employee of the Gerrard company under the principles applied in Carlson v. Industrial Accident Commission, supra.

The petitioners place great reliance upon Winther v. Industrial Accident Commission, supra, but it is not in point upon the facts now before the court. In that case, Winther, who owned a ranch, made an agreement with one Rueda to pick an olive crop and transport it to the packing house for $16 per ton. Rueda employed a man to assist him. The latter was injured and sought compensation from Winther. Be-

cause there was no evidence showing that Winther was interested in the slightest degree in the means by which the work should be done or in the details of its accomplishment, Rueda was held to be an independent contractor. The evidence concerning the right of the Gerrard company to control all of W. Hanaoka's operations compels the contrary holding in the present controversy.

The award is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.; CURTIS, J.; CARTER, J.



17 Cal.2d 415

AULT v. COUNCIL OF CITY OF SAN RAFAEL et al.

S. F. 16544.

Supreme Court of California.

Feb. 19, 1941.

Rehearing Denied March 20, 1941.

1. Mandamus ⇐7

The granting of a writ of mandate is discretionary.

2. Mandamus ⇐1, 10

A writ of mandate will be granted only where necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by the petitioner if the writ is denied. Const. art. 11, § 8.

3. Mandamus ⇐168(2)

In mandamus proceeding by a registered elector of city to compel publication of proposed amendment to charter of city, and to call a special election thereon, the Supreme Court could not assume, as contended by registered elector, that if proposed amendment was placed on ballot at general election, as intended by respondents, it might be lost sight of and registered elector therefore damaged.

4. Mandamus ⇐74(2)

Where city council ordered that proposed amendment to city charter be placed on ballot for general election, and the earliest possible special election date was 12 days before date of general election if writ of mandate sought by registered elector of city to compel compliance with time limit set out in constitution were to be granted, and registered elector did not show how he, as a taxpayer, would be injured by the short delay, petition for writ of mandate would be denied. Const. art. 11, § 8.

CARTER, J., dissenting.

Mandamus proceeding by John M. Ault, as a registered elector of the City of San Rafael, against the Council of the City of San Rafael and others to compel respondents to publish a proposed amendment to the charter of the City of San Rafael, and to call a special election thereon not less than forty nor more than sixty days thereafter.

Petition denied.

Rehearing denied; CARTER, J., dissenting.

Lionel Browne, of San Francisco, for petitioner.

Martinelli & Gardiner, of San Rafael, for respondents.

CURTIS, Justice.

Petitioner, as a registered elector of the city of San Rafael, filed his application for a writ of mandamus to compel respondents to publish a proposed amendment to the charter of said city, and to call a special election thereon not less than forty nor more than sixty days thereafter. An alternative writ of mandate has been heretofore issued; a return filed by respondents; and the cause argued orally by counsel for the respective parties.

It is alleged that a petition requesting the city council to submit to the electors of the city a proposed amendment to the city charter was circulated and signed by more than 15 per cent of the registered electors; that the petition was filed with the city clerk on December 4, 1940, along with a request to publish the same within fifteen days thereafter and to hold a special election thereon not less than forty nor more than sixty days after such publication. It is further alleged that no publication was made within fifteen days from the date of filing nor was a special election thereafter called within a period of seventy-five days following the December 4th filing.

Petitioner contends that such failure to publish and call a special election within the seventy-five day period is in direct violation of Art. XI, sec. 8, of the State Constitution. The provisions therein, it is

argued, make it obligatory, on the part of the city council, to so act within the period above designated. Petitioner, therefore, now asks this court to order the council to publish immediately and call a special election not less than forty nor more than sixty days thereafter.

Respondent city council, by its return, admits the filing of the petition and its refusal to publish and call a special election within the seventy-five-day period, but alleges that a resolution was adopted at its meeting on February 3, 1941, wherein it ordered that publication of the petition for the proposed amendment be made on February 20, 1941, and that an election be held thereon on April 14, 1941; the latter date being the date fixed for the holding of a general municipal election of the city. It should be here noted that although petitioner in his original petition alleged that respondents had refused to publish said proposed amendment and had refused to submit the same to the registered voters of said city at the next general election, counsel for petitioner, during the oral argument, admitted that it was the intention of respondents to submit this proposed amendment at the next general election to be held in said city, as ordered by the city council in said resolution of February 3, 1941.

Respondents deny that they have violated Art. XI, sec. 8, of the State Constitution, and maintain that under its provisions it was discretionary with the council to submit said proposed amendment either at a special election to be called after publication of the proposed amendment or at the general election to be held on April 14, 1941.

[1,2] The granting of a writ of mandate is discretionary and it will be granted only where necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by the petitioner if said writ is denied. Rogers v. Board of Directors, 218 Cal. 221, 22 P.2d 509; Fawkes v. City of Burbank, 188 Cal. 399, 205 P. 675; Clough v. Baber, 38 Cal.App.2d 50, 100 P.2d 519; DeBrincat v. Mogan, 1 Cal.App.2d 7, 36 P.2d 245. It therefore follows that a petitioner upon application must show that as a result of a failure to grant such writ, he will suffer some substantial damage.

[3,4] In the instant case petitioner is asking this court to issue its writ of mandate directing the city council to publish immediately said proposed amendment, and within not less than forty nor more than sixty days thereafter to call a special election on the proposed amendment even though a general election is to be held on April 14th. If the writ were issued immediately, a special election could not possibly be held earlier than April 2nd, because of the necessity of publication and the forty-day limit thereafter required by Art. XI, sec. 8, before election. However, as noted above, the respondent city council has ordered the proposed amendment to be placed on the ballot at the general election on April 14th or only twelve days after the earliest possible special election date. Petitioner does not contend that the amendment would be invalid if it be approved at the general election. During the oral argument counsel for petitioner made some statement to the effect that the proposed amendment, if placed on the ballot at the general election, might be lost sight of and the petitioner therefore damaged. We do not believe this was seriously urged, but even if it were, this court could not make such assumption. Furthermore, counsel for respondents pointed out that this proposed amendment would be the only one on the ballot at the general election. Petitioner has completely failed to show how he, as a taxpayer, would be injured in any way by the short delay between the earliest date of a special election and the general election of April 14th.

No injury being shown, this petition should be denied, and it is so ordered.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; TRAYNOR, J.

CARTER, Justice (dissenting).

I dissent.

In my opinion petitioner is clearly entitled to the issuance of a writ of mandate as prayed for in his petition.

Article XI, section 8, as amended in 1936, provides in part:

"The charter of any city or city and county may be amended by proposals therefor submitted by the legislative body thereof on its own motion or on petition signed by fifteen per cent of the registered electors, or both. *Such proposals shall be submitted to the electors at either a special election called for that purpose or at any general or special election.* Petitions for the submission of any amendment shall be filed with the legislative body of the city

or city and county not less than sixty days prior to the general election next preceding a regular session of the Legislature. The signatures on such petitions shall be verified by the authority having charge of the registration records of such city or city and county, and the expenses of such verification shall be provided by the legislative body thereof. If such petitions have a sufficient number of signatures the *legislative body* of the city or city and county *shall so submit the amendment or amendments so proposed to the electors.* Amendments proposed by the legislative body and amendments proposed by petition of the electors may be submitted at the same election. The amendments so submitted *shall* be advertised in the *same manner* as herein provided for the advertisement of a proposed charter, and the *election thereon, held at a date to be fixed by the legislative body of such city or city and county, not less than forty, and not more than sixty, days after the completion of the advertising in the official paper.*"

It is to be noted that the advertisement of the amendments to the charter shall be done in the same manner as advertisements of a proposed charter. In regard to advertising the charter the section provides: "The legislative body of said city or city and county shall, within fifteen days after such filing, cause such charter to be published once in the official newspaper * *."

On two occasions the appellate courts of this state have had occasion to consider whether or not the calling of the election on a charter amendment was mandatory under Article XI, Section 8. In Lubliner v. Alpers, 145 Cal. 291, 78 P. 722, the court determined that mandamus would not lie to compel the legislative body to call the election. The court does not discuss the reasons upon which its holding was based but at that time, 1904, the provision was quite different. It read: "The charter, so ratified, may be amended at intervals of not less than two years by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof at a general or special election, held *at least forty days after the publication of such proposals* for twenty days in a daily newspaper of general circulation in such city, and ratified by a majority of the electors voting thereon, and approved by the legislature as herein provided for the approval of the charter. Whenever fifteen per cent. of the qualified voters of the city shall petition the legislative authority thereof to submit any proposed amendment or amendments to said charter to the qualified voters thereof for approval, the legislative authority thereof must submit the same."

Obviously, the court was correct in holding that the section as it stood in 1904 was not mandatory, for several reasons. The portion thereof dealing with the time the election should be held had to do with proposed amendments *initiated by the legislative body of the city rather than the electors.* The provision authorizing fifteen per cent of the electors to initiate the proposed amendment contained no provisions as to the *time* when such election should be held; the only mandatory requirement was that the amendments be submitted to the electors at some time. But even assuming that the provisions as to the time of the election applied to amendments originating with the electors, yet there is no particular time when the election must be had. The requirement is that it be at least forty days after the publication, thus setting a minimum but no maximum, as is done in the section as it now reads. The other authority which considered whether the section was mandatory is Moore v. City of Los Angeles, 58 Cal.App. 555, 209 P. 64, 65. There a writ of mandate was sought to compel the Los Angeles City Council to advertise a proposed amendment within fifteen days from the time the petition by fifteen per cent of the electors was filed. The court held that the requirement that the advertisement of the amendment be made in the same "manner" as the advertisement of a charter, meant that the same *method* must be followed but that the term "manner" did not include the *time* the advertisement must be made, that is, within the fifteen days following the filing of the petition for the amendment. The court gives three grounds for so holding, two of which are predicated on the factor that the section as it then read contained the statement: "Such proposals [referring to amendments] shall be submitted to the electors *only during the six months next preceding a regular session of the Legislature or thereafter and before the final adjournment of that session* and at either a special election called for that purpose or at any general or special election."

By the amendment to the section in 1930 and as appears in the subsequent amendments of 1932 and 1936, the italicized portions of the section were *omit-*

ted. Therefore the court's reasoning as to those two grounds in the Moore case must fall and are no longer the law. The third ground relied on by the court in the Moore case is that it would not be practicable to apply the fifteen day period to charter amendments for the reason that in many instances that period would not be sufficient time in which to verify the signatures on the petition, whereas in the case of a freeholder's charter proposal, the verification of signatures has all been consummated before the fifteen days commences to run. That reasoning I cannot approve. If it were pursued to its logical conclusion the court would indulge in legislation, for the reason that it would render nugatory any period of time fixed for the doing of a certain thing in the constitutional provision adopted by the people. It is to be presumed that the people in enacting the constitutional provision here involved gave consideration to the time physically required to perform the preliminary acts, and concluded that the time specified was sufficient. Furthermore, a more reasonable view would be that if it were impossible to perform the preliminary acts in the stated time the court could determine that the time was extended sufficiently to enable the completion of the verification of the signatures, but no longer. The amount of additional time required would be a question of fact.

Returning again to the constitutional provision as it now reads, I believe that it is patent from the language employed and particularly the above italicized portions thereof, that it is the mandatory duty of the legislative body to call the election not less than forty and not more than sixty days after the advertisement. And to give real force and consequence to that duty, it is equally clear that the advertisement must be made within fifteen days after the petition for the proposed amendment is filed, or at most within the time in fact required for the verification of the signatures on the petition. Otherwise, the purpose to be accomplished by the constitutional provision will be frustrated. The legislative body could postpone the election indefinitely by failing to advertise, and by so doing indirectly and improperly escape their express duty to call the election within the prescribed time. This means, of course, that the phrase "in the same manner" must under the circumstances and for the foregoing reasons be held to embrace not only the method of advertising but also the time when the advertisement must be made. These conclusions are not without support. Sound public policy demands that when electors have the right to amend their charter and they comply with the conditions necessary therefore, they are entitled to have the matter determined by a vote of the electorate in the time specified in the authorizing act. This is a high and treasured privilege which is fundamental in a democracy, and a dilatory or belligerent legislative body should not be permitted to thwart it This is especially true when we consider that such body's functions in the matter are purely ministerial and not legislative. This public policy is recognized in Wallace v. Payne, 197 Cal. 539, 545, 241 P. 879, 881, where it is said:

"Such an interpretation would also be in accord with the statutory policy, that, when cities and cities and counties have once adopted charters, and when they discover that such charters are defective in any particular or are inadequate for the present needs or growth of the municipality, and should be amended, such amendment, in order to be remedial, should be facilitated rather than unreasonably delayed in its adoption."

While it is true that the respondents on February 3, 1941, adopted a resolution evidencing an intent to advertise for the election on February 20, 1941, to be held at the general municipal election on April 14, 1941, that action was taken long after the time prescribed by the Constitution. The petition was filed on December 4, 1940, therefore the advertisement should have been made not later than December 19, 1940, and although respondents deny that they refused to advertise and call the election, they have done nothing except assert that they intended to call one, and it was not until after petitioner had filed his petition for the writ here involved that it passed, on February 3, 1941, its resolution of intention to advertise the proposed amendment on February 20, 1941. Respondents' conduct and pleadings are therefore tantamount to an admission that they never intended to comply with the Constitution, but rather intended to hold the election at the time of the general municipal election in April. This is equivalent to a failure to make any appearance in the proceeding or to admitting petitioner's allegations. Under such circumstances mandamus should issue, as it is not a situation where the respondent has not

refused to perform the mandatory act or has already performed it. The fact remains that it has not advertised the amendment or called the election, its mere expression of intention to do so is not enough; indeed that amounts in reality to a confession that the writ should issue. It is immaterial that the time within which respondent should have advertised under the Constitution has expired. That does not prevent the issuance of the writ. Wahl v. Waters, 11 Cal. 2d 81, 77 P.2d 1072; Conn v. City Council, 17 Cal.App. 705, 121 P. 714, 719.

The majority opinion does not decide anything. It ignores and fails to pass upon the only legal proposition presented by the petition, namely, whether under the provisions of Article XI, Section 8 of the Constitution, the City Council was required to advertise the proposed amendment within fifteen days and submit the same to the electors at a special election within sixty days thereafter.

I am positively and unalterably opposed to any such side-stepping policy. The duty of the City Council in the premises is either mandatory or discretionary, and both parties to this litigation and the general public are entitled to know what the opinion of this court is on this proposition.



17 Cal.2d 409

LONG v. LONG.

S. F. 15969.

Supreme Court, Department 2, California.

Feb. 19, 1941.

Divorce ⇐234

Where interlocutory divorce decree directed payment of monthly alimony for six months without reserving right to modify period for making payments, the alimony was duly paid and final decree was subsequently entered, court was without power to modify interlocutory decree so as to require additional monthly alimony payments. Civ.Code, § 139.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Suit by Louis A. Long against Margaret C. Long, wherein the defendant was awarded an interlocutory decree of divorce. From an order granting the plaintiff's motion to set aside an order modifying the interlocutory decree of divorce, the defendant appeals.

Order affirmed.

David M. Burnett and John M. Burnett, both of San Jose, for appellant.

Henry E. Monroe and Henriette W. Steinegger, both of San Francisco, for respondent.

TRAYNOR, Justice.

On January 7, 1930, the Superior Court of Santa Clara County awarded appellant Margaret C. Long an interlocutory decree of divorce against respondent Louis A. Long directing him to pay appellant $50 a month alimony for the six months from February 5, 1930, to and including July 5, 1930. This alimony was duly paid. The final decree of divorce, entered on March 30, 1931, neither awarded alimony to appellant nor reserved to the court jurisdiction thereafter to make an allowance for appellant's support. On November 10, 1931, on application of appellant supported by an affidavit averring that because of injury she was no longer able to support herself, the court after a hearing made an order modifying the interlocutory decree of divorce by requiring respondent to pay $50 a month alimony thenceforth until further order of the court. On December 20, 1935, the court entered an order granting respondent's motion to set aside the order of November 10, 1931, upon the ground that the attempt to modify the interlocutory decree of January 7, 1930 was without jurisdiction and void. The present appeal is taken from this order.

Section 139 of the Civil Code provides: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its order in these respects." Appellant, relying on Smith v. Superior Court, 89 Cal.App. 177, 264 P. 573, and Bechtel v. Bechtel, 124 Cal.App. 617, 12 P.2d 970, contends that the above section confers on the court an express power to modify an ali-

mony decree even though the alimony was awarded for a limited time, which has expired, and the decree did not contain a reservation of jurisdiction.

This contention is answered adversely and the authorities relied on are distinguished in Tolle v. Superior Court of Los Angeles County, 10 Cal.2d 95, 73 P.2d 607, which holds that if the court provides for alimony payments for a definite term without reserving the right to change or modify the term, the court has no power to make further allowance for the wife's support after such alimony has been paid and the final decree has been entered.

The order is affirmed.

We concur: CURTIS, J.; HOUSER, J.



17 Cal.2d 490

WATKINS et al. v. NUTTING et al.

L. A. 17672.

Supreme Court of California.

Feb. 24, 1941.

Rehearing Denied March 24, 1941.

1. Automobiles ⇐160(4)

A driver of a vehicle striking a pedestrian crossing highway is not guilty of negligence if driver did those things which a reasonably prudent person would have done under similar circumstances.

2. Automobiles ⇐150, 160(3)

A driver of vehicle must always maintain a vigilant watch for other persons and vehicles using the highway.

3. Automobiles ⇐245(6, 47)

In action for death of pedestrian struck by automobile, under evidence that motorist was driving at speed of 50 miles per hour through rain, that motorist did not see pedestrian until he was within 34 feet of pedestrian, and that immediately before pedestrian was struck motorist did not turn his automobile either to right or to left, whether motorist was negligent was for the jury.

4. Automobiles ⇐160(4)

The right of motorist to claim right of way over a pedestrian crossing highway other than at an intersection or in marked crosswalk is not an absolute one, and pedestrian is not absolutely prohibited from so crossing. Vehicle Code, § 562, St.1935, p. 93.

5. Automobiles ⇐245(72)

Where pedestrian crossing highway other than at intersection or in marked crosswalk was struck by automobile and there was evidence that the pedestrian looked but either did not see the approaching automobile or saw it and misjudged either its speed or distance, question whether pedestrian was guilty of contributory negligence was a "question of fact" for the jury. Vehicle Code, § 562, St.1935, p. 93.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

6. Automobiles ⇐246(31)

In action for death of pedestrian struck by automobile while crossing highway, other than at an intersection or in marked crosswalk, instruction regarding duty of one driving an automobile so far as pedestrians are concerned was proper. Vehicle Code, § 562, St.1935, p. 93.

7. Trial ⇐295(4)

In action for death of pedestrian struck by automobile while crossing highway, other than at an intersection or in marked crosswalk, where the instructions when read in their entirety stated the law of case fairly and clearly, the failure to include in each one of them a statement of the rule concerning contributory negligence was not error. Vehicle Code, § 562, St.1935, p. 93.

8. Action ⇐38(6)

The statutory cause of action for wrongful death is one to be exercised by all the heirs, yet it is a joint one, a single one, and an indivisible one. Code Civ.Proc. § 377.

9. Death ⇐105

In wrongful death action, the court or jury may compute damages, if any, by considering the pecuniary damage suffered by all the heirs and return a verdict for one sum. Code Civ.Proc. § 377.

10. Death ⇐41

A wrongful death action must be brought in the name of the person to whom the right is given, and an action by some, but not all, of the heirs, is not authorized by the wrongful death statute. Code Civ.Proc. § 377.

11. Death ⇐101

Where plaintiffs in wrongful death action recover judgment, it is duty of court,

in a separate proceeding, to apportion the amount to be awarded to each heir. Code Civ.Proc. § 377.

12. Parties ⇐35

In wrongful death action, complaint alleging that two named children of the decedent were of age of majority and did not join the plaintiffs and were therefore named as defendants did not strictly comply with statute, but the alleged wrongdoers could not object because as to them it was sufficient that the heirs were made parties to the action, in some capacity, so that their rights might be determined in it. Code Civ. Proc. §§ 377, 382.

13. Judgment ⇐97

In wrongful death action, the fact that children of former marriage of decedent were joined as defendants did not alter the essential relations between the parties, since, although named as defendants, they were in reality "plaintiffs" in the case, so that order of court directing clerk to enter their default was ineffective for any purpose. Code Civ.Proc. §§ 377, 382.

See Words and Phrases, Permanent Edition, for all other definitions of "Plaintiff".

14. Death ⇐58(1, 2)

In wrongful death action where children of former marriage of decedent were joined as defendants, the plaintiffs were not obliged to produce evidence concerning the amount of damage sustained by such children but the nature of the action was a call upon plaintiffs to inform the jury regarding the existence and relationship of all heirs entitled to bring action. Code Civ.Proc. §§ 377, 382.

15. Torts ⇐13

A plaintiff in an action for wrongful death who does not join as a party an heir who is known to him is liable for damages resulting to the heir from his failure to do so. Code Civ.Proc. §§ 377, 382.

16. Death ⇐101, 106

In wrongful death action where children of former marriage of decedent were joined as defendants, but all evidence introduced on issue of damages related to plaintiffs with no mention of such children who were not mentioned in the instructions, the children who were not mentioned to the jury were not entitled to share in the damages awarded but their remedy was to move for a new trial on the issue of damages. Code Civ. Proc. §§ 377, 382.

17. New trial ⇐135

In wrongful death action where children of former marriage of decedent were joined as defendants but they were not entitled to share in damages awarded because no evidence was introduced regarding their damages and they were not mentioned in instructions, request of such children that motion of other defendants for new trial be granted was not a notice of motion for new trial upon any ground available to the children and did not entitle the children to new trial on issue of damages. Code Civ.Proc. §§ 377, 382.

18. New trial ⇐136

A notice of intention to move for a new trial upon one or more of the grounds specified in the Code of Civil Procedure is essential to the court's jurisdiction.

19. New trial ⇐135

Notice of motion for new trial filed by defendants against whom judgment was rendered gave court jurisdiction to determine motion later made by them but not to grant relief to other parties upon different grounds.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Irene Guinevere Watkins and others against Franklin P. Nutting and others, for the death of Henry Watkins. From a judgment for plaintiff, defendant Franklin P. Nutting and the American Vineyard & Investment Company appeal, and defendant Mildred Westra Ingalls and Mahlon Wilson Watkins, children of the deceased, appeal from an order made after judgment seeking to avoid the effect of an order to enter their default.

Judgment and order affirmed.

For prior opinion of District Court of Appeal, see 104 P.2d 413.

Ray W. Hays, of Fresno, for appellants.

Ralph Robinson and Clyde E. Cate, both of Fresno, for appellants Mildred Westra Ingalls and Mahlon Wilson Watkins.

Rae B. Carter and John D. Chinello, both of Fresno, for respondents.

EDMONDS, Justice.

In addition to the appeal by Franklin P. Nutting and the American Vineyard & Investment Company from a judgment

against them for damages caused by the death of Henry Watkins, Mildred Westra Ingalls and Mahlon Wilson Watkins, children of the deceased who were named as defendants in the action, have appealed from an order made after judgment. The appellants against whom the judgment is directed contend: (1) That there is no evidence of any negligence on the part of Nutting; and (2) that the evidence shows Watkins was guilty of contributory negligence as a matter of law. The other appellants are seeking to avoid the effect of an order to enter their default.

Considering the appeal from the judgment, it appears from the evidence that the accident occurred at about four o'clock on a March afternoon on a three-lane highway a short distance south of Fresno. Watkins was a truck driver and had stopped at a cafe to make a delivery. While walking back to his truck, he was struck by an automobile being driven by Nutting, who was operating it in the course of his duties as president and manager of American Vineyard & Investment Company.

The facts stand practically undisputed. It was raining at the time of the accident. The roadway was wet and the visibility only fair. As Watkins started to cross the highway, the automobile driven by Nutting and several other cars were traveling south on the highway, approaching from his left. Another automobile was coming from the opposite direction.

In describing the relative position of these cars just before the accident occurred, the driver of one in the group going south testified that a truck was in the right traffic lane about 50 yards ahead of him, Nutting in the center traffic lane about 75 or 100 yards ahead of him, and a Chevrolet in the right lane about 35 yards ahead of the truck. He admitted that these distances were mere estimates and the testimony of other witnesses proved them to be inaccurate. No other witness mentioned seeing the truck and there is no other evidence concerning it.

A passenger in the Chevrolet testified that Watkins left the cafe and proceeded at a rapid walk towards the highway; "that he walked up near our car, and as we drove by he just walked behind it and started across the highway; * * * I just put the window down and looked out * * * and Mr. Watkins started across the highway and he looked north one time and he seen this car, must have seen it, and just hesitated for a second, and then started in a fast walk; * * * and just as he reached the east lane or about the white line this car struck him". Other testimony of this witness was: "As he went just behind the car I was in of course I couldn't see him, but as he entered the highway he was looking most of the time to the south, but he looked to the north only one time that I saw—that I know—he really looked—and that is when he hesitated just a second and then started".

Nutting testified that as he approached the scene of the accident he was driving at a speed of between 40 and 45 miles an hour; that he was driving in the right traffic lane until he turned into the center lane for the purpose of passing the Chevrolet. "I was about a couple of car lengths behind the Chevrolet at the time Watkins dodged out from directly behind the Chevrolet and across the highway." According to Nutting's testimony, he first saw Watkins when Watkins was near the westerly line of the center traffic lane and about two car lengths, 34 feet, distant from him; then he sounded his horn, applied his brakes, and swerved to his left; that Watkins proceeded easterly and when on or near the easterly boundary of the center traffic lane Watkins either stopped, or stopped and stepped back; that he turned his car to his right but that the left end of his front bumper hit Watkins; that he stopped his car within about 20 feet; that at the time of this impact his automobile was traveling about 15 miles per hour; that the accident happened in about one-half of a second after he first saw Watkins.

Appellants argue that these facts do not disclose any negligence on the part of Nutting. They urge that he was driving at a lawful rate of speed at the place on the highway which the law assigned to him when passing another vehicle. They also urge that as soon as he became aware of Watkins' presence on the highway he did everything humanly possible to avoid the collision.

[1-3] The driver of a vehicle is not guilty of negligence under the circumstances here shown if he did those things which a reasonably prudent person would have done under similar circumstances. But the law requires that a driver shall always maintain a vigilant watch for other persons and vehicles using the highway.

Under the facts disclosed the jury might have concluded that Nutting failed to perform this duty. According to one witness he was driving his automobile at a speed of 50 miles per hour through the rain. He did not see Watkins until he was within about 34 feet of him. There is evidence that immediately before Watkins was struck he did not turn his car either to the right or to the left. From these facts the jury could draw the inference that Nutting was negligent.

[4] The contention that Watkins was guilty of contributory negligence as a matter of law is based upon section 562 of the Vehicle Code, St.1935, p. 93, which requires pedestrians to "yield the right of way to all vehicles upon the roadway". But by another provision of the same section, the requirement laid upon one crossing a highway "shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway". The right of the automobile driver to claim the right of way over a pedestrian crossing a highway other than at an intersection, or in a marked crosswalk, is not, therefore, an absolute one, nor is the pedestrian absolutely prohibited from so crossing. "The duty of a pedestrian to 'yield' the right of way while crossing a street other than at a regular crosswalk, as imposed by section 562 of the Vehicle Code, * * * may call for a higher degree of care upon the part of such pedestrian than would be applied to one crossing at a regular crosswalk, but the question as to whether or not such care was exercised in a given case is one for the jury, unless he is so careless that it can be said he is negligent as a matter of law." Brannock v. Bromley, 30 Cal. App.2d 516, 524, 86 P.2d 1062, 1067.

[5] Where, as in the present case, there is evidence that the injured person looked, but either did not see the approaching automobile, or saw it and misjudged either its speed or distance, the question whether, under the particular circumstances then existing, he was guilty of contributory negligence is one of fact. Genola v. Barnett, 14 Cal.2d 217, 93 P.2d 109; White v. Davis, 103 Cal.App. 531, 284 P. 1086.

[6] The appellants urge that the giving of certain instructions constitutes reversible error. The first of these states the duty of one driving an automobile, so far as pedestrians are concerned, and embodies the requirements laid down in Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027. An instruction in substantially the same form as the one now challenged has been upheld in numerous cases. Casalegno v. Leonard, Cal.App., 105 P.2d 125; Eastman v. Rabbeth, 128 Cal.App. 534, 17 P.2d 1009.

[7] Two other instructions are questioned by the appellants upon the ground that they have no proper application to the facts and that they eliminate the defense of contributory negligence from consideration by the jury. An examination of them shows that they are correct statements of the law applicable to the facts presented in this case, particularly when the instructions are considered as a whole. By 10 of the 43 instructions the jury was informed in regard to the defense of contributory negligence. In one of them the rule was stated at length and the court informed the jury that if Watkins "was in the slightest degree negligent, which negligence contributed directly and proximately to his injury", there can be no recovery. When the instructions are read in their entirety they state the law of the case fairly and clearly, and the failure to include in each one of them a statement of the rule concerning contributory negligence is not error. Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237.

The appeal of Mildred Westra Ingalls and Mahlon Watkins presents some interesting and novel questions. During the trial of the case, the widow of the deceased identified these appellants as Watkins' children by a former marriage and testified, that at the time the complaint was filed, the former had reached her majority and was married, and the latter was only 20 years of age. Thereupon, counsel for the respondents stated that these children had been named in the complaint as defendants "by virtue of the fact that they did not choose to join as plaintiffs in the action". He added: "No appearance has been filed by them or either of them in this action, and we ask that their default be entered at this time for non-appearance." Upon this motion the trial judge ruled: "The default of the two defendants * * will be entered by the clerk." No record of such entry appears in the transcript nor was the court's order followed by a judgment.

One month after the judgment in favor of the respondents was entered, these appellants filed a petition to reopen the case

for the purpose of taking testimony to establish their pecuniary loss by reason of the death of their father and to secure an allotment to them of a percentage of the judgment, or "that the court grant the motion of the defendants Franklin P. Nutting and American Vineyard & Investment Co., a corporation, for a new trial and upon the retrial of said cause that the petitioners herein be allowed to join as plaintiffs and prove their pecuniary loss". By affidavits accompanying this petition, these appellants asserted that they had been served with summons but were informed by Mrs. Watkins' attorney that they had no cause of action and they, therefore, sought no further legal advice at that time. Later, they said, they consulted an attorney and were advised that they had been damaged despite the fact that each of them was self-supporting. Upon a new trial, the affidavits continued, they would offer proof of their damage and loss by reason of the death of their father.

The respondents moved to strike this petition and the affidavits from the record. Prior to the hearing upon them, the appellants filed a notice of motion for an order amending the judgment by adding the names of Mildred Westra Ingalls and Mahlon Wilson Watkins, as plaintiffs, for the purpose of permitting them to share in the recovery. The notice of motion recited that it would be based, in part, upon an affidavit of one of their attorneys. According to the affidavit, the appellants were not asked to join in the action and were advised by Mrs. Watkins and her attorneys, without any desire on their part to deceive but by reason of mistake as to the law, that they had suffered no damages by the death of their father for which they were entitled to recover. By reason of this mistake and erroneous advice and the confidence of the appellants in Mrs. Watkins and her attorneys, it was said, the appellants did not seek other legal advice and did not appear and plead in the action.

The respondents moved to strike this notice of motion and the supporting affidavit from the files. Upon a hearing both motions were granted and the appeal now being considered was taken from that order.

The appellants contend that the default of persons named as defendants under the provisions of section 382 of the Code of Civil Procedure does not bar them from appearing after judgment upon a motion to amend the judgment to include them as plaintiffs in order to share in the judgment obtained. They maintain that children are entitled to share in the damages awarded for the death of their father notwithstanding their failure to appear in the action. They also assert that it is the duty of the plaintiff to offer proof of damage in behalf of all the heirs, and that the court must apportion the damages awarded under the judgment among the children of the deceased notwithstanding the failure of the children to offer proof of damage sustained to them. The respondents take the position that a defendant, against whom a default has been entered, has no standing in court until the default has been set aside, and that a default by an heir at law, joined as a defendant under section 382 of the Code of Civil Procedure in a wrongful death action, operates as a waiver of such heir of any claim for damages.

[8-11] The statutory cause of action for wrongful death, Sec. 377, Code Civ. Proc., is one to be exercised by all the heirs, yet it is a joint one, a single one and an indivisible one. Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41; Salmon v. Rathjens, 152 Cal. 290, 92 P. 733. In such actions, the court or jury must compute the damages, if any, by considering the pecuniary damage suffered by all the heirs and return a verdict for one sum. This suit must be brought in the name of the persons to whom the right is given, and an action by some, but not all, of the heirs is not the action authorized under the statute. Robinson v. Western States Gas, etc., Co., 184 Cal. 401, 194 P. 39; Rose v. San Diego Electric Ry. Co., 133 Cal.App. 646, 24 P.2d 838; Salmon v. Rathjens, supra; Roach v. Drew, 72 Cal. App. 45, 236 P. 568. If the plaintiffs recover judgment, it is then the duty of the court, in a separate proceeding, to apportion the amount to be awarded each heir. Gilmore v. Los Angeles Ry. Corp., supra; Rose v. San Diego Electric Ry. Co., supra.

[12] The complaint in the present action alleges only that Mildred Ingalls and Mahlon Watkins, children of the decedent, are of the age of majority and "do not join these plaintiffs in this action, and are therefore named as defendants herein". These allegations do not comply strictly with section 382 of the Code of Civil Procedure which requires that "those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as

plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint". However, the other appellants were in no position to object, because, as to them, it was sufficient that the heirs were made parties to the action, in some capacity, so that their rights might be determined in it. Martin v. Howe, 190 Cal. 187, 211 P. 453.

[13] The fact that the children of the former marriage were joined as defendants does not alter the essential relations between the parties; although named as defendants they are, in reality, plaintiffs in the case. Gilmore v. Los Angeles Ry. Co., supra; Donohoe v. Wooster, 163 Cal. 114, 124 P. 730. No judgment could properly be taken against them because no relief was demanded from them, and the order of the court directing the clerk to enter their default was ineffective for any purpose.

[14, 15] This does not mean that the respondents were obliged to produce evidence concerning the amount of damage sustained by these children, but the nature of the action was a call upon them to inform the jury as to the existence and relationship of all heirs entitled to bring suit. Gilmore v. Los Angeles Ry. Corp., supra. The law's requirement in this regard is so strong that the plaintiff in an action for wrongful death who does not join as a party an heir who is known to him, is liable for the damages resulting to the heir from his failure to do so. Roach v. Drew, supra.

[16, 17] In the present case, not only did all of the evidence introduced upon the issue of damages relate to the respondents with no mention of Mildred Ingalls and Mahlon Watkins, but they were not mentioned in the instructions to the jury. In effect, this was a concealment from the jury that Watkins left other heirs entitled to sue for his death and it prevented a determination of the appellants' rights. But as the amount of damages awarded by the jury represented the damages suffered by the respondents, the children who were not mentioned to the jury are not entitled to share in it. Under the circumstances here shown, their remedy was to move for a new trial upon the issue of damages. Rose v. San Diego Electric Ry. Co., supra. This they did not do, and their request that the motion of the appellants Nutting and American Vineyard & Investment Company be granted was not a notice of motion for a new trial upon any ground available to them.

[18, 19] A notice of intention to move for a new trial upon one or more of the grounds specified in the Code of Civil Procedure is essential to the court's jurisdiction. Smith v. Ibos, 22 Cal.App.2d 551, 71 P.2d 847; Peters v. Anderson, 113 Cal. App. 158, 298 P. 76. The notice filed by the appellants against whom judgment was rendered gave the court jurisdiction to determine the motion later made by them but not to grant relief to other parties upon different grounds, and, for the reasons which have been stated, it was properly denied.

The judgment and order appealed from are, and each of them is, affirmed.

We concur: CURTIS, J.; TRAYNOR, J.; CARTER, J.



17 Cal.2d 445

ROHE v. STATE BAR.

L. A. 17548.

Supreme Court of California.

Feb. 20, 1941.

1. Attorney and client ⇐58

Evidence that attorney while settling claim for client against third party on contingent fee basis procured a settlement of attorney's personal obligations without making proper disclosure to client warranted suspension from practice for three months. Code Civ.Proc. § 287, subds. 2, 5; St.1939, p. 357, §§ 6103, 6106.

2. Attorney and client ⇐46

The reason for a client's civil action against attorney and motive behind initiation of disciplinary proceedings before state bar's local administrative committee were not controlling in determining whether attorney should be suspended from practice where facts disclosed independently lead to conclusion that attorney was subject to disciplinary action.

Proceeding by Clifford A. Rohe against the State Bar of California to review a rec-

ommendation of the Board of Governors of the State Bar that petitioner be disbarred from the practice of law.

Petitioner ordered suspended from the practice of law for three months.

Isaac Pacht, Byron C. Hanna, Clore Warne, and Pacht, Pelton, Warne & Black, all of Los Angeles, for petitioner.

Claude Minard, of San Francisco, for respondent.

PER CURIAM.

In January, 1939, Clifford A. Rohe, an attorney at law of this state, was notified to appear before Local Administrative Committee No. 7 of the State Bar for Los Angeles county and show cause why he should not be disciplined for professional misconduct arising out of his activities in connection with a claim of his client, Miss Carlotta Monti, against W. C. Fields. The attorney filed an answer to the charges and after hearings the local committee made findings and recommended suspension from practice for a period of three months. After argument before it, the Board of Governors adopted the findings of the local committee and recommended to this court that the attorney be disbarred. The attorney is before this court as petitioner in a proceeding to review the board's recommendation.

The petitioner was born in Cincinnati, Ohio, in 1888, was admitted to the practice of law in Illinois in 1909, and in California in 1912. He is married and is the father of six children. He has practiced law in Los Angeles county since his admission to the bar of this state. The record shows that on September 29, 1936, he received a public reprimand from the Board of Governors of the State Bar. The proceeding in this instance grows out of the following facts:

On October 9, 1937, Miss Carlotta Monti employed the petitioner to press a claim for damages against W. C. Fields for a beating to which he was alleged to have subjected her on the front steps of his residence at Bel Air the preceding night upon their late return from a dinner party. It was agreed between Miss Monti and the petitioner that compensation for legal services in the matter should be contingent upon recovery, and should be an amount equal to 25 per cent of any recovery from Mr. Fields. Negotiations produced an offer of $5,000 from Mr. Fields. This was communicated to Miss Monti, who refused acceptance. Mr. Fields declined to raise his named figure. Subsequently the petitioner informed Miss Monti that Mr. Field's attorney, Mr. Loyd Wright, had three clients to whom the petitioner owed money on notes and otherwise, aggregating $1,300; that these obligations were old and that he believed they could be settled at a considerable discount. He suggested that negotiations through Mr. Field's attorney be resumed on the basis of including sufficient in his offer to Miss Monti to discharge these obligations of the petitioner. Miss Monti consented, and the petitioner communicated the suggestion to Mr. Wright. The petitioner thereupon received a letter from Mr. Wright, asking for a release executed by Miss Monti and a letter of authorization appropriate to the terms of the petitioner's suggestion. Thereupon the petitioner signed a letter dated December 9, 1937, to Mr. Wright, containing the following:

"In compliance with the request contained in your letter of the 9th instant, Miss Monti has executed and acknowledged the form of release, and I am enclosing the same which you may use when you deliver $5,000.00 to me for Miss Monti, and the Chipron, Donovan Notes marked 'paid' and a receipt from John Rauen.

"This letter will be your authority to use any amount you may have to pay in the adjustment of those three items in excess of the $5,000.00 to be paid Miss Monti. * * *

"I shall certainly appreciate it if you will have this concluded during this week as it will be of very material advantage."

Miss Monti signed a letter to Mr. Wright, bearing the same date, stating:

"I have read your letter to Mr. Rohe of the 9th instant, and have also read, signed and acknowledged the form of release which you sent him with that letter, all in connection with the adjustment of my claim against Mr. W. C. Fields.

"You are authorized to use whatever is necessary in excess of the $5000.00 which will be paid me to settle Mr. Rohe's obligation on the $500.00 note to Frank Chipron, $500.00 note to Dick Donovan and $300.00 obligation to John Rauen, making the $5,000.00 check directly to me.

"You are also authorized to fill in the blank space on the top line of the release the total amount Mr. Fields must pay in settlement of those obligations of Mr. Rohe, plus the $5,000.00 which you pay me; such total

amount being the consideration for the release."

These letters and the signed release were forwarded to Mr. Wright. On December 17, 1937, Mr. Wright sent a check for $5,000 to the petitioner with the following letter of transmittal:

"I am enclosing herewith check for $5,000.00, made payable to Carlotta Monti, in full payment and liquidation of all claims against Mr. Fields.

"I cannot enclose the notes and the receipt from Mr. Rauen to you personally, because I am just leaving for a stockholders' meeting, but this will acknowledge that I have accepted $6,300.00 in complete satisfaction of those items set forth in your letter, and that I will in the next day or two forward you the receipt from Mr. Rauen and the two cancelled notes involved."

In response to the petitioner's call, Miss Monti arrived at his office with her sister, received the check for $5,000 and delivered to the petitioner her check for $1,250. The petitioner's testimony was that he exhibited to Miss Monti Mr. Wright's letter of transmittal. That testimony was contradicted by Miss Monti, who claimed that the petitioner told her he had to settle "without the notes".

About December 20, 1937, the petitioner received from Mr. Wright the cancelled notes and the receipt evidencing payment of the petitioner's obligations, with a letter of transmittal which concluded: "We appreciate your cooperation with us concerning the settlement of these matters."

Shortly thereafter Miss Monti and Mr. Fields were reconciled and Miss Monti testified that she then learned for the first time that the settlement figure had been $6,300. She claimed that she telephoned to the petitioner, made some accusations, and that he denied any knowledge that more than $5,000 was received, but stated that he would make inquiry. He thereupon wrote the following letter to Mr. Wright, bearing date December 24, 1937: "I shall appreciate it if you will let me have a copy of the release which Carlotta signed in the Fields matter, and also advise me what was paid to Donovan, Chipron and Rauen, so that I may have a complete file in the matter. * * * "

The petitioner testified that Miss Monti claimed that more than $6,300 had been received by Mr. Wright, and that the latter had retained the excess. His explanation for couching his letter of December 24th in the language quoted, however, was that he did not want to intimate to Mr. Wright that "I thought he got more than he had told us, that was the reason I mentioned the amount of the notes. I asked for the information so that I would have a complete file."

In response to his request he received the following, dated January 5, 1938, signed by Mr. Wright's brother:

"Last week Loyd asked me to write to you concerning your request as to the amounts which were paid to Donovan, Rauen and Chipron. He was under the impression that you had knowledge of the amounts paid, anyway I forgot to write you at that time.

"We paid Dick Donovan $500, Chipron $500, less $50 attorney's fees, and John Rauen $300.00. These payments were made in full settlement of all of their respective claims against you, and the same were made in accordance with your agreement arising out of the settlement of the alleged claims of your client, Miss Monti vs. W. C. Fields."

Miss Monti heard nothing further from the petitioner and in October, 1938, brought the matter to the attention of the State Bar. In the meantime she had filed a civil action against the petitioner to recover seventy-five per cent of the $1,300, which action does not appear to have been prosecuted to judgment.

It was the petitioner's contention during the hearings before the local administrative committee and the Board of Governors, and it is his contention here, that Miss Monti and he had come to an understanding that he should have, in addition to the 25 per cent contingency fee, the benefit of anything in excess of $5,000 which would be necessary to settle the three obligations aggregating $1,300. The committee found that the petitioner did not advise Miss Monti, at the time she received from him the $5,000 check, that his obligations had been settled for their face value though he was in receipt of information from Mr. Wright to that effect; that when he wrote the letter of December 24th to Mr. Wright he knew that the full amount of $1,300 had been paid in settlement of his obligations. The committee concluded that the petitioner had violated rule 9 of the Rules of Professional Conduct of the State Bar (prohibiting commingling of client's and personal funds and requiring prompt report of

receipt of client's property); that he had violated his oath and duties as an attorney within the meaning of subdivision 2 of section 287 of the Code of Civil Procedure, Sec. 6103, State Bar Act, St.1939, p. 357, and had committed wrongful acts within the meaning of subdivision 5 of section 287 of the Code of Civil Procedure, Sec. 6106, State Bar Act.

In its findings the committee called attention to the fact that the petitioner had stated before it that he was willing to pay Miss Monti 75 per cent of the $1,300, but that he would not do so under compulsion either of the civil action brought by her or of the State Bar proceeding.

In its recommendations the committee expressed its belief that Miss Monti had been willing that the petitioner should include the three obligations in the negotiations for a settlement of her claim against Mr. Fields, and that he should have the benefit thereof without accounting to her, if they could be settled for a small amount; but that the dispute arose over the fact that the petitioner did not fully or fairly advise her of all steps taken in connection with the settlement of his obligations and that had Miss Monti known that as a result of those negotiations he had received more than double the original fee agreed upon, she would not have authorized the liquidation of his obligations in the manner disclosed.

[1, 2] These findings and conclusions, as qualified by the committee's analysis in its recommendations, are supported by the record. This is so even though we consider favorably to the petitioner the collateral matters referred to by him and relied upon as showing a motive to cast discredit upon him by the initiation of proceedings before the State Bar. It is a fact that the events herein were not called to the attention of the State Bar for nearly a year after their occurrence. But it is also a fact that in the meantime Miss Monti had brought a civil action against the petitioner. Whatever may have been the instigating factor, or whatever may have been the personal motive, in the initiation of the State Bar proceeding, are not matters of controlling concern in a case where the facts disclosed independently lead to the conclusion that the attorney is subject to some disciplinary action. There is no showing that any personal motives of individuals have generated any pressure or prejudice or have in any way prevented the petitioner from having full, fair and unbiased hearings. However, we are in agreement with the petitioner that under all the circumstances disbarment is too harsh discipline, and that the ends to be subserved by the proceeding herein will be satisfied by a suspension as recommended by the local committee.

It is ordered that the petitioner, Clifford A. Rohe, be suspended from the practice of the law in this state for a period of three months, beginning thirty days from and after the filing of this order.



17 Cal.2d 451

PEOPLE v. YOUNG.

Cr. 4324.

Supreme Court of California.
Feb. 20, 1941.

1. Criminal law ⇐531(3)

In murder trial, police officer's testimony that defendant, in witness' presence, read and freely and voluntarily signed statement transcribed by shorthand reporter was sufficient to justify reading of relevant portions thereof to jury as confession, regardless of admissibility of another officer's testimony merely identifying statements in written document as those made to him by defendant.

2. Criminal law ⇐444

In murder trial, defendant's admission in signed confession that he wrote his mother a letter outlining his plan to kill deceased, testimony that defendant admitted writing such letter immediately after fatal shooting, and handwriting expert's testimony identifying signature thereto with that on another letter written by defendant, justified trial court's finding that signature was sufficiently proven to permit introduction of letter in evidence. Code Civ.Proc. §§ 1940, 1944.

3. Criminal law ⇐1171(1)

In murder trial, district attorney's reference to defendant as a "killer" in closing address to jury *held* not prejudicial "misconduct" justifying reversal of conviction for first-degree murder, in view of facts in evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

Appeal from Superior Court, Los Angeles County; Pierson M. Hall, Judge.

William Young was convicted of first degree murder, and he appeals.

Affirmed.

Ben Van Tress and Beecher Stowe, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant was found guilty of first-degree murder without recommendation of leniency in the superior court of Los Angeles county which pronounced the death sentence and denied a motion for a new trial. The cause comes before this court on an automatic appeal.

The evidence establishes the following facts: Defendant, twenty-six years old and unmarried, was in love with Ruth Lugo, a twenty-nine-year-old Mexican woman who had been twice married and had four children. Her refusal to marry him and her plea that they stop seeing each other led the defendant to brooding which culminated in his determination to kill her and himself. To that end he stole a gun, purchased cartridges and wrote a letter outlining his plan to be given to his mother. On June 10, 1940, he called on Ruth Lugo and tried to persuade her to marry him. Failing to do so, he came over to her chair, sat in her lap, and fired two shots through her chest, causing her death. Members of the family, residing in the same house and in nearby houses, heard the shots and rushed into the room where they found the defendant with a gun in his hand near the body of Ruth Lugo. The shot which he fired at himself just missed being fatal. While he was attempting to shoot himself a second time, the members of the family intervened, finally overpowered him and then delivered him into the custody of the police.

[1] During the course of the trial Police Officer Lopez took the stand and testified that shortly after the killing he had interviewed the defendant, that the questions and answers were taken down by a shorthand reporter under his direction, that these shorthand notes were transcribed by the reporter, that he had read them shortly after they were transcribed and verified them as correct. He was then asked to give the questions and answers, but defendant objected on the grounds that the shorthand reporter was not present to verify the transcribed statement and that no proper foundation had been laid. Lopez did not give the questions and answers but testified that the questions and answers contained in the written statement produced in court and shown to him were correct according to his present recollection. Officer Fremont then testified that defendant subsequently had read the statement and freely and voluntarily signed it in his presence. The statement contained a full confession of the crime by the defendant, and the parts considered relevant and not prejudicial were read to the jury as evidence. Regardless of Officer Lopez's testimony which merely identified the statements contained in the written document as those made to him by defendant, Officer Fremont's testimony was sufficient to justify the reading of the relevant portions thereof to the jury as a confession of the crime.

[2] The defendant further objected to the introduction in evidence of the letter written by him to his mother on the ground that there was insufficient proof that the signature on the letter was defendant's. Defendant's admission in his signed confession that he had written the letter, the testimony by a witness that defendant immediately after the shooting admitted writing the letter, and the testimony by a handwriting expert identifying the signature with that on another letter written by the defendant, justify the finding of the trial court that the signature had been sufficiently proven to permit the introduction of the letter. Code Civ.Proc. §§ 1940, 1944.

[3] The district attorney's reference to the defendant as a "killer" in his closing address to the jury did not constitute prejudicial misconduct justifying a reversal in the light of the facts of the case.

In view of the ample evidence to support the verdict, the absence of any errors in the record, and the soundness of the instructions given by the trial judge to the jury, the judgment and order of the trial court are affirmed.

17 Cal.2d 405

PEOPLE v. REED.

Cr. 4323.

Supreme Court of California.

Feb. 18, 1941.

1. Homicide ⇐253(1)

Evidence was sufficient to sustain conviction for murder in the first degree.

2. Criminal law ⇐729

In murder prosecution where district attorney was permitted to cross-examine defendant regarding whether he had been convicted of stealing government property and sentenced under that conviction, but at conclusion of testimony district attorney stated that he asked question in good faith expecting to be able to prove conviction by documentary evidence, which was not available, and the matter was expunged from the record by the court in compliance with the district attorney's request, there was no prejudicial "misconduct" requiring a reversal.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

Appeal from the Superior Court, San Bernandino County; Chas. L. Allison, Judge.

John Reed was convicted of murder in the first degree, and he appeals.

Affirmed.

Charles D. Warner, of China, and Albert Trujillo, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

PER CURIAM.

John Reed and John Thurman were convicted of murder in the first degree. The jury recommended life imprisonment for Thurman; Reed was sentenced to die. They appeal from the judgment and the order denying their motions for a new trial.

The evidence establishes the following facts: George Stephenson, the deceased, lived alone in a cabin on the edge of the Colorado river near the little settlement of Crossroads, located in the southeast corner of San Bernardino county. He was sixty-nine years of age and received old age pension checks monthly in the amount of $40. From these payments he saved about $300 or $350 which he carried on his person in a billfold. When making purchases at the stores in Crossroads, it was not unusual for him to exhibit his savings and to exchange small bills for ones of larger denomination.

Down the dirt road about 150 feet from Stephenson's cabin was another cabin occupied by Henry Williams, an elderly negro. On the evening of Friday, March 15, 1940, Stephenson visited Williams for about a quarter of an hour. Shortly after Stephenson left to return to his own cabin, Williams heard him call in an unusually loud voice, "What does all this mean? What is this all about?" Then all was quiet. Williams became uneasy and after a few minutes seized an ice pick and started for the Stephenson cabin. As he was proceeding along the dirt road which skirted the dense arrow weeds separating the two cabins, he saw two men come running from the direction of Stephenson's cabin. One man came within eight or ten feet of him. This man he later identified as Reed. The other man appeared tall and thin, but was not otherwise clearly visible. Williams then proceeded to the cabin, but finding no one there, hastened to a nearby gas station and persuaded the proprietor to drive back with him. The latter found Stephenson a few yards beyond the cabin, lying just at the brink of the river bed, bound and gagged, with his head badly beaten. He died a few hours later at the hospital. Upon search of his body and premises neither his billfold nor his money could be found.

For several months before the commission of the crime John Reed had lived in the vicinity of Crossroads and patronized the same stores in Crossroads as the deceased. One week before the commission of the crime he secured a ride from Phoenix, where he had been working, to Parker, a town in Arizona not far from Crossroads, with a friend named Cox. At this time Reed had little or no money. He stayed in a cabin with Cox and another man named West, paying nothing for accommodations. Three days before the commission of the crime, he met John Thurman, whom he had known for several years in Parker, and who was now out of work and without funds. The day before the crime Reed and Thurman visited Crossroads in the company of a man named Young. At that time Reed had a gun in his possession. On the day of the homicide he went to Crossroads with a man named Jack Hollis. At that time he wore a leath-

er jacket and had a bundle under his arm. Thurman was seen in Crossroads the same afternoon. About five o'clock in the afternoon, shortly before the homicide was committed, Thurman was seen by two men who were acquainted with him walking in the direction of the deceased's cabin in the company of a man carrying a bundle under his arm.

That night Reed exhibited a roll of bills to West, saying he had gotten them from an Indian to purchase liquor, and offered to pay West $25 for a ride to Phoenix or Wickenburg. West at first refused, having learned from Cox that Reed and Thurman were under suspicion with regard to the homicide, but several days later West drove Reed to Phoenix and received $25. While in Phoenix, Reed, accompanied by a Mrs. Scott with whom he was acquainted, purchased a suit of clothes and a used car. He was then picked up by two police officers. A wallet containing $113 was found in his car. His suitcase containing a leather jacket and other articles of clothing was found The clothing was turned over to a chemist who found blood stains on the sleeve of the jacket and a shirt. Upon being questioned about the money Reed gave contradictory stories—that he got it from Mrs. Scott; that he earned it selling whiskey; that he earned it selling stolen goods; that he got it from an Indian to purchase liquor.

Thurman left Parker several days after the homicide and went to Wickenburg by train, and from there to Phoenix by train. Then he bought a ticket to Herford, Texas, but returned it and went to Fresno, California, by bus and thereafter by bus to Van Nuys where he was arrested. He had spent about $47 on his trip and had $6 at the time of his arrest.

At the preliminary examination Henry Williams testified as to the circumstances surrounding the homicide and identified Reed as one of the men whom he had seen running from the deceased's cabin. Shortly thereafter Williams disappeared. His clothes were found on the bank of the Colorado river near Crossroads, and his body was recovered from the river in an identifiable condition. At the trial the testimony given by him at the preliminary hearing was read into the record.

[1] The foregoing facts constitute evidence which, even though circumstantial, is substantial enough to have established the guilt of the two defendants in the minds of the jury.

[2] Defendants contend that the district attorney was guilty of prejudicial misconduct at the trial in questioning Reed as to whether or not he had been previously convicted of a felony. On cross-examination Reed was asked whether or not he had been convicted of stealing government property and sentenced under that conviction. The court permitted the question over objection by counsel for the defendants, and Reed answered "no". At the conclusion of the testimony in the case the district attorney stated that when he had asked the question regarding a prior conviction, he had asked it in good faith, expecting to be able to prove the conviction by documentary evidence, but that such evidence was not available, and he therefore requested that the matter be expunged from the record and the jury instructed to disregard the question. The court complied with the request. In view of this subsequent statement by the district attorney, the expunging of the matter from the record by the court in compliance with the district attorney's request, and the absence of any evidence of bad faith on the part of the district attorney, there is no prejudicial misconduct requiring a reversal. People v. Braun, 14 Cal.2d 1, 92 P.2d 402.

The judgment and order of the trial court are affirmed.



17 Cal.2d 873

THE PEOPLE, Respondent, v. John THURMAN, Appellant.

Cr. 4325.

Supreme Court of California.

Feb. 18, 1941.

Albert D. Trujillo, of San Bernardino, and Charles D. Warner, of China, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

PER CURIAM.

The case of People v. Reed, Cal.Sup., 110 P.2d 394, this day decided, completely

disposes of all issues involved herein. On the authority thereof the judgment and order of the trial court are affirmed.



17 Cal.2d 484

ORLOFF v. METROPOLITAN TRUST CO. et al.

L. A. 17607.

Supreme Court of California.

Feb. 24, 1941.

1. Contracts ⇐187(1)

A contract made for benefit of a third person may only be enforced by him before parties thereto rescind it. Civ.Code, § 1559.

2. Contracts ⇐332(2)

In action for breach of escrow agreement providing that escrow holder should pay, in specified order, claims of a brewing company's creditors out of sums deposited by purchaser of company's stock and that after payment of creditors, balance, if any, deposited by purchaser should be divided between plaintiff's assignor and others, a complaint failing to allege that if purchaser had complied with escrow instructions amount deposited would have been sufficient to pay creditors and alleging a rescission of agreement by parties to it before plaintiff attempted to enforce agreement did not state a cause of action. Civ.Code, § 1559.

3. Conspiracy ⇐18

To state a cause of action for "conspiracy", facts must be alleged showing formation and operation of a conspiracy and damage resulting from an act done in furtherance of the plan, and since the cause of action is for damage suffered and not mere conspiracy complaint must state facts which show that a civil wrong was done resulting in damage.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

4. Conspiracy ⇐6

Damage is the gist of a civil action for "conspiracy", and a deprivation of some right must support the action, and if what plaintiff has been deprived of was not a right but an advantage merely hoped for plaintiff cannot maintain action.

5. Conspiracy ⇐18

A count in complaint charging civil conspiracy in that prior to termination of an escrow agreement defendants entered into a conspiracy to defraud plaintiff of money due plaintiff under an assignment did not state a cause of action for "conspiracy" where allegations affirmatively showed that assignment gave plaintiff no rights as against any one, but defendant brewing company and complaint did not show that plaintiff could not recover full amount of assignor's claim from company, since complaint lacked requirement of an allegation of damage.

6. Escrows ⇐9

An escrow holder does not become a "trustee" of the property deposited with him until conditions of escrow have been fulfilled.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

7. Escrows ⇐1

Where escrow agreement providing for payment of a brewing company's creditors was executed in connection with a purchase of company's stock, and agreement was terminated by parties before compliance with its provisions, escrow holding never became a "trustee", and hence plaintiff could not maintain an action against escrow holder on theory that it received and held money in trust for plaintiff as assignee of company's creditor.

8. Pleading ⇐193(5)

Where allegations of facts which were to be considered in connection with common count of money had and received did not support a cause of action against codefendants, sustaining demurrers to common count as to codefendants was proper.

9. Limitation of actions ⇐124

A common count of money had and received was barred as to codefendants by two-year statute of limitations where cause of action upon common count was first pleaded by plaintiff on June 8, 1939, when plaintiff filed an amended complaint, and codefendants, who were included in amended complaint, had not been named in original complaint as parties to action, and plaintiff's allegations showed that money which codefendants had received was paid to them on March 25, 1937. Code Civ.Proc. § 339.

10. Action ⇐6

Where count in complaint for declaratory relief alleged that a controversy existed between plaintiff and defendants as to their respective rights, and acts of which plaintiff complained were concluded before action was commenced, and plaintiff merely sought to have court review the acts and declare that plaintiff was entitled to a money judgment, count did not state a cause of action for declaratory relief and hence superior court's refusal to exercise its power to entertain complaint as to such count was not an abuse of discretion. Code Civ.Proc. §§ 1060, 1061.

11. Action ⇐6

A judgment refusing to entertain a complaint for declaratory relief is not reviewable on appeal except for an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Morris Orloff against the Metropolitan Trust Company of California, a corporation, and others, for alleged breach of an escrow agreement and for other relief. From a judgment of dismissal, plaintiff appeals opposed by defendants Metropolitan Trust Company, P. T. Libby, Sam Weiss and Edward Flam.

Affirmed.

Prior opinion, 102 P.2d 562.

Orloff & Katz, of Los Angeles (Wm. Katz and Abraham Gorenfeld, both of Los Angeles, of counsel), for appellant.

Wm. H. B. Haymond, Philip Grey Smith, and Burr & Smith, all of Los Angeles, for respondents Metropolitan Trust Co. and P. T. Libby.

Sydney Tannen, of Los Angeles, for respondent Sam Weiss.

Edward Flam, of Los Angeles, in pro. per.

EDMONDS, Justice.

An order sustaining general demurrers to a third amended complaint was followed by the judgment of dismissal from which this appeal is prosecuted against Metropolitan Trust Company, P. T. Libby, Sam Weiss and Edward Flam.

The complaint as amended purports to set forth five causes of action. The first count alleges facts which, the appellant declares, state a cause of action as to respondents Metropolitan Trust Company and Libby, its escrow officer, for breach of an escrow agreement between the trust company, as escrow holder, with the defendants Grossfeld, Margulis, Garrison and Rio Brewing Company, Inc. The remaining counts attempt, respectively, to state causes of action for civil conspiracy, for money received in trust for appellant, for money had and received, and for declaratory relief.

The first cause of action alleges: In 1935, Garrison agreed with Grossfeld, Margulis and the brewing company to purchase all of the capital stock of the latter for approximately $40,000, to be paid through an escrow with the trust company. Under the escrow instructions of Garrison to carry out this purpose, he agreed to deposit $5,000 when certain stock certificates and other papers, specifically described, were delivered to him. He also agreed to deposit $2,500 every three months thereafter. From these sums the escrow holder was directed to pay, in a specified order, the claims of creditors of the brewing company.

These creditors were classified in six groups. The claims of the first five groups were stated as amounting, in the aggregate, in excess of $18,000. The instructions provided that after the amounts due these creditors were paid, the balance, if any, deposited by Garrison was to be divided pro rata to Margulis, Grossfeld and Leo Schinagel, the appellant's assignor. The amounts of the claims of these three were stated as $3,041, $4,985 and $2,500, respectively.

The escrow holder was given notice of the Schinagel assignment after Garrison paid $5,000 to it, and before he deposited further sums aggregating $5,375. These amounts were paid to creditors of the brewing company in accordance with the escrow instructions.

Following these payments, Garrison gave the defendant Grace an option to purchase all of the outstanding stock of the brewing company. The option agreement provided that the consideration should be deposited in escrow with Metropolitan Trust Company and required the escrow holder to pay $3,000 to certain persons, which the appellant alleges constituted all of the unpaid creditors named in the escrow instructions of Garrison except the appellant's assignor. The instructions of Grace also provided for the payment of stated amounts to Grossfeld, Margulis, and Weiss

The appellant charges that these instructions were complied with, but the payments to Weiss, Grossfeld, Margulis and Flam included $2,500 which they received "as nominees and dummies" for Schinagel. Concurrently with the closing of this escrow, Garrison, Margulis and Grossfeld notified the trust company, in writing, to terminate the former escrow.

[1, 2] Although the agreement made by Garrison which was expressed by the first escrow is one which the law recognizes as having been made for the benefit of a third person, the amount which the appellant's assignor was entitled to receive under it was not a certain sum. By its terms, Schinagel's interest was contingent, and the appellant does not allege that if Garrison had fully complied with his escrow instructions, the amount deposited by him would have been sufficient to pay the creditors whose claims were specified as being prior to that of Schinagel. Moreover, a contract made for the benefit of a third person may only be enforced by him before the parties thereto rescind it. Sec. 1559, Civ.Code. The appellant's complaint pleads a rescission of the agreement by the parties to it long before any attempt was made by him to enforce its provisions, and, at least for that reason, does not state a cause of action.

The second count of the complaint, appellant contends, states a cause of action for civil conspiracy against all of the respondents. In addition to the facts alleged in his first cause of action, he alleges that prior to the termination of the first escrow, the respondents entered into a conspiracy to defraud him of the sum due to him under the assignment of Schinagel; that in furtherance of that conspiracy Schinagel, the respondents and the other defendants agreed to pay Schinagel the amount of the claim which he had theretofore assigned to the appellant by paying, or causing it to be paid, to Weiss, Flam, Grossfeld and Margulis "as nominees and dummies as and for" him; that this conspiracy was carried out by omitting the name of Schinagel from the escrow instructions providing for the transfer of the money paid by Grace for the brewing company's stock; and that pursuant to these escrow instructions Weiss was paid $1,305 and Grossfeld, Margulis and Flam $1,195, totaling $2,500, in satisfaction of the Schinagel claim. In effect, the appellant charges that Schinagel, the respondents and others conspired to defeat the assignment of his claim for $2,500 by procuring the payment of that amount to him.

[3, 4] These allegations are not sufficient. To state a cause of action for conspiracy, facts must be alleged showing the formation and operation of a conspiracy and damage resulting from an act or acts done in furtherance of the plan. As the cause of action is for the damage suffered, and not the mere conspiracy, the complaint must state facts which show that a civil wrong was done, resulting in damage. Mox, Incorporated, v. Woods, 202 Cal. 675, 262 P. 302; Darrow v. Robert A. Klein & Co., Inc., 111 Cal.App. 310, 295 P. 566; Rapaport v. Forer, 20 Cal.App.2d 271, 66 P.2d 1242; 3 Cal.Jur.Supp., p. 746. The damage is the gist of the action. "As it is the wrong accomplished—in other words, the deprivation of some right—that must support the action, it follows that if what the plaintiff has been deprived of was not a right at all, but an advantage merely hoped for, he cannot maintain his suit." Cooley on Torts, 4th Ed., vol. 1, p. 236.

[5] The allegations of the complaint affirmatively show that the assignment made by Schinagel to appellant gave the latter no rights as against anyone but the brewing company. He would have benefited if that claim had been paid by Grace, but his failure to receive payment from that source did not discharge the brewing company's obligation. For all that appears in the complaint, the appellant could have recovered from the brewing company the full amount of the Schinagel claim notwithstanding the contract carried out by Grace. The pleading therefore lacks the requirement of an allegation of damage.

[6, 7] By the third cause of action, the appellant attempts to state a cause of action against the trust company and Libby for money which he alleges they received from Garrison in the first escrow and held in trust for him as the assignee of one of the creditors of the brewing company. However, an escrow holder does not become a trustee of the property deposited with him until the conditions of the escrow have been fulfilled. Newport Bay Dredging Co. v. Helm, 120 Cal.App. 127, 7 P.2d 1039; Law v. Title Guarantee & Trust Co., 91 Cal.App. 621, 267 P. 565. In the present case, the first escrow was terminated by the parties, as they had a right to do, before compliance with its provisions,

hence the escrow holder never became a trustee.

[8] The appellant states as his next cause of action the common count of money had and received. But this count following allegations setting out in detail the facts upon which appellant relies, must be considered in connection with those facts. As the statements of those facts do not support a cause of action against the trust company or Libby the demurrers were properly sustained as to them. Hays v. Temple, 23 Cal.App.2d 690, 73 P.2d 1248.

[9] In support of the ruling of the trial court sustaining their demurrer to this cause of action, the respondents Weiss and Flam contend that it is barred by the statute of limitations. Code Civ.Proc., sec. 339. This point is well taken and must be upheld. These respondents were not named in the original complaint as parties to the action but were included as defendants in the amended complaint filed June 8, 1939. The cause of action upon the common count was first pleaded by the appellant at that time. By other allegations of the appellant, it affirmatively appears that the money which Weiss and Flam received through the Grace escrow was paid to them on March 25, 1937.

[10, 11] The final count of the complaint is, in form, one for declaratory relief. The appellant alleges that a controversy exists between him and the defendants as to their respective rights and obligations under the agreements which have been particularly pleaded. But all of the acts of which he complains were concluded before his suit was commenced and the relief he seeks is for the court to review them and declare that he is entitled to a judgment for $2,500. These allegations do not measure up to the requirements of an action for declaratory relief, and the superior court properly refused to exercise its power to entertain the complaint upon that count. Code Civ.Proc., secs. 1060, 1061. Moreover, a judgment refusing to entertain a complaint for declaratory relief is not reviewable upon appeal except for an abuse of discretion, which is not here shown. Cutting v. Bryan, 206 Cal. 254, 274 P. 326.

The judgment is affirmed.

We concur: TRAYNOR, J.; SHENK, J.; CURTIS, J.; CARTER, J.

17 Cal.2d 500

In re ANDREWS' GUARDIANSHIP.

ANDREWS v. ANDREWS et al.

L. A. 17244.

Supreme Court of California.

Feb. 25, 1941.

1. Insane persons ⇐27

Record established compliance with alleged requirement that copy of petition for appointment of guardian be served on alleged incompetent under statute providing for service of citation on an alleged incompetent in the same manner as provided by law for service of summons. Probate Code, § 1461.

2. Insane persons ⇐27

Whether alleged incompetent was physically unable to attend hearing on application for appointment of guardian for her, as stated in physician's affidavit, which on its face was sufficient to excuse the absence of alleged incompetent from the hearing, was for the trial court in ruling on motion to set aside order appointing guardian for the alleged incompetent who sought to impeach the affidavit. Probate Code, § 1461.

3. Insane persons ⇐27

Reviewing court was without jurisdiction to consider merits of an appeal from an order appointing a guardian for an alleged incompetent, which was not taken within the time prescribed by law, and the appeal was dismissed. Probate Code, § 1233; Code Civ.Proc. § 939.

4. Insane persons ⇐8

Where petition for appointment of guardian for alleged incompetent was filed and service of notice required by statute was made and physician's affidavit that alleged incompetent was unable to attend hearing because of physical disability, which was presented to the court, was sufficient on its face and was not successfully impeached, the superior court, had jurisdiction to appoint guardian even though the alleged incompetent was not present at the hearing. Probate Code, § 1461.

5. Insane persons ⇐27

The fact that physician's affidavit stating that in his opinion alleged incompetent was unable to attend hearing on petition for appointment of guardian for alleged incompetent was taken over telephone was not prejudicial to alleged incompetent on whom service of notice of hearing was properly

made, especially where at hearing on motion to vacate guardianship order the physician confirmed the statements made by him in his affidavit. Probate Code, § 1461.

6. Insane persons ⇐13

An attorney for person filing petition for appointment of guardian for an alleged incompetent, not being a party to action, was competent to serve the citation on the alleged incompetent. Code Civ.Proc. § 410; Probate Code, § 1461.

7. Insane persons ⇐25

The alleged power of the superior court to set aside an order appointing a guardian from which no appeal had been taken and which for all purposes was final could be exercised only when in the discretion of the superior court the ends of justice would be thereby served. Probate Code, § 1461.

8. Judgment ⇐386(1)

The granting of an application to set aside a judgment which is not void on its face must depend on the facts of each particular case, except that the application must be made within the time limited by statute. Code Civ.Proc. § 473.

9. Insane persons ⇐25

The superior court did not abuse its discretion in refusing to set aside original order appointing a guardian for an alleged incompetent from which no appeal had been taken, where the alleged incompetent acquiesced in the order for four months and permitted the guardian to administer her estate. Probate Code, § 1461.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin and Vaughn N. Thompson, Judges.

Proceeding in the matter of the guardianship of the estate of Juliette B. Andrews, an incompetent, on the petition of John F. Andrews and opposed by Juliette B. Andrews. From an order adjudging Juliette B. Andrews incompetent and appointing the First National Trust and Savings Bank of San Diego as guardian of her estate, and an order denying Juliette B. Andrews' petition to vacate previously entered order appointing a guardian, Juliette B. Andrews appeals.

Appeal from order appointing a guardian dismissed. Order denying the petition to vacate the previous order affirmed.

For prior opinion, see 103 P.2d 439.

Hugh B. Rotchford and Hubert Starr, both of Los Angeles, for appellant.

Wright, Monroe, Harden & Thomas and Clarence Harden, all of San Diego, Keith M. Ferguson, of La Jolla, and Luce, Forward & Swing and Edgar A. Luce, all of San Diego, for respondents.

SHENK, Justice.

The petition of appellant for a hearing in this court after decision by the District Court of Appeal, Second Appellate District, Division One, was granted in order that further consideration might be given to the contentions of the appellant that in the matter of the appointment of a guardian of her estate the provisions of section 1461 of the Probate Code were not sufficiently complied with, and that therefore the trial court was without jurisdiction to make the order appointing the guardian.

[1] The section of the Probate Code referred to provides for the service of the citation upon the alleged incompetent "in the same manner as provided by law for service of summons". The return of the service on file at the time the application was heard showed that the citation had been served on the appellant "by showing the said within original to" appellant "and delivering a true copy thereof to her". On the motion to set aside the order appointing the guardian, Mr. Ferguson, the person who served the citation, testified that he served the citation on appellant by delivering to her a true copy of the citation and a true copy of the petition for the appointment of a guardian. The court found that the citation had been served as shown by the affidavit of service and as testified by Mr. Ferguson. If we assume that service of a copy of the petition is required by the code section, it must be concluded that the record shows that there was compliance with such requirement.

[2] It is also provided in the code section that the alleged incompetent, "if able to attend, must be produced at the hearing, and if not able to attend by reason of physical disability, such inability must be evidenced by the affidavit and certificate of a duly licensed physician or surgeon". The affidavit of Doctor Diefenbach, presented to the court at the hearing on the application, was sufficient on its face to excuse the absence of the appellant from the hearing. On the motion to set aside the order appointing the guardian, the appellant sought to impeach this affidavit. Testimony at

some length was presented on which the court was called upon to resolve the conflicts in the evidence. A consideration of that evidence leads fairly to the conclusion that it presented a question of fact for the trial court to determine.

The appellant's contentions on the foregoing and other points are further discussed and correctly disposed of in the opinion of the District Court of Appeal, 103 P.2d 439, 440 prepared by Mr. Justice White, of which the following, with additional comment, is adopted as the opinion of this court:

"This is an appeal from two orders of the superior court of San Diego county, the first of which was made on April 22, 1938, adjudging the appellant incompetent and appointing respondent bank as guardian of her estate, while the last-named order was one made April 13, 1939, denying appellant's petition to vacate the previously entered order appointing a guardian for her estate.

"The pertinent facts are that on or about April 7, 1938, proceedings were had upon a complaint which sought commitment of appellant to a state institution as an alcoholic. After a hearing at the psycopathic ward on April 14, she was sent home and the hearing continued one year, a psychopathic parole officer being designated 'to look after her to some extent'. Mrs. Andrews was represented at this hearing by attorney Keith Ferguson. Two days thereafter, on April 16, Mr. Ferguson filed on behalf of John B. Andrews, husband of appellant, a petition alleging that the latter was incompetent and praying for the appointment of a guardian of her estate. A citation was issued, and in the afternoon of that day Mr. Ferguson personally served the same upon Mrs. Andrews. Mr. Ferguson told Mrs. Andrews at that time that if her physician believed that the state of her health was such that she should not appear they could substitute the affidavit of her physician to that effect, and that it seemed to him a proper case for the affidavit to be used. Mrs. Andrews asked if she should contact her doctor, but Mr. Ferguson said he knew her physician, Dr. Diefenbach, and would speak to him; that he presumed he would be willing to make such an affidavit. On April 22, the day set for the hearing, Mr. Ferguson prepared an affidavit and sent it to Dr. Diefenbach, who signed it after a telephone conversation with Mr. Ferguson. It was then returned to the office of Mr. Ferguson, who affixed his signature and notarial seal thereto and presented it at the hearing. The affidavit contained the statement 'that Juliette B. Andrews * * * is under his' (affiant's) 'professional care; that she is confined to her home in the personal charge of nurses at all times; that in the opinion of affiant, she is not able to attend a court hearing on Friday, April 22, 1938, by reason of her physical condition'. The doctor testified at the hearing on the petition to vacate the order appointing the guardian that he had last seen Mrs. Andrews on March 15, but that his affidavit was based on 'knowing the patient since 1936; seeing her through several illnesses; letters which I had from Doctor Kerr of the University of California * * * and also a neurologist whom I don't recall'; also reports from Dr. Yuskis as to her alcoholism and inability to eat; and extreme nervousness and inability to sleep at night. The doctor further testified: 'I knew she was up around the house, at least this is my report of the nurse. I knew that she had been out for rides. I urged that. I knew she was * * very nervous and very restless. * * * Q. You have not given us the ultimate conclusion that you reached as to whether she was in condition to be produced in court or not? A. Physically she could have been taken to court. * * * Q. What did you apprehend, as a professional man, would probably happen? * * * A. An extreme nervous tension, one of these cataleptic or epileptic seizures, whichever they were, and strain on a woman who had gone through considerable, with a serious illness shortly in the background. * * * I thought she should not be produced. Q. Why not? A. On the ground just stated, and from the fact that this was presumably settled and it was agreeable to her to go through with this procedure.' On cross-examination he testified: 'Q. * * * You were under the impression, at least under the belief at the time you made this affidavit, that Mrs. Andrews had consented to the appointment of a guardian of her property, and that this proceeding was agreeable to her? A. That is what I was told and believed.' The doctor further testified that he never saw Mr. Ferguson in person; that he thought the incompetency hearing was merely 'a formal routine matter'. * * *"

[3-9] Although the trial court stated that the appellant could have attended the hearing, such statement must be taken in

connection with the finding and conclusion of the court that the showing as to her physical condition was sufficient to excuse her absence.

"It is stated in respondent's brief and not denied, that since the adverse ruling upon her application to revoke the order appointing the guardian, appellant on her own petition has been restored to competency.

"The appeal from the order appointing the guardian must be dismissed, for the reason that the same was not taken within the time prescribed by law. Probate Code, § 1233; Code Civ.Proc., § 939. This court is therefore without jurisdiction to consider the appeal on the merits. Williams v. Long, 130 Cal. 58, 62 P. 264, 80 Am.St.Rep. 68; Lawson v. Guild, 215 Cal. 378, 10 P.2d 459.

"Appellant's claim that the order denying her petition to set aside the decree appointing the guardian must be reversed because the court was without jurisdiction, cannot be upheld. It is true, as urged by appellant, that section 1461 of the Probate Code provides that the alleged incompetent 'must be produced at the hearing', but that such attendance may be excused upon the filing of an affidavit by a physician that by reason of physical disability such person is unable to attend. * * *" The affidavit presented to the court at the hearing was on its face sufficient and was not successfully impeached at the hearing on the motion to set aside the order appointing the guardian.

"It becomes unnecessary to pass upon the legality of the physician's affidavit taken through the telephone, for it is evident no prejudice resulted to appellant therefrom. Indeed, at the hearing upon the motion to vacate the guardianship order the doctor confirmed the statements made by him in his affidavit and gave his reasons for believing that the alleged incompetent should not have attended the hearing, testifying as to the consequences which in his opinion might ensue to her physical and mental well-being were she to attend. Banning v. Banning, 80 Cal. 271, 22 P. 210, 13 Am. St.Rep. 156; Fairbanks, Morse & Co. v. Getchell, 13 Cal.App. 458, 110 P. 331.

"We find no merit in appellant's contention that due and legal service of the citation was not made upon her for the reason that under the old common-law rule, undisturbed by statute, an attorney may not serve a process the issuance of which was procured by him. Upon conflicting but substantial evidence, the court found that in the guardianship proceeding attorney Ferguson was acting as counsel for appellant's husband. Not being a party to the action, the attorney was competent to serve the citation. Code Civ.Proc., sec. 410; Anderson v. Goff, 72 Cal. 65, 66, 13 P. 73, 1 Am. St.Rep. 34; Sheehan v. All Persons, 80 Cal.App. 393, 252 P. 337.

"Lastly, appellant urges that the order refusing to set aside the original order appointing a guardian should be reversed because the petition for such relief was timely and merited for appellant an opportunity to have a hearing upon the merits and in her presence. Conceding, but not deciding, that the court had a right in the second proceeding to set aside an order from which no appeal was taken and which for all purposes was final, such power nevertheless could be exercised only when, in the discretion of the court, the ends of justice would be thereby served. In the instant case the court resolved its discretion against appellant, and we cannot say that the court's action amounted to an abuse of discretion. The granting of such relief as to a judgment or order not void upon its face must depend somewhat upon the circumstances of each particular case, except, of course, that application for relief must be made within the time limited by section 473 of the Code of Civil Procedure. Where, as in the case before us, the applicant for relief acquiesced in the original order of guardianship for four months and permitted respondent bank as guardian to administer her estate, we would not be justified in concluding that the trial court's decision was not a fair and just exercise of its discretion."

For the reasons herein stated, the appeal from the order of April 22, 1938, appointing respondent bank as guardian is dismissed, and the order of April 13, 1939, denying the petition to vacate the aforesaid order of April 22, 1938, is affirmed.

We concur: CURTIS, J.; CARTER, J.; TRAYNOR, J.; EDMONDS, J.

17 Cal.2d 453

PEOPLE v. CRAIG.

Cr. 4327.

Supreme Court of California.

Feb. 20, 1941.

1. Rape ⚖51(4), 52(3)

Evidence supported conviction of rape, based on an act of intercourse committed without consent and against will of a 16-year-old girl. Pen.Code, § 261, subds. 1, 3.

2. Criminal law ⚖1202(3)

In rape prosecution, evidence sustained trial court's finding that charge of a prior conviction of a felony was true.

3. Rape ⚖1

The statute defining rape, which contains six subdivisions enumerating circumstances under which an act of intercourse may be deemed an act of rape, creates but one offense. Pen.Code, §§ 261, 263.

4. Criminal law ⚖29

A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other.

5. Criminal law ⚖984

Where two counts of information charging offense of rape were based on a single act of intercourse committed without the consent and against the will of a 16-year-old girl, the only difference between the two counts being that the first count charged forcible rape and the second count charged statutory rape, two judgments finding defendant guilty of two offenses were unauthorized. Pen.Code, § 261, subds. 1, 3; § 954.

6. Criminal law ⚖1184

An appellate court possesses power to modify a judgment on appeal therefrom. Pen.Code, § 1260.

7. Criminal law ⚖1184

Where trial court improperly pronounced two judgments against defendant, who was convicted under an information charging forcible rape in one count and statutory rape in another, sentences to run concurrently, Supreme Court would modify the judgments to extent of consolidating them into a single judgment, so as to preclude dual judgments of trial court from working any possible disadvantage to defendant in later fixing of his definite term by State Board of Prison Terms and Paroles. Pen.Code, § 261, subds. 1, 3; §§ 954, 1260.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Arkell H. Craig was found guilty on two counts of rape, and he appeals.

Judgments modified and, as modified, affirmed.

For prior opinion, see 104 P.2d 864.

Franklin B. MacCarthy and Henry F. Poyet, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant was prosecuted and found guilty upon two counts of rape based on a single act of intercourse committed without the consent and against the will of a sixteen-year-old girl. Count 1 of the information charged that the rape was accomplished by force and violence, contrary to the provisions of subdivision 3 of section 261 of the Penal Code. Count 2, after alleging that it was "a different statement of the same offense", charged statutory rape upon a child under the age of consent, contrary to the provisions of subdivision 1 of the section. Each count also charged a prior conviction of felony and service of a term of imprisonment therefor. A jury trial was waived, and the court, at the conclusion of the evidence, found defendant guilty on both counts. A separate judgment was pronounced and entered on each count sentencing the defendant thereon to the state prison at Folsom "for the term prescribed by law", the sentences to run concurrently. Defendant has appealed.

[1, 2] An examination of the record discloses sufficient evidence to support the conviction of defendant and the finding with respect to the prior felony charge. The only question meriting serious consideration is as to the propriety of entering separate judgments and sentences for both forcible and statutory rape, charged under separate counts, when but a single act of sexual intercourse has been committed.

[3] Section 261 of the Penal Code defines rape as "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances", viz.: (1) Where

she is under 18 years of age; (2) where she does not possess the mental capacity to legally consent thereto; (3) where her resistance is overcome by force; (4) where resistance is precluded by certain designated means; (5) where she is unconscious of the nature of the act and this is known to the accused; and (6) where she submits under artifice, fraud, etc.

Under this section, but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions. These subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; they are not to be construed as creating several offenses of rape based upon that single act. This conclusion finds support in section 263 of the Penal Code which provides that: "The essential guilt of rape consists in the outrage to the person and feelings of the female." The victim was not doubly outraged, once because she was forcibly attacked and once because she was under 18 years of age. There was but a single outrage and offense. People v. Snyder, 75 Cal. 323, 17 P. 208; People v. Vann, 129 Cal. 118, 121, 61 P. 776; People v. Jailles, 146 Cal. 301, 304, 79 P. 965; People v. Maruyama, 19 Cal. App. 290, 293, 125 P. 924.

The Vann case, supra [129 Cal. 118, 61 P. 777], states: "We think the true construction of section 261 to be that thereby the legislature meant merely to put beyond doubt the rule that on an information for rape the things mentioned in the subdivisions could be proven, and would establish the crime. It is not intended to alter or establish a rule of pleading, or to create six different kinds of crime."

In the Jailles case, supra [146 Cal. 301, 79 P. 966], the accused, as here, was charged in separate counts with both forcible and statutory rape based on a single act of intercourse. This court declared that: "It must be conceded that it would be preferable for the pleader endeavoring to set forth one offense in different forms under different counts to expressly state in the information that the matters and things so set forth are descriptive of one and the same offense. Such a statement would obviate all question as to the intention of the pleader. We think, however, that, despite the absence of such a statement in the information before us, it is manifest that it was sought to charge but one offense, viz., one rape committed on Maria Tampo on May 10, 1903. The nature of the allegations in the two counts shows this very clearly. The only difference between the allegations of the two counts is that force, violence, and resistance are alleged in one, without allegation as to age, while in the other is the allegation as to age, without any allegation as to force, violence, and resistance. The allegations of each show the offense of rape, committed on the same person on the same day, and indicate that the district attorney was simply endeavoring to set forth the same transaction in different ways, so as to bring the case within either subdivision 1 or subdivision 3 of section 261, Pen. Code, as the evidence on the trial might show it to have been. All these allegations might undoubtedly have been joined in one count, for there is nothing inconsistent in them."

Section 954 of the Penal Code still provides, as it did then, for a statement of the "same offense" in separate counts. Here, as already stated, the information expressly alleged that the second count represented "a different statement of the same offense", indicating the pleader's belief to be that one offense was being stated in different ways. However, even in the absence of such an averment in the Jailles case, the information there was held to charge but one offense in varying forms and in separate counts. It is true that at the time of the decision in the Jailles case section 954 did not authorize, as it does now, the charging in one indictment or information of two or more "*different* offenses" of the same class or connected together in their commission. Still, it cannot be successfully contended that the absence of such authority in the statute prompted the decision that charges of forcible and statutory rape based on a single act of intercourse constitute but one offense. If the court in the Jailles case had been of the opinion that these charges represented different offenses, it would have so held and declared the joinder of such "different" offenses improper in the absence of statutory authority. Instead, it held that but one offense was involved.

[4, 5] The authorities have set down certain rules or tests whereby it may generally be determined whether one or more offenses result from a single act or transaction. Frequently, the test it stated to be "the *identity of the offenses* as dis-

tinguished from the identity of the transactions from which they arise. A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and *one is not included within the other.*" People v. Venable, 25 Cal.App.2d 73, 74, 76 P.2d 523. Where, as here, the charge and proof disclose a *single* act of intercourse resulting from *force* employed upon a *minor,* but one punishable rape is consummated, for the proof, though dual in character, necessarily crystallizes into one "included" or identical offense.

Under the above test for determining whether one or more offenses result from the same act or transaction, it has been held, by way of illustration, that where one shot is fired and two persons are killed, two punishable homicides result. People v. Majors, 65 Cal. 138, 3 P. 597, 52 Am.Rep. 295. Likewise, it has been held that where one act or transaction violates the provisions of two statutes, whether of the same or different jurisdictions, it is punishable under both. People v. Painetti, 210 Cal. 476, 292 P. 965 [violation of Still Act and Wright Act]; People v. Burkhart, 5 Cal. 2d 641, 55 P.2d 846 [violation of county ordinance for being drunk in public place and driving motor vehicle while drunk]; People v. Coltrin, 5 Cal.2d 649, 55 P.2d 1161 [abortion and murder]; People v. Warriner, 37 Cal.App. 107, 173 P. 489 [lewd and lascivious acts and rape committed same day on same child]; People v. McCollum, 116 Cal.App. 55, 2 P.2d 432 [incest and rape].

All of these illustrations are distinguishable from the situation here confronting the court. In the cited instances, the one act or transaction either injured or affected two or more victims or ran counter to two or more separate and distinct statutes defining different crimes with variable elements. In many instances the violation of these separate statutes was complete at different stages of the commission of the single act or transaction. In other words, a punishable abortion results when the woman has aborted as a result of the accused's act, but the homicide for which he may likewise be tried and convicted does not result until the victim later dies. The two offenses arising out of the same transaction are consummated at different times, and the statute condemning each is based upon an independent public policy. This is equally true of the illustration with respect to the offenses of lewd conduct and rape perpetrated on the same child. But none of the foregoing distinguishable characteristics is here present. There is only one victim. There has been a violation of but one statute—section 261 of the Penal Code. And, while the proof necessarily varies with respect to the several subdivisions of that section under which the charge may be brought, the sole punishable offense under any and all of them is the unlawful intercourse with the victim. We conclude that only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code.

Section 264 of the Penal Code prescribes a punishment of "not more than fifty years" in the state prison for rape committed in violation of *any* of the subdivisions of section 261. In the case of statutory rape (subd. 1, sec. 261), it also provides for an alternative county jail punishment. The trial court, however, by its "judgments" has sentenced defendant on both counts of the information to the state prison.

[6, 7] The "judgments" entered by the trial court should be modified to the extent of consolidating them into a single judgment. A new trial or reversal with directions is not necessary for this purpose. An appellate court possesses the power to modify a judgment on appeal therefrom. Sec. 1260, Penal Code; People v. Kynette, Cal.Sup., 104 P.2d 794. Such modification will serve to preclude the dual judgments of the trial court from hereafter working any possible disadvantage or detriment to the defendant in the later fixing of his definite term by the State Board of Prison Terms and Paroles.

For the foregoing reasons, the "judgments" herein are consolidated and modified to read:

"Whereas the said Arkell H. Craig has been found guilty of the crime of *Rape,* a felony, as defined and proscribed in subdivisions 1 and 3 of section 261 of the Penal Code, and as charged in counts 1 and 2 of the amended information, being separate statements of the same offense, and the allegation of prior conviction having been found true as therein alleged, to-wit: Lar

ceny of Auto, a felony, convicted in the Circuit Court of the State of Illinois, Cook County, upon which judgment was rendered on or about March 14, 1925, and that defendant served a term of imprisonment therefor in a penal institution,

"It is Therefore Ordered, Adjudged and Decreed that the said Arkell H. Craig be punished by imprisonment in the State Prison of the State of California at Folsom for the term prescribed by law."

As modified, the judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; EDMONDS, J.; TRAYNOR, J.; CARTER, J.



17 Cal.2d 479

PEOPLE v. JOHANSEN.

Cr. 4334.

Supreme Court of California.

Feb. 21, 1941.

1. Criminal law ⇐1068½

Where defendant was convicted of two murders in the first degree, and his punishment was fixed at death, appeals from such judgments were automatic under statute. Pen.Code, § 1239.

2. Homicide ⇐237

In murder prosecutions, wherein defendant interposed pleas of not guilty by reason of insanity, evidence justified trial court's finding that defendant was sane when he committed the crimes.

3. Homicide ⇐250

Evidence sustained convictions for two murders.

4. Homicide ⇐354

Where evidence sustained convictions for two murders, and trial court's finding that defendant was sane at the time of commission of the murders, the trial court's action in imposing the death penalty would be sustained on appeal. Pen.Code, § 1239.

Appeals from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

William Johansen was convicted of two murders, and he appeals.

Judgments affirmed.

Gerald J. Kenny, Public Defender, of San Francisco, for appellant.

Earl Warren, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and John J. McMahon, Asst. Dist. Atty., both of San Francisco, for respondent.

CURTIS, Justice.

The defendant, William Johansen, was charged in two separate informations with the murder of two human beings in the City and County of San Francisco. In one information he was charged with the murder of Lena Coffin on the 6th day of April, 1935, and in the other the charge was that he had murdered Irene Chandler, known also as Irene McCarthy, on the 24th day of June, 1940. The two informations were filed on July 18, 1940. Defendant interposed to each information pleas of not guilty, and not guilty by reason of insanity. He subsequently withdrew his pleas of not guilty and waived a jury, and went to trial on October 14, 1940, before the court on his pleas of not guilty by reason of insanity. The two cases were consolidated for trial. Prior to the date of trial the court had appointed two alienists, Dr. Tilton E. Tillman and Dr. Margaret H. Smyth, the former a member of the Lunacy Commission and the latter being at the time of her appointment medical director and superintendent of the Stockton State Hospital.

[1] At the close of the evidence the court found the defendant sane and fixed his punishment at death, and thereafter pronounced judgments in each case in accordance with the penalty so fixed. The appeals from these judgments under section 1239 of the Penal Code are automatic. While defendant was represented by the Public Defender in the trial court, there has been no appearance on his behalf in this court and no brief has been filed by him personally or otherwise. The Attorney General has filed a statement setting forth a summary of the evidence in the case and such matters as he deems pertinent.

The only witnesses at the trial were the two alienists and the defendant. The latter identified three statements made by him to prosecuting officers after his arrest and

prior to his trial, which, upon proof of their authenticity, were introduced in evidence without objection upon his part.

The qualifications of each of the alienists were admitted by counsel for the defendant. Dr. Tillman was first called as a witness and identified the written report which he had made to the court as to defendant's mental state. His report bore the date of October 10, 1940, and was as follows: "This is to certify that I have examined William Johansen on two different occasions at the County Jail and have had a long interview with his present wife who is a resident of Long Beach, California, and that I have been in consultation with Dr. Margaret Smyth of the Stockton State Hospital, and I find that William Johansen is sane and competent."

He further testified that he had read the confession of defendant, meaning the three statements just referred to, and had questioned the defendant respecting each of the crimes of which he was accused, and gave as his opinion that the defendant was sane when he committed "both murders".

Dr. Smyth, the other alienist appointed by the court to examine the defendant was then sworn as a witness and testified that she was medical director and superintendent of the Stockton State Hospital and had been there ten years; that at the request of the court she had examined the defendant and had made a written report to the court as to his mental condition. This report was addressed to the court and was by the court read into the record of the case. It was as follows:

"Enclosed please find result of examination together with my opinion of the mental condition of William Johansen.

"I found him to be quiet and composed, his conversation coherent and rational. He gave the story of his life from childhood and stated that he had suffered a great deal due to continued references to his having been an illegitimate child.

"He gave no evidence of hallucinations or delusions. His memory was good. He had been educated to the eighth grade in school. He said he had been able to make a fairly good living for himself and family.

"He declared there had never been anything abnormal in his sexual life in spite of all that has been said in the newspapers about him; that his present trouble is due to the effects of drink, and he now wishes to withdraw both pleas—guilty, and not guilty by reason of insanity—in order to avoid further distress to his wife. He feels that he has the best wife in the world and has decided this is the only thing for him to do.

"It is my opinion that this man is not insane and that he knew the difference between right and wrong at the time of the commission of the acts charged against him."

At the close of the reading of this report Dr. Smyth, in answer to a question propounded to her by the court, stated that the defendant was legally sane at the time he committed the offenses with which he was charged, "these two murders". On cross-examination, Dr. Smyth reaffirmed her opinion respecting the sanity of the defendant at the time the offenses were committed.

The defendant then took the witness stand in his own behalf and gave testimony respecting the two murders charged in said informations. When upon cross-examination he was shown the three statements hereinbefore alluded to, he admitted making the same, that he signed each of them, and that they correctly reflected the questions asked him and his answers to said questions. These statements, which may be referred to as his confession, were thereafter admitted in evidence.

His testimony given at the trial and these three statements give a detailed history of the defendant from his birth to the time of his arrest immediately following the death of Irene Chandler. It is not necessary to set forth this evidence at any great length. We deem it sufficient to state that it shows that defendant was born in Denmark and brought to this country at an early age. He attended school at Beverly, Massachusetts, and finished the eighth grade. He enlisted in the army at an early age, but deserted after a short service. He then went to New York, where he married his first wife. After they had two children born to them, dissension arose between him and his wife. He visited her one night about midnight. They engaged in an encounter, and he choked her to death, and afterwards mutilated her body by opening her abdomen to determine whether she was pregnant as she had claimed that she was in that condition. He then shipped as a seaman, and some eighteen months thereafter arrived in San Francisco early in the year 1935. On April 5, 1935, one evening on Market street he met Lena Coffin. They went to

a nearby hotel and secured a room. They sat around the room about an hour, when he grabbed her by the throat and strangled her to death. He then mutilated her body by cutting out her breast. He left the hotel and soon shipped out of San Francisco on a boat leaving for Portland. He spent considerable time on the Gulf of Mexico and in Texas, but returned to San Francisco, and on June 24, 1940, he met Irene Chandler, known also as Irene McCarthy, in a beer hall on Fifth street. They had a number of drinks together and both were fairly well intoxicated. He bought a bottle of whiskey, and they went to a nearby hotel and engaged a room. The woman immediately undressed and went to bed. He did the same and found that she had "passed out". He tried to arouse her but she would not wake up. He grabbed her by the throat and choked her to death. He then mutilated her body, washed himself and left the hotel. That same day he took a bus for Los Angeles.

We, of course, are not concerned with the murder committed by defendant in New York. The only excuse he gave for this crime was that his wife threw a flower pot at him. In explanation of the murder of Lena Coffin he stated, "I don't know, something came over me and I grabbed a hold of her by the throat." Referring to the killing of Irene Chandler, he said, "I guess a mania must have seized me again and I grabbed her by the throat and choked her while she was lying in bed * * * put pressure on her windpipe." He had sexual intercourse with neither of his victims, although he stated that he went to the hotel in each instance for that purpose. He made no rational explanation as to the reason he mutilated their bodies.

After he had testified and his confession had been read into the record, both Dr. Tillman and Dr. Smyth were recalled to the witness stand, and each stated that the evidence to which they had just listened confirmed them in their opinion that the defendant was sane at the time he committed the two murders of which he was accused.

The cases were then submitted to the court for its decision, which was as follows: "The Court finds the defendant sane at the time of the commission of the two murders alleged in the informations." At a later date the court pronounced judgment in each case by sentencing the defendant to death.

[2] There can be no question but that the evidence before the court fully justifies the finding of the court that the defendant was sane at the time he committed the crimes of which he was charged in the informations.

[3, 4] The evidence against the defendant in each of these two cases establishes beyond any doubt that defendant is guilty of murder in the first degree, as charged in each information herein. The action of the trial court in imposing upon defendant the extreme penalty under the law should therefore be sustained. Each of the judgments against defendant is affirmed.

We concur: GIBSON, C. J.; HOUSER, J.; TRAYNOR, J.; EDMONDS, J.; SHENK, J.; CARTER, J



17 Cal.2d 459

PEOPLE v. IVES et al.

Cr. 4315.

Supreme Court of California.

Feb. 21, 1941.

1. Criminal law ⇐1134(1)

Where convictions were of murder in the first degree without recommendation, all appeals would be considered "automatic" and the entire record searched on behalf of each defendant for error resulting in a possible miscarriage of justice. Pen.Code, § 1239(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Automatic Appeal".

2. Criminal law ⇐622(2)

In prosecution of four persons for murder in the first degree, refusal of two defendants of a separate trial was not error where theory of prosecution was that such defendants were aiders and abettors even though not present at time of murder, and theory of prosecution was later substantiated by the evidence.

3. Criminal law ⇐563

The corpus delicti may be proved by circumstantial evidence and the reasonable inferences drawn therefrom.

4. Criminal law ⇐563

To warrant a conviction, the corpus delicti must be proved to a moral certainty and beyond a reasonable doubt but it is not necessary that it should be so proved before corroborative evidence is introduced.

5. Homicide ⇐228(1)

In prosecution for homicide, if a prima facie case is presented that deceased met his death by means of an unlawful act of another, the evidence is sufficient to prove the corpus delicti.

6. Criminal law ⇐304(2)

It is a well-known fact that while occasionally persons take chloral hydrate to induce sleep, it is generally administered by a physician.

7. Criminal law ⇐323

When chloral hydrate is given other than by a physician, an inference may be reasonably drawn that the purpose is to take advantage of the person to whom it is administered, and in such instances chloral hydrate is commonly referred to as "knockout drops".

See Words and Phrases, Permanent Edition, for all other definitions of "Knockout Drops".

8. Homicide ⇐228(1)

To prove a "prima facie case of corpus delicti" in a homicide prosecution, all that was required was to show a reasonable probability that a criminal act of another had been the cause of death.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case of Corpus Delicti".

9. Homicide ⇐268

In prosecution for murder in the first degree, evidence of the corpus delicti was sufficient to submit to jury.

10. Criminal law ⇐412(1), 1169(3)

In prosecution for murder in the first degree where the corpus delicti had been proved sufficiently, irrespective of testimony of defendants, statements made by them were admissible, and in any event the reception of such statements was harmless where defendants subsequently testified concerning the same matters.

11. Homicide ⇐268

In prosecution for murder in the first degree, there was sufficient legal evidence upon which to deny motion of defendants for directed verdict.

12. Criminal law ⇐511(2)

The statements and admissions of a defendant charged with murder in the first degree were sufficient to show the commission of the offense or the circumstances of its perpetration within the rule that the testimony of an accomplice cannot be considered on question of defendant's guilt or innocence unless the latter is connected with commission of the offense by other independent evidence showing the commission of the offense or the circumstances of its perpetration. Pen.Code, § 1111.

13. Homicide ⇐253(1)

Verdict of murder in the first degree without recommendation was sustained by the evidence without considering testimony objected to.

14. Witnesses ⇐41

The circumstances of a killing may show a general malignant disregard for the lives of others evidencing a heart insensible to social obligation and an insufficient mentality to distinguish between right and wrong, yet the possessor of such heart and mind may be competent to testify. Code Civ.Proc. §§ 1879, 1880.

15. Witnesses ⇐41

Unsoundness of mind does not per se establish the incompetency of a witness. Code Civ.Proc. §§ 1879, 1880.

16. Criminal law ⇐1158(4)

In prosecution for murder where defendants made motion for new trial on ground of newly discovered evidence which was that one jointly charged with defendants was found insane at time of killing and that such defendant had given testimony detrimental to his co-defendants, it was for trial court to determine whether such defendant was able to perceive and could make known his perceptions to others, so as to be competent as a witness. Code Civ.Proc. §§ 1879, 1880.

17. Witnesses ⇐41

One may be insane upon a certain subject but sane as to other matters and one may be unable to distinguish legally between right and wrong and still be able to narrate facts chronologically, correctly, intelligently and truly, as regards competency of such person as a witness. Code Civ.Proc. §§ 1879, 1880.

18. Criminal law ⇐1169(1)

Where there was abundant evidence to sustain verdict of guilty of murder in the

first degree without considering the testimony objected to on ground of insanity of witness, the defendants could not be said to have been prejudiced by reception of such testimony. Code Civ.Proc. §§ 1879, 1880.

19. Criminal law ⇐641(1)

Persons accused of murder in first degree were entitled to competent legal representation. Pen.Code, § 987; Const. art. 1, § 13.

20. Criminal law ⇐641(3)

The mere fact that attorney appointed by court to defend one charged with murder in first degree had been practicing for only a year did not show that the attorney was not competent. Pen.Code, § 987; Const. art. 1, § 13.

21. Criminal law ⇐641(3)

Record showed that defendant was competently represented by attorney appointed by court to represent defendant. Pen.Code, § 987; Const. art. 1, § 13.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Gordon Hawkins, Mike Simeone and Eithel Leta Juanita Spinelli were convicted of murder in the first degree without recommendation, and they appeal.

Judgments affirmed.

Gordon Fleury, of Sacramento, for appellant Albert Ives.

Robert H. Schwab, of Sacramento, for appellant Gordon Hawkins.

Paul Angelillo and Arthur E. White, both of Los Angeles, and Peter Mannino, of Sacramento, for appellant Mike Simeone.

Ralph Thomas Lui, of Sacramento, for appellant Eithel Leta Juanita Spinelli.

Earl Warren, Atty.-Gen., and J. Q. Brown, Deputy Atty.-Gen., for respondent.

WARD, Justice pro tem.

[1] Appeals by Gordon Hawkins, Mike Simeone and Eithel Leta Juanita Spinelli from judgments of conviction of the murder of Robert Sherrard, had upon an indictment wherein they were charged jointly with one Albert Ives, and from orders denying their separate motions for new trial. The defendants Ives, Hawkins and Spinelli, in addition to their pleas of not guilty, entered pleas of not guilty by reason of insanity. These pleas were withdrawn by defendants Hawkins and Spinelli. Ives was declared to be insane at the time of the commission of the offense and was committed to an asylum. Briefs and a short oral argument on the appeal have been presented on behalf of Simeone; a brief was filed on behalf of Mrs. Spinelli, and the appeal by Hawkins has been submitted upon the record. The convictions were of murder in the first degree without recommendation. In view of the Hawkins appeal, all appeals will be considered as automatic, Penal Code, § 1239, subd. b, and the entire record searched on behalf of each defendant for error resulting in a possible miscarriage of justice. People v. Perry, 14 Cal.2d 387, 94 P.2d 559, 124 A.L.R. 1123; People v. Williams, 14 Cal.2d 532, 95 P.2d 456. Consideration will also be given to matters set forth in the briefs, and to those that may suggest themselves from reading the clerk's and reporter's transcripts.

[2] A motion for a separate trial was presented on behalf of Mrs. Spinelli and Simeone. The motion was made and argued by the attorney for Simeone and predicated upon the theory that the evidence against these two defendants would be "different and distinct", both in kind and degree, from the evidence against the other defendants; that Mrs. Spinelli and Simeone were not present when the crime was committed; that a denial of the motion would mean "that the interests of these two defendants will be materially prejudiced, and since the crime is the crime of the first degree, a great deal of consideration and a great deal of thought should be given before any interests of these two clients is put into jeopardy". The district attorney stated his theory that the defendants were aiders and abettors, and this theory was later substantiated by the evidence. The court was correct in denying the motion.

Before narrating any of the ghastly and sordid evidence describing the crime, we deem it advisable to give consideration to the sufficiency of the proof of the corpus delicti. The body of the deceased, Robert Sherrard, was recovered as the result of dragging a portion of the Sacramento river in the vicinity of Freeport bridge. Clad only in bathing trunks, it was found approximately 447 feet south of the bridge, and about 150 feet out from the Yolo county shore of the river. About 404 feet north

of the bridge and about 6 feet away from the highway also on the Yolo county side, the clothing of the deceased was found. Between this spot and the place where the body was recovered, the bank of the river is thickly covered with trees and underbrush. No mark was found on the body except a scratch on the head.

The autopsy surgeon testified that the deceased came "to his death by asphyxiation, by drowning"; that both lungs were "badly" congested and just oozed with dark venous colored blood; that the right side of his heart was dilated, and both sides were venous in character, showing lack of oxygen or some obstruction in breathing; that Sherrard was either partially or more probably totally unconscious when his body entered the water. This conclusion was based upon the condition of the lungs and heart, also a chemical analysis of the stomach, which showed traces of chloral hydrate, a substance used "as a hypnotic" to produce sleep. The chemist testified that he did not know how much chloral hydrate was actually in the stomach.

[3-5] The corpus delicti may be proven by circumstantial evidence, and the reasonable inferences drawn therefrom. To warrant a conviction it must be proven to a moral certainty and beyond a reasonable doubt, but it is not necessary that it should be so proven before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom. If a prima facie case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient. People v. King, 213 Cal. 89, 1 P.2d 15; People v. Selby, 198 Cal. 426, 245 P. 426; People v. Vertrees, 169 Cal. 404, 146 P. 890; People v. Wilkins, 158 Cal. 530, 111 P. 612; People v. Bonilla, 114 Cal.App. 219, 299 P. 784; People v. Wagner, 21 Cal.App.2d 92, 68 P.2d 277.

[6, 7] We proceed then to examine the evidence in order to determine its sufficiency in this respect. Did Sherrard enter the water while conscious, and was his unconscious condition produced thereafter? This question is sufficiently answered by the autopsy surgeon. What caused this unconscious condition if not the chloral hydrate? Is it reasonable to conclude that had the deceased desired to commit suicide, he could, in even a partially dazed condition as the result of having voluntarily swallowed the chloral hydrate, have climbed down an embankment, removed his clothing, donned bathing trunks and walked through the thick brush to the river without receiving even a scratch on the lower part of his body? It is a well-known fact that while occasionally persons take this drug to induce sleep, it is generally administered by a physician. Is it reasonable to infer that a physician would have administered it at any time other than when Sherrard was so situated that he could immediately sleep? When chloral hydrate is given, other than by a physician, an inference may be reasonably drawn that the purpose is to take advantage of the person to whom it is administered. In such instances it is commonly referred to as "knockout drops". Assuming that Sherrard could have swallowed chloral hydrate voluntarily and then entered the water, it is more reasonable to conclude that the drug was administered by another for an unlawful purpose.

[8, 9] To prove a prima facie case of corpus delicti, all that was required was to show a reasonable probability that a criminal act of another had been the direct cause of the death of Sherrard. However, in this case, each defendant appeared as a witness in his own behalf and admitted certain participation in the offense. With both these elements present here, evidence of the corpus delicti was amply sufficient to submit to the jury. People v. Hill, 2 Cal. App.2d 141, 37 P.2d 849; People v. Kelly, 70 Cal.App. 519, 234 P. 110; People v. Kinsley, 118 Cal.App. 593, 5 P.2d 938.

[10] The corpus delicti having been proven sufficiently, irrespective of the testimony of the defendants, certain statements made by each were admissible in evidence over objection by them. A search of the record does not disclose any ground upon which an objection could have been properly sustained. If any possible error appeared in the reception in evidence of the statements, such error was rendered harmless by each defendant voluntarily appearing on the witness stand and testifying relative to the same matters. People v. McLachlan, 13 Cal.2d 45, 87 P.2d 825.

Hereinafter certain testimony of each appellant and of Ives will be referred to or quoted, but for the present, pieced together, the tale appears as follows: Mrs. Spinelli formerly lived in an eastern city with her "common law husband" Mike Simeone, who had given her a gun. She left Simeone and came to San Francisco the latter part of January of 1940. Shortly thereafter she was "on relief". In March of the same

year Simeone arrived in San Francisco and lived at the address of Mrs. Spinelli, where Ives, Sherrard and Hawkins were in the habit of visiting. Mrs. Spinelli, nick-named by her associates "the Duchess", took part with Ives in the making of "blackjacks", although she testified she did so only as a result of a threat of Ives to injure her daughter by placing her in a resort in the Chinese quarter of the city. In the course of the association of the four defendants with Sherrard, a robbery in which the proprietor of a barbecue stand was shot and killed, was perpetrated in San Francisco; the gun used at the time was later proven to be the one given Mrs. Spinelli by Simeone. The defendants, learning that Sherrard was "talking too much" about the affair, left San Francisco and went to Sacramento, where, at a picnic along the Sacramento river, and while Sherrard was in swimming, the four defendants discussed various ways and means of killing him. It was Mrs. Spinelli's idea to make his death as painless as possible, and it was Simeone's to camouflage the killing as a suicide. During the same evening, at their hotel, Sherrard was given whisky drugged with chloral hydrate furnished by Mrs. Spinelli, Simeone offering the drink to Sherrard, and later Simeone and Hawkins assisted in carrying the partly unconscious youth to a waiting automobile. Hawkins and Ives then transported him to the river and threw him over the Freeport bridge into the water. These facts are substantiated in part by each defendant.

[11] At the conclusion of the case for the People, the attorney for Simeone strenuously contended that the evidence was insufficient to connect Simeone with the commission of the offense, and moved for a "directed" verdict in favor of his client. It was stipulated that the motion should apply to all of the defendants. In denying the motion, the court called attention to the circumstance that during the afternoon preceding the evening when knockout drops were administered to Sherrard, Simeone had taken part in a conversation on the subject of doing away with Sherrard; that there was evidence Simeone knew in the evening that the knockout drops were going to be put into Sherrard's whisky, and that he poured the whisky into a glass or paper cup from which Sherrard subsequently drank. Such evidence, or the substance of it, as above set forth, appears in written admissions of Simeone. There was sufficient legal evidence upon which to deny the motion for a directed verdict.

[12] While the testimony of an accomplice cannot be considered on the question of defendant's guilt or innocence unless the latter is connected with the commission of the offense by other independent evidence which, as appellant Simeone contends, must, to be sufficient, go further than merely to show the commission of the offense, or the circumstances of its perpetration—in this case the statements and admissions of appellant Simeone are sufficient to meet the requirements of this rule. People v. West, 4 Cal.2d 367, 49 P.2d 276. In addition to his statements that during the afternoon of the picnic the subject of administering knockout drops to Sherrard had been discussed; that he had offered the drink containing the drug to the youth, and had later carried the unconscious Sherrard on his shoulder from the hotel room, it was independently proved that there was chloral hydrate in the stomach of Sherrard, and that Simeone fled from the scene of the crime with the other perpetrators thereof. These facts taken collectively or separately are not consistent with a theory of the innocence of Simeone. People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Kempley, 205 Cal. 441, 271 P. 478.

Up to this point, the sufficiency of the corroborative evidence has been considered as of the time of the submission of the case for the People. If, for the sake of argument, it be assumed, as appellant Simeone contends, that the testimony given by independent witnesses is insufficient as corroboration, and that error was committed in the admission of his written statements, there is the further fact that later, in his voluntary appearance as a witness, Simeone made admissions of his participation in the crime. The same condition prevails as to each of the other appellants voluntarily appearing as a witness in his or her own behalf at the trial, who made admissions connecting the witness with the execution of the murder plot. Pen.Code, § 1111; People v. Negra, 208 Cal. 64, 280 P. 354; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951; People v. Hanks, 35 Cal.App.2d 290, 95 P.2d 478; People v. King, 30 Cal.App.2d 185, 85 P.2d 928.

Upon submission of the case to the jury, the evidence showed that Simeone had advised that the death should have the appearance of a suicide. The independently

proved circumstances of the finding of the body attired only in swimming trunks, and the discovery of Sherrard's clothing under circumstances apparently designed to indicate that Sherrard had placed them there while he went swimming, indicated that Simeone's instructions had been carried out.

On the trial each defendant testified on his or her own behalf to facts and circumstances tending to place the blame on some other defendant. On appeal, Mrs. Spinelli seeks to name Ives as the instigator of the plot to kill Sherrard, while Simeone attempts to have it appear that Mrs. Spinelli alone was responsible for the administration of the knockout drops (which she sometimes refers to in her testimony as "Mickey Finns"). Hawkins contends that he was merely following the directions and orders of others.

Did the facts justify the verdict returned? Let us consider the testimony of each defendant separately.

Mrs. Spinelli testified on direct examination that at the picnic, while Sherrard was down at the river swimming, she advised Hawkins that Sherrard had admitted to her that he had told his brother's fiancee all about the holdup in San Francisco and the killing of the proprietor of the barbecue stand, to which Hawkins replied that if Sherrard would tell one person, he would tell others, upon which Mrs. Spinelli remarked that since Sherrard was equally guilty he could not tell without involving himself. She said Hawkins then talked to Simeone and Ives about the matter and Ives said: "Well, that settles it. Bobby is going to die, and he is going to die right now." Later, in talking to Simeone, so she testified, Ives said "we can wait until we get to Gary, Indiana for this here"; that during the afternoon the four defendants discussed ways and means of getting rid of Sherrard; that among the methods suggested, it was proposed to tie him to a railroad track, beat him to death, run over him with the car, drown him, shoot him; that later on that evening when they returned to their hotel in Sacramento, Ives said to her: "You people going on through here and help me with this? * * * If you tell Mike and Gordon to help me, they will help me." She stated Ives then told her he could get outside help on the job if necessary, but "you know the price you are paying"; that she and Simeone then talked the matter over, the others being requested to remain outside the room during this conversation; that she told Simeone she had three grains of "Mickey Finn" crystals and she would go down and get some whisky and put them in. She further testified: "And when I went out of the room I taken these crystals with me and I emptied them out of a little small capsules, three grain capsules, that they were in into the bottle that had been on display here * * * and put enough whisky in it to dissolve the crystals and then I went back in the room and put the whisky on the dresser and laid this little bottle [a perfume bottle] on the dresser also." She stated that when Sherrard, Hawkins and Ives left the room for a moment she "opened the bottle and I poured these Mickey Finn—this solution into the cup that was on the dresser. * * * And then Al and Bobby and Gordon came back in the room, and Mike poured the whisky out, and he handed Bobby a cup * * * of whisky." She testified that neither Gordon nor Ives took the drinks poured for them, Hawkins saying "I don't drink when I am driving an automobile * * * if I know I am going to drive a car, I never drink"; that Ives said he never drank whisky—"only beer"; that Simeone and Sherrard continued to drink, and that the men "then played with wrestling around there, and they were sparring and boxing"; that shortly thereafter Sherrard became ill and was "kind of staggering"; that she requested the men to get him downstairs; that someone said "How are you going to get him out of here?" and Simeone replied: "I will pick him up"; that he set Sherrard up on his shoulder and carried him to the head of the steps; that she then picked up her purse and went downstairs with two of her children for something to eat.

It is not necessary to refer to the cross-examination of Mrs. Spinelli except to note the following: The gun used in the barbecue stand holdup and killing was found on Mrs. Spinelli at the time of her arrest on the present charge; it had been in her possession since approximately one hour after the killing of the proprietor of the stand. In her purse, also, were blackjacks. Referring to placing the crystals or the solution thereof in a cup, Mrs. Spinelli testified:

"Q. Well, at the time that Mike poured the whisky on top of the crystal solution, do you know whether or not he knew that the solution had been put into the cup? A. Well, to my best knowledge, yes.

"Q. Did you tell him you had? A. He was right there. * * *

"Q. That is, you did tell him you were going to put the knockout drops in there? A. He and I had talked about that ahead, when I talked to him alone in the room.

"Q. You talked with one another, you told him you were going to put them in? A. Yes.

"Q. And it was he who poured the whisky on top of them, and it was he who gave the drink to Bob? A. As far as I know, yes, sir."

Simeone testified that Ives had made several threats to get rid of Sherrard and suggestions as to how it could be done; denied that Mrs. Spinelli had ever mentioned knockout drops to him, but admitted that he had poured the whisky into three cups handed him by Mrs. Spinelli. He stated that Ives and Hawkins refused to drink and that he drank the portions poured for them; that he offered Sherrard the third drink; that Sherrard subsequently drank the whisky contained in a paper cup, and later he and Sherrard drank from the bottle. He denied that he handed Sherrard the cup containing the knockout drops. He testified that in removing Sherrard from the hotel room, he only went as far as the steps and then back into the house; that he did not know anything about the drowning until the next morning when one of the party spoke of it while they were in the car. On cross-examination Simeone testified that during the afternoon, as they were sitting on the bank of the river Mrs. Spinelli took from her purse a small bottle and showed it to Ives, Hawkins and himself. He stated: "Somebody asked what was in it and somebody said knockout drops." At this period Sherrard was down by the river. Simeone further testified: "Al was talking about shooting a guy in Frisco, which he shot a man in Frisco, and he was scared of Bob and wanted to take him out and get rid of him"; that Ives said "We ain't going to let Bob live because he is talking too much. I ain't going to fry for nobody", to which Simeone replied "If he does talk he will only hang himself". On being confronted with written statements made by him to the district attorney and his deputy, and, prior thereto, to a police officer, that it was agreed at the hotel room just prior to the serving of the whisky that knockout drops should be placed in Sherrard's drink in furtherance of their plan of the afternoon to kill him because he talked too much; that he knew when he poured the drinks that Mrs. Spinelli intended to place the knockout drops in Sherrard's whisky and referring to his participation in transporting the drugged youth from the hotel room to the waiting automobile, that "We took him downstairs", he denied having made such statements.

On the day of the picnic Hawkins drove several members of the party to the bank of the river and then returned to the hotel where he went up to Mrs. Spinelli's room. He testified "Well, she seemed to be fairly excited, she said * * * that Irene [Sherrard's brother's fiancee] was in town and * * * looking for Bob Sherrard * * * that we would have to do away with Bob, because * * * if Irene got hold of Bob, she would take him back to San Francisco, and he would talk, and we would all get in trouble." Hawkins further testified that upon their joining the others at the river bank, Mrs. Spinelli talked to Ives, Simeone and himself about the necessity of getting rid of Sherrard; that later he (Hawkins) drove Mrs. Spinelli, her daughter and two sons back to Sacramento to buy provisions for the picnic; that Mrs. Spinelli left the car and went to her hotel room where her daughter and Hawkins joined her. In this connection, Hawkins testified that Mrs. Spinelli was grinding some crystals with a bottle or a spoon and upon his asking her what they were, she said they were "Mickey Finn crystals"; that she was going to grind them and dissolve them in whisky; that after the picnic, drinks would be passed around, and she would put the knockout drops in Bob's drink and he would go in swimming and drown. Referring to the evening, on their return to the hotel, Hawkins testified that Simeone filled with whisky three of the cups furnished him by Mrs. Spinelli and offered him and Ives drinks, which they both refused; that Mrs. Spinelli offered Sherrard one of the cups and he drank its contents; that shortly thereafter Sherrard became groggy, stumbling around, holding on to things for support and falling time after time; that different members of the party picked him up on different occasions; that once Mrs. Spinelli hit him in the back of the neck; that a little later on she told them it was time for them to go out and get some sleep; that Sherrard was placed on Simeone's shoulder, and with his (Hawkins') and Ives' assistance he was taken down to the automobile and placed in the

back seat; that as the car pulled out, Mrs. Spinelli said to Ives: "Take care of Bob. You know what to do."

Hawkins further testified that as the car rolled on toward the river, Sherrard kept "rambling in his speech and talking foolishly and he said something about a girl that he used to go with and he said something at the time I didn't understand what he meant, but afterwards I figured out that he must have known that he was going to be killed or going to * * * be taken for a ride"; that he was very pale and rigid in the back seat, coughing and gasping; that during the drive Sherrard "passed out"; that his pulse was "a good twice normal"; that as they neared the bridge, Ives changed to the rear seat, saying "I want to make it look like suicide"; that Ives removed Sherrard's clothing and placed on him bathing trunks; that they then stopped the car while Ives "laid the clothes in a pile" and then drove on until they reached the bridge, crossed it and went on for a quarter of a mile further, returned to the bridge, where they stopped at the approach, and Ives told him to get out and see whether there was any water "under that railing over there"; that when he told Ives there was none, they drove on to the bridge, when they observed another car parked on the other side of the bridge; that they drove on across until they reached the highway on the other side, turned and recrossed the bridge, went beyond it, turned and again came upon the bridge, Ives indicating where he wished Hawkins to stop; that Ives then "pulled Bob out of the car" and Hawkins "heard a splash". Hawkins further testified that when Ives told him to stop the car, he (Hawkins) did not have any idea what was about to take place.

On cross-examination Hawkins was asked "Your testimony is that you had no understanding or agreement, among yourselves, to destroy Bob, is that right? A. It was mentioned many times, but it was nothing any further than that—just mentioned * * * it was planned that we were to go in and hold up a place, and it would be fixed ahead of time so that when we walked into the place Bob would be shot and killed." Hawkins was confronted with his written statement previously made to the district attorney. He admitted parts of the statement and as to other parts said that he could not remember. Finally the court asked him the following question: "At the time that you testified that the defendant Ives boosted or threw the deceased over the railing of the bridge, did you know what he was doing then? The Witness. I did. * * *

"The Court: Well, what was the condition of the man at that time when his clothes were taken off and the swimming suit put on him; did he appear to know that this swimming suit was being put on him?

"The Witness: He was unconscious.

"The Court: Well, you knew he wasn't going to get into the river, didn't you—himself?

"The Witness: That is right.

"The Court: Well, how did you figure then that he was going to get into the river?

"The Witness: When he said that he wanted to make it look like suicide, I drew my own conclusions."

In response to this question by the district attorney "Why did you feel his pulse?", Hawkins answered: "Because he was gasping and coughing.

"Q. Well, what was running in your mind, did you think he was going to die? A. Well, I didn't know until I took his pulse.

"Q. What did you say to Ives? A. I said, 'This man is just about dead.' That there was my opinion of it. * * *

"Q. Did you ask him why he was removing his clothes? A. I did not.

"Q. Why didn't you? A. Because I knew then just about what was going to happen.

"Q. Oh, that is when you decided that a murder was going to be committed, was it? A. Yes, sir."

After the murder, Hawkins and Ives joined Simeone and Mrs. Spinelli at the hotel, from which all the parties were later ejected. They slept in the car in a lumber yard that night, and early the next morning fled from Sacramento in the direction of Reno.

The testimony of each defendant speaks for itself. There was an express agreement to kill Sherrard. Mrs. Spinelli's suggestion that knockout drops be administered to make the killing "merciful" was followed, and the drug was furnished by her. (The idea of mercy is hardly consistent with testimony that after Sherrard had consumed the drugged whisky, and during the wrestling affair, Mrs. Spinelli struck him across the back of the neck.) Simeone and Haw-

kins assisted in carrying Sherrard to the death car, which Hawkins drove. If the latter's testimony is to be believed, he did not know that Sherrard was to be drowned at the time he left the hotel. However, the evidence shows him to be operating the car on a bridge and over roads with an unconscious man "just about dead", whose clothing had been removed and replaced by bathing trunks. He knew that plans had been discussed to kill Sherrard, and that the killing was to have the appearance of suicide. Relative to placing the bathing suit on Sherrard, he testified: "I knew then just about what was going to happen". He crossed the bridge several times and made every effort to see that there were no witnesses. He saw Ives pull Sherrard's limp body from the car. He stood by—turned his head a bit and heard the "splash". To the question "You knew what had happened?" Hawkins answered "Yes".

[13] Eliminating statements made by Ives to the police and to the district attorney, likewise his testimony given at the trial, and confining consideration to the evidence heretofore related, that evidence is amply sufficient to justify the findings of the jury as reflected in its verdict. However, in view of the claim made on appeal by Simeone that Ives' testimony was erroneously admitted and prejudicial to defendants' rights—which could with equal force be made by Mrs. Spinelli and Hawkins—we include a resume of such testimony.

Defendant Ives testified that he met Mrs. Spinelli during the month of March 1940; that he often visited at her home and associated there with her and the other defendants; that at the river bank picnic, Mrs. Spinelli showed him a bottle, saying "* * * we are going to pull some jobs with drunkards; give them some dope". Referring to the evening of the same day, Ives testified that Simeone offered him a drink in a paper cup, which he refused; that thereupon Simeone took a sip and then poured the contents of the cup into Sherrard's drink; that "Bob started stumbling" and "Mike started knocking the hell out of him" and "Bob fell down by the Duchess and then she hit him over the neck like that (indicating) two times; that Simeone carried the unconscious or partially conscious Sherrard on his shoulder to the foot of the stairs, Hawkins assisting him; that he himself opened the door of the car and, with Hawkins' assistance, put Sherrard in the back seat; that Hawkins drove the car and that Ives sat by his side; that during the ride Bob spoke about some girl and said "I think you guys are going to give me the works". Ives further testified "Mike told me to put on a bathing suit and make it look like suicide. * * * We just drove off and took his clothes off and I threw him in there. * * *

"Q. Did you ever have any intent to kill Robert Sherrard, Al? A. Not then; just when I got my orders to get rid of him, that is all. * * *

"Q. Now, who was it that told you to throw him in the river? A. Mike.

"Q. Mike Simeone? A. That is right.

"Q. Did Mrs. Spinelli say anything about it? A. They both said it.

"Q. What is that? A. They both commanded—both of them said it.

"Q. Both of them told it to you—A. That is right.

"Q. * * * to throw him in the river? A. That is right."

Ives testified that on the drive Hawkins told him that he (Hawkins) had felt Sherrard's pulse, and that Hawkins said "This guy is going out fast"; that Hawkins assisted in removing Sherrard's clothing and placing on him the bathing trunks; that Sherrard was then taken to the bridge where, after driving around to be sure no one was about, Ives was going to throw Sherrard over where they first stopped the car, but Hawkins suggested that Sherrard might hit his head against a cement or concrete abutment, so Ives took him a distance away and "dumped" him over the rail into the river.

On appeal, Simeone is represented by a different attorney than the one who defended him at the trial. In addition to the claim of error in denying the motion for a directed or advised verdict of acquittal, the new attorney sums up the evidence against Simeone as follows: "1. That Simeone had apparently been convicted of a felony; 2. That he associated with Ives and Hawkins socially for a period of not more than two weeks prior to the murder. 3. That he had known Mrs. Spinelli for more than a year and lived with her as man and wife during part of that time; 4. That he was not present when the murder was committed; 5. That after the murder of Sherrard, the appellant Simeone accompanied the perpetrators and Mrs. Spinelli to Nevada and perhaps aided in their escape or attempted escape; 6. That previous to the

occurrences of the night of the murder of Robert Sherrard, Simeone had reason to believe generally that Albert Ives, Gordon Hawkins, and Mrs. Spinelli were committing unlawful acts of some character; 7. That he undoubtedly learned that they had been involved in a murder in San Francisco, the details of which he did not know."

From the foregoing it is argued that there is merely a suspicion Simeone may have had something to do with the crime, but that the evidence is devoid of proof tending to connect him with advising or encouraging it or placing him at the scene of its commission. We believe this contention has been heretofore sufficiently answered.

Prejudicial error is claimed on behalf of appellant Simeone, in that the court did not fully instruct the jury relating to conspiracy, accomplice and "other matters". Further attention has not been called to "other matters" and reference is made to specific instructions only by number. The instructions have been scrutinized with the view of safeguarding the interest of each defendant. No error appears therein. On the contrary, considering the instructions collectively, they were framed in a manner particularly favorable to the defendants and to each of them.

[14-17] Appellant Simeone contends that the court should have granted a new trial on its own motion, on the ground of newly discovered evidence. The newly discovered evidence is the fact that after the verdict of guilty of murder, Ives was found to be insane at the time of its perpetration. On the motion for a new trial the court went into this question exhaustively. Unlike Mrs. Spinelli and Hawkins, Simeone did not enter a plea of not guilty by reason of insanity. As stated, such pleas by Mrs. Spinelli and Hawkins were withdrawn. The court was cognizant of the testimony offered in support of Ives' insanity plea. Two of the expert witnesses based their opinions as to his sanity at the time of the commission of the offense upon the theory that he was under the complete domination of someone else; that he was boastful of the fact that he was "the trigger man", a killer, and proud of his selection by his associates to actually do the killing. We are not called upon to approve or disapprove the conclusions reached by the jury upon the question submitted to it as to the sanity of Ives. The jury found Ives to be insane on the date of the commission of the offense. However, the expert witnesses, by affidavit or oral testimony, on the motions for new trial, in substance admitted that Ives was at all times since the 14th day of April, 1940 (the date of the commission of the murder), capable of giving a correct account of the things he had seen or heard, including the details of the Sherrard homicide. Assuming the insanity verdict to be in accordance with the contention that Ives did not know or appreciate the difference between right and wrong on the date of the commission of the offense, still no evidence appears that he was of unsound mind at the time he appeared in his own behalf as a witness on the trial. The circumstances of a killing may show a general malignant disregard for the lives of others, evidencing a heart insensible to social obligation, and an insufficient mentality to distinguish between right and wrong, yet the possessor of such heart and mind may be competent to testify. Unsoundness of mind does not per se establish the incompetency of a witness. It was for the trial court to determine whether Ives was able to perceive and could make known his perceptions to others. Code Civ.Proc. §§ 1879, 1880. One may be insane upon a certain subject but sane as to other matters. One may be unable to distinguish legally between right and wrong, and still be able to narrate facts chronologically, correctly, intelligently and truly. People v. Tyree, 21 Cal.App. 701, 132 P. 784; In re Mazuran, 88 Cal.App. 272, 263 P. 339. On the motions for new trial the trial judge in this case had an opportunity of considering whether Ives understood and appreciated testimony given under oath; whether he had the mental power to recollect, and the ability to narrate; in other words, the trial judge had the opportunity to and did pass upon the truthfulness of the testimony given by Ives on the trial.

[18] The trial judge was very careful to satisfy himself that an injustice had not occurred in the matter of the verdicts against Mrs. Spinelli, Hawkins and Simeone as the result of the Ives testimony. Each defendant was given every opportunity to present evidence in his or her defense. If a new trial had been granted to Mrs. Spinelli or Hawkins, the order would undoubtedly have applied equally to Simeone. There would have been no reasonable ground for granting the motions upon the ground of newly discovered evidence in favor of two of the defendants and denying

it as to the third. The affidavits filed and the arguments of the attorneys in support of the motions were considered as applying to all defendants. There was abundant evidence of the guilt of each defendant independent of the testimony of Ives, who was subsequently found by the jury to have been insane at the time of the commission of the offense, so that it cannot be said that appellants or any of them were prejudiced by his testimony.

[19-21] The final point raised by the present attorney in the Simeone appeal is that the trial attorney was incompetent to properly represent the defendant; that he "showed gross ignorance or incompetence in his conduct of the trial". The point is a novel one. It often happens that an attorney will vigorously criticize opposing counsel, but seldom one on his own side. However, this is a death penalty case, and we are disposed to consider any objection advanced. The original attorney was not selected by the defendant, but was appointed by the court, Pen.Code. § 987, as indeed was the case with respect to all the defendants. They and each of them are entitled to competent legal representation. Const.California, art. I, § 13. We realize that the accusation against the trial attorney is a grave one; and, if true, it is also indirectly an attack upon the trial judge responsible for his selection, but these considerations are of no importance as compared to the rights of a defendant to a fair trial. It is claimed that at the time of his appointment, "the ink was hardly dry" on the trial attorney's certificate of admission to the bar; that he had been practicing but one year. The reason advanced is hardly pertinent in gauging the competency of an attorney to conduct a murder trial. He might have had twenty years of experience in the trial of civil cases and yet be grossly incompetent to defend one upon a charge of murder. One may be specially adapted to try criminal cases, irrespective of the length of time he has been practicing; or the selection may have been ill advised. The attorney may have demonstrated stupidity and ignorance; he may have blundered and floundered to the prejudice of his client. State of Missouri v. Jones, 12 Mo.App. 93. The best criterion of the competency, care and alertness of the attorney referred to is the record in the case.

The trial counsel is criticized for one question propounded to his client, as to whether Simeone and Mrs. Spinelli had lived together in an eastern city. That fact had already been established by several written statements introduced in evidence, and by the direct testimony of Mrs. Spinelli.

Attention is also called to a question asked under a mistaken assumption of the evidence upon cross-examination of defendant Ives, and to the failure to confront Ives with the previous testimony of a police officer. The mistaken assumption was rectified and the confronting of Ives with the transcript of the testimony of another witness was hardly the recognized method of impeaching a witness on the stand or refreshing his recollection.

The next criticism directed by counsel against the conduct of the trial by the former counsel is that affidavits were not filed on the motions for new trial to cover the fact that Ives had been declared insane. The verdict on the Ives insanity plea was returned by the same jury before the same judge in the same court and is part of the record on this appeal. We fail to understand how the filing of such affidavits—that Ives was insane—could have assisted the trial judge in his consideration of the motions.

During the first day of the trial it was stipulated by all the attorneys that objections made by any of them to the admission of testimony should be deemed to have been made on behalf of all the defendants. It is noteworthy that the trial judge carefully differentiated in his rulings on the admission of evidence applicable to one or more of the defendants and inapplicable to others. At times the burden of defense was cast upon one defendant's attorney, and at other times upon another. The efforts of each defendant to save himself at the expense of another defendant caused a conflict of interest, with one defense attorney battling another. At all times Simeone's trial attorney seemed alert to protect the interest of his client. Certainly the record does not disclose "an exhibition of ignorance, stupidity". On the contrary, a keen knowledge of the facts and the law applicable thereto was displayed, demonstrating that the trial judge had properly protected the rights and interests of Simeone in the selection of his legal representative. If

any point was overlooked by Simeone's attorney, it is not apparent in the record. It is a noteworthy fact that the trial judge not only correctly ruled upon the evidence sought to be introduced, but zealously guarded the rights of the defendants throughout the preliminaries, the trial and the subsequent proceedings.

We are convinced that the verdict of the jury against each and all of the defendants was fully justified, and that the denial by the trial court of the respective motions for new trial necessarily followed. Each defendant was fairly tried, and, notwithstanding the nature of the penalty fixed by the law of this state, justly convicted.

The judgments of conviction and the orders appealed from are, and each of them is, affirmed.

We concur: GIBSON, C. J.; SHENK, J.; EDMONDS, J.; TRAYNOR, J.; CARTER, J.; PETERS, J., pro tem.



17 Cal.2d 432

MILLER v. McCOLGAN.

L. A. 17355.

Supreme Court of California.

Feb. 20, 1941.

Rehearing Denied March 20, 1941.

1. Corporations ⇐1

A corporation has a personality distinct from that of its shareholders, who own neither corporate property nor corporate earnings, but simply have an expectancy in each and become owners of a portion of each only when corporation is liquidated by action of directors or a portion of corporation's earnings is segregated by declaring dividends.

2. Taxation ⇐123

The "source" of dividends as affecting taxable situs is the stock itself, rather than the activities, property, and earnings of the corporation, which constitute the ultimate source of the income. St.1935, p. 1117, § 25(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Source".

3. Taxation ⇐122

The property of shareholders in their shares is distinct from the corporate property, franchises, and capital stock, and may be separately taxed.

4. Taxation ⇐363½

The federal practice which allows American residents a credit for income taxes paid to foreign countries on dividends is not applicable in computing state income tax, since it is dictated by specific statutory provisions. St.1935, p. 1117, § 25(a); 26 U.S.C.A. Int.Rev. Code, § 119.

5. Taxation ⇐123

Under the doctrine of "mobilia sequuntur personam", corporate shares have their situs or location for purposes of taxation in the state or country wherein their owner resides, unless they have acquired a business situs elsewhere.

See Words and Phrases, Permanent Edition, for all other definitions of "Mobilia Sequuntur Personam".

6. Statutes ⇐215

Legislation should be construed in the light of court decisions existing at time of enactment.

7. Taxation ⇐204(2), 363½

The statutory provision for credit against income tax for income tax paid to other state or country on income derived from sources without the state is in effect an "exemption" from liability for a tax already determined and admittedly valid, and hence must be strictly construed against the taxpayer. St.1935, p. 1117, § 25(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Exemption".

8. Taxation ⇐169, 363½

The situs of stock in Philippine corporation owned by California resident was in California under rule "mobilia sequuntur personam", where stock certificates were in the Philippines but there was no indication of a separate business situs, and hence tax paid to Philippines on income from dividends and on profit from sale of stock to Philippine buyer through Philippine broker was not within California statute authorizing credit against income tax for taxes paid on income from "sources" without the state. St.1935, p. 1117, § 25(a).

9. Taxation ⇐98, 260

The general principle "mobilia sequuntur personam" as applied to situs of intangible personalty for purposes of taxation has a well-established exception to the effect that there may be a business situs of intangibles distinct from the domicile of the creditor.

10. Taxation ⇐169, 363½

That the Philippines may impose income tax on income from dividends from Philippine corporations, or from sales of property having a situs in other jurisdictions, does not mean that such income is derived from the Philippines under California theories of taxation and statutes, so as to require California court to treat such income as derived from sources in the Philippines, and to be credited against California income taxes, but merely that the Philippines have adopted a different theory of taxation. St. 1935, p. 1117, § 25(a).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Merton L. Miller against Charles J. McColgan, Franchise Tax Commissioner of the State of California, to recover part of income tax paid under protest. From a judgment directing a refund, defendant appeals.

Reversed with direction.

Rehearing denied; TRAYNOR, J., not participating.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brookes, Deputies Atty. Gen., for appellant.

Claude I. Parker, John B. Milliken, Bayley Kohlmeier, and Stuart T. Baron, all of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal by the defendant as Franchise Tax Commissioner of the State of California from a judgment directing a refund of that part of the income tax for 1935 theretofore paid under protest by plaintiff.

There is presented here for our consideration a single question of law, to-wit: Under section 25(a) of the California Personal Income Tax Act of 1935, St. 1935, p. 1117, is plaintiff entitled to a credit against his California tax in the amount of the tax paid by him for said year on the same income to the Philippine government?

The facts upon which this appeal is based were stipulated and are substantially as follows: Plaintiff is a resident of the state of California. During the year 1935 plaintiff owned stock in the Balatoc Mining Company, a Philippine corporation, engaged in the mining business. All of the properties and activities of that company were in the Philippines, and it did not carry on any business in California. During the year 1935 plaintiff received dividends from the Balatoc Mining Company in the amount of $104,130.50, of which the sum of $29,055, accrued and payable as dividends in 1934, was eliminated from consideration here, and the balance of said dividends, or $75,075.50, was taxable and was taxed by California.

During the same year 1935 plaintiff sold certain stock of the Philippine mining corporation for a profit. The sales were made in the Philippines, and the certificates representing these stocks were delivered by plaintiff's agent in the Philippines to brokers in the Philippines, and after the sale thereof the proceeds received were delivered to plaintiff's agent in the Philippines and were by him transmitted to plaintiff.

During the entire year 1935 there was in full force and effect in the Philippines a net income tax law which imposed a tax upon the entire net income of residents of the Philippines and also upon the entire net income of nonresidents of the Philippines derived from sources within the Philippines. Under the income tax law of the Philippines, as it is interpreted by their taxing officials, dividends paid by Philippine corporations to nonresident stockholders and gains from sales of stocks in the Philippines by nonresident aliens constitute income derived from sources within the Philippines, within the meaning of their tax law, and are subject to their income tax. Furthermore, it has been held by the supreme court of the Philippines that dividends paid by Philippine corporations to nonresident stockholders are subject to the Philippine income tax. Manila Gas Corp. v. Collector of Internal Revenue, Supreme Court Decision No. 42780, Jan. 17, 1936.

Pursuant to the law of the Philippines, plaintiff filed an income tax return with the Collector of Internal Revenue of the Philippines, in which he reported the dividends received by him from the Balatoc Mining Company and the gains derived by

him from the sale of stocks in the Philippines, and paid a tax thereon to the Philippines for the year 1935 in the amount of $6,638.54.

Plaintiff as a resident of California filed his income tax return for the year 1935 with the Franchise Tax Commissioner of the State of California and included in his return the dividends received by him from the Balatoc Mining Company in the sum of $75,075.50 and the gain derived from the sale of stock in the Philippines in the sum of $7,830.72. It is agreed that the amount of $3,434.99 of the $6,638.54 paid by plaintiff as income tax to the Philippines for the year 1935 was paid upon income which was also included in plaintiff's taxable income for 1935 for California personal income tax purposes. Pursuant to the terms of section 25(a) of the California Personal Income Tax Act, plaintiff claimed a credit on his California return for the taxes paid by him to the Philippine government on the same income. In computing plaintiff's tax liability to California for the year 1935, defendant, as Franchise Tax Commissioner, disallowed the deduction and, as a result thereof and after protest by plaintiff, assessed a deficiency tax against plaintiff. The latter paid the deficiency tax and brought this action to secure a refund. It was agreed by the parties that if plaintiff was entitled to a credit for income taxes paid by him to the Philippines upon income which was also included in plaintiff's income tax return for California, the amount of that credit was $3,434.99. The trial court concluded that the credit should have been allowed, and defendant brings this appeal from the judgment rendered in favor of plaintiff.

Section 25(a) of the California Personal Income Tax Act of 1935 provided: "Whenever a resident taxpayer of this State has become liable to income tax to another State or country upon his net income, or any part thereof, for the taxable year, derived from sources without this State, and subject to taxation under this act, the amount of income tax payable by him under this act shall be credited with the amount of income tax so paid by him to such other State or country, but such credit shall not exceed such proportion of the tax payable under this act as the income subject to tax in such other State or country bears to the taxpayer's entire income upon which the tax is imposed by this act."

The important words are "income * * * derived from sources without this State," for if the income was derived from sources *within this state,* the credit provision is inapplicable, and respondent is not entitled to recover.

Appellant contends (a) that the source of the dividends received by respondent in California was the stock itself and therefore the income was not from sources without this state; and (b) that the source of capital gain from the sale of the shares of stock was also in California and therefore no credit was permissible in respect to the tax paid to the Philippine government. In support of this position appellant relies primarily on the common law doctrine of mobilia sequuntur personam, a well-established guiding principle in the taxation of intangibles.

[1, 2] In our approach to the problem presented here let us first consider the nature of this property—corporate stock—and the status of corporations and shareholders. It is fundamental, of course, that the corporation has a personality distinct from that of its shareholders, and that the latter neither own the corporate property nor the corporate earnings. The shareholder simply has an expectancy in each, and he becomes the owner of a portion of each only when the corporation is liquidated by action of the directors or when a portion of the corporation's earnings is segregated and set aside for dividend payments on action of the directors in declaring a dividend. This well-settled proposition was amplified in Rhode Island Hospital Trust Co. v. Doughton, 270 U.S. 69, 81, 46 S.Ct. 256, 258, 70 L.Ed. 475, 43 A.L.R. 1374, wherein appears the following cogent language: "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property." Since the shareholder by reason of his stockholding is entitled to share in any dividends which may be

declared, it logically follows, as appellant urges, that the source of dividends is the stock, because income which comes to one solely because of ownership of property has a source in that property.

[3] At this point it is pertinent to draw a distinction between the *immediate* source of the income with respect to a particular recipient, and what might be called the *ultimate* source of the same income. For example, the Balatoc Mining Company owns its mines and the machinery and materials therein. Its legal ownership is complete. Respondent owns stock in this corporation, which stock represents a number of intangible rights in him legally distinct from the ownership rights of the corporation in the mine and supplies. When we think of source, it seems safe to say that the corporate income has its source in the mining and management process. When the same income reaches respondent as dividends, it is arguable that its source as well is to be found in the corporate activities. However, the dividends, so far as respondent is concerned, represent a yield of the wealth invested in his legally recognized property interest, the shares of stock. Thus, to respondent the source of the income is the corporate stock, the legally created property interest owned by respondent and without which he would not receive this benefit. The shares of stock are the *immediate* source of the income *to the recipient,* though the *ultimate* source is to be found one or more steps back in the process where the new wealth was first called into existence. It is this fundamental differentiation which underlies the well-established principle that "the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed. Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 584, 18 L.Ed. 229, 234; Farrington v. Tennessee, 95 U.S. 679, 687, 24 L.Ed. 558, 560; Tennessee v. Whitworth, 117 U.S. 129, 136, 137, 6 S.Ct. 645, 29 L.Ed. 830, 832; New Orleans v. Houston, 119 U.S. 265, 277, 7 S.Ct. 198, 30 L.Ed. 411, 415." Hawley v. Malden, 232 U.S. 1, 9, 34 S.Ct. 201, 58 L.Ed. 477, Ann.Cas.1916C, 842.

In harmony with this line of decision, it appears that there is in the beginning an income to the corporation, and that part of such income in turn is passed on to the shareholder in the form of dividends. As such it represents in law an income to the shareholder quite distinct from the income to the corporation. Therefore, in the absence of an express statutory mandate to the contrary, it logically follows that the source of the income to the shareholder (the dividends) is the corporate stock.

Respondent contends that the activities, the property and the earnings of the corporation, and not the stock, are the source of dividends, and in this connection he cites the Philippine case of Manila Gas Corporation v. Collector of Internal Revenue, supra, as establishing that his income was from sources within the Philippines. However, it appears from the opinions in that case that the Philippine statute expressly declared that interest on bonds (intangibles) paid by corporations resident in the Philippines was taxable. Further, it may be gleaned from the Philippine court's opinions that prior to the enactment of the statute there concerned that court had held that interest paid by Philippine residents to nonresidents was not from sources within the Philippines.

[4] Also, it should be noted that the federal practice, which allows American residents a credit for income taxes paid to foreign countries on dividends, is not applicable here because it is dictated by specific statutory provisions. And Lord Forres v. Commissioner, 25 B.T.A. 154; Bence v. United States, Ct.Cl., 18 F.Supp. 848, and Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 55 S.Ct. 50, 79 L.Ed. 211, relied on by respondent, all involved the construction of section 217 of the Federal Revenue Act, 26 U.S.C.A. Int.Rev.Code, § 119, which expressly declares that dividends paid to nonresidents by corporations doing business in the United States are derived from sources within this country. The courts had no alternative but to apply the statute as they did unless they were to hold the statute unconstitutional. This they could not do in view of the principles enunciated in Burnet v. Brooks, 288 U.S. 378, 53 S.Ct. 457, 77 L.Ed. 844, 86 A.L.R. 747, to the effect that congress had the power to enact such a statute as construed and applied to the property in question. These cases cited by respondent turned on constitutional considerations of the scope of the taxing power of the federal government and because of the distinct differentiation in legal principles involved there, those decisions have no bearing on our determination of the present question, whose pivotal point cen-

ters on the proper construction of the precise language employed in the statute subject of interpretation.

[5] Having fixed upon the source of the particular income as the corporate stock, the next task is to assign to this source a taxable situs. Under the doctrine of mobilia sequuntur personam, shares of stock in a corporation have their situs or location in the state or country wherein their owner resides, unless they have acquired a business situs elsewhere. The possibilities of this case being affected by the doctrine of business situs will be discussed later in this opinion.

[6] In 1935 when the Income Tax Act was enacted by our legislature the courts of California and the federal courts had declared that the taxation of intangibles was subject to the rule of mobilia sequuntur personam. First National Bank v. Maine, 1932, 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313, 77 A.L.R. 1401; Beidler v. South Carolina, 1930, 282 U.S. 1, 51 S.Ct. 54, 75 L.Ed. 131; Baldwin v. Missouri, 1930, 281 U.S. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303; Farmers' Loan & Trust Co. v. Minnesota, 1930, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000; Safe Deposit & Trust Co. v. Virginia, 1929, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386; Blodgett v. Silberman, 1928, 277 U.S. 1, 48 S.Ct. 410, 72 L.Ed. 749, and In re McCreery's Estate, 1934, 220 Cal. 26, 29 P.2d 186; Westinghouse Electric & Manufacturing Company v. County of Los Angeles, 1922, 188 Cal. 491, 205 P. 1076; and Hinckley v. County of San Diego, 1920, 49 Cal.App. 668, 194 P. 77. The principle is well established that legislation should be construed in the light of court decisions existing at the time of its enactment.

Moreover, long prior to the adoption of our Income Tax Act of 1935 the Supreme Court of the State of Wisconsin in the case of State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Comm., 161 Wis. 111, 152 N.W. 848, had held as a matter of statutory construction that interest on bonds paid by residents to nonresidents was not income from sources within Wisconsin and consequently could not be taxed by that state. That case involved construction of the language of that part of the Income Tax Act of 1911 which provided for taxation of nonresidents "upon such income as is derived from sources within the state or within its jurisdiction" St.Wis.1911, § 1087m—2, subd. 3, and in concluding that the assessment against nonresident bondholders was invalid, the court said at page 850 of 152 N.W.: "* * * The situs of a bond remains at the domicile of the bondholder. So the interest in question did not, as to nonresident bondholders, constitute an income derived from sources within the state * * *." If the rule of mobilia is applicable to income from bonds, it necessarily is equally applicable to income from stock. So it may be said that the situs of a share of stock is at the residence or domicile of the owner. First National Bank v. Maine, supra.

In support of his contention that the earnings and property of the corporation are the source of dividends, respondent cites the later Wisconsin case of State ex rel. Froedtert G. & M. Co. v. Tax Comm., 221 Wis. 225, 265 N.W. 672, 267 N.W. 52, 104 A.L.R. 1478, which involved the application and validity of the privilege dividend tax of that state. Wisconsin desired to share with nonresidents their dividends from corporations deriving earnings and profits from Wisconsin. In Newport Co. v. Wisconsin Tax Comm., 219 Wis. 293, 261 N.W. 884, 100 A.L.R. 1204, certiorari denied 297 U.S. 720, 56 S.Ct. 598, 80 L.Ed. 1004, the Wisconsin supreme court held that income from stock owned by a nonresident corporation had its source at the domicile of the owner. Concluding that an income tax on dividends paid to nonresidents by Wisconsin corporations would be held invalid, Wisconsin in 1935 imposed a tax on corporations doing business in Wisconsin for the privilege of paying dividends to nonresidents to the extent the dividends were paid from income earned by the corporations in Wisconsin. In the Froedtert case [221 Wis. 225, 265 N.W. 673], wherein suit was brought to procure a declaratory judgment as to the constitutionality of the privilege dividend tax statute, this tax was upheld, but the reason assigned was that the tax did not purport to be an income tax, or in any way to be a tax upon the dividend of the shareholder, but was an excise tax "for the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state." Then in J. C. Penney Co. v. Wisconsin Tax Comm., 233 Wis. 286, 289 N.W. 677, 126 A.L.R. 1333, when the question of applicability of this tax statute to a locally licensed foreign corporation came before the supreme court

of Wisconsin, it was held that under those circumstances the statute ran afoul the due process clause. This case was then taken to the Supreme Court of the United States on the sole question of whether or not the Wisconsin Privilege Dividend Tax offended the 14th Amendment of the Constitution. That court in its decision of December 16, 1940 (State of Wisconsin v. J. C. Penney Co., 61 S.Ct. 246, 250, 85 L. Ed. 267, 130 A.L.R. 1229), quite properly recognized the logic of the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, and because the "taxing power exerted by the state" of Wisconsin bore a "fiscal relation to protection, opportunities and benefits given by the [said] state," this statute was held constitutional as being within the confines of the due process clause.

Careful examination of these Wisconsin cases reveals that the basis of the Froedtert and Penney decisions was constitutional considerations of the privilege dividend tax, an excise tax on corporate earnings as distinguished from a tax on the income of the shareholder, and the question of local source of income as related to taxable situs was disregarded therein. In the instant case we have the definite problem of statutory interpretation, and in this connection it is particularly significant that the two Wisconsin cases based on the proper construction of phraseology practically identical with that now under consideration here—State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Comm., supra, and Newport Co. v. Wisconsin Tax Comm., supra—applied the rule of mobilia to income taxation and held that the place in which the intangibles had their taxable situs was also the place in which the income therefrom had its source.

[7] In support of his argument that the source of dividend income is the place where the corporation earns its profits and carries on its business, respondent also cites the recent case of Union Electric Company of Missouri v. Coale, Mo.Sup., 146 S.W.2d 631, 632, wherein it was held that dividends received by a domestic corporation from a foreign corporation not doing business in Missouri was not income "from sources in this state [Missouri]" within the meaning of the Missouri income tax law. Mo.St.Ann. § 10115, p. 8080. However, we note an important distinction present in the Missouri decision which prevents it from being completely analogous to the instant case. The issue in the Missouri case was whether certain income was taxable, and the supreme court of Missouri held that the point must be strictly construed against the government. Apparently, this rule of construction was a governing factor in the conclusion reached. In the case at bar the provision allowing a credit (sec. 25(a)) is in effect an exemption from liability for a tax already determined and admittedly valid, and such statute must be strictly construed against the taxpayer. Pacific Company, Ltd., v. Johnson, 212 Cal. 148, 298 P. 489, affirmed in 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893. Furthermore, the Missouri court in its opinion made no mention of either Newport Co. v. Wisconsin Tax Comm., supra, 219 Wis. 293, 261 N.W. 884, 100 A.L.R. 1204, certiorari denied 297 U.S. 720, 56 S.Ct. 598, 80 L. Ed. 1004, or Domenech v. United Porto Rican Sugar Company, 1 Cir., 62 F.2d 552, certiorari denied 289 U.S. 739, 53 S.Ct. 656, 77 L.Ed. 1486, each of which considered at great length the question of source of income in its relation to taxable situs for intangibles. Both these cases decided the exact issue involved in the Missouri decision squarely contra to the latter and applied without exception the rule of mobilia in such circumstances. As the result of these pertinent observations, the limitations of the holding in Union Electric Company of Missouri v. Coale, supra, in so far as they reflect on the present case must be recognized.

[8] Respondent urges that the long line of federal cases (First National Bank v. Maine, supra; Beidler v. South Carolina, supra; Baldwin v. Missouri, supra; Farmers' Loan & Trust Co. v. Minnesota, supra; Safe Deposit & Trust Co. v. Virginia, supra; and Blodgett v. Silberman, supra) as well as the California case of In re McCreery's Estate, supra, cited by appellant as supporting his contention that the situs of the stock owned by the respondent was in California and that the source of the dividends was also in California, has no application to the instant case because those cases involve inheritance and property taxes. But it appears to us that if there is any reason for the rule of mobilia sequuntur personam in connection with property or inheritance taxation, there is every bit as much reason for that rule in income taxation. The practical difficulties inherent in the application of any other principle in determining the source of income have undeniably constituted an important factor in

the adoption and survival of this well-established common law tenet. Rhode Island Hospital Trust Co. v. Doughton, supra. Respondent cites as authority for his statement that this rule has not been applied by the courts to income taxation, the case of Lawrence v. State Tax Comm., 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374, in which the court held that Mississippi had constitutional jurisdiction to tax a resident on compensation for personal services performed in another state. However, the income in question was not derived from the ownership of intangibles, but from the performance of personal services. The references made by the court to intangibles were made in support of the right of Mississippi to tax under the facts of the case and were not made to indicate that the income in question was from intangibles. No corporation intervened between the performance of the services and the right of Lawrence to the income. He acquired the right to the income immediately on completion of the service. The intangible, if any, was merely a note for his compensation and was not the source of his income, but instead was mere evidence of it.

The doctrine of mobilia sequuntur personam has been repeatedly and consistently maintained in determining the taxable situs of intangible property, and as recently as the 1938-1939 term the Supreme Court of the United States again recognized it in Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 906, 83 L.Ed. 1339, 123 A.L.R. 162, wherein the majority opinion stated: "In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason [citations omitted], by saying that his intangibles are taxed at their situs and not elsewhere, or, perhaps less artificially, by invoking the maxim mobilia sequuntur personam [citations omitted], which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains * * *."

The discussion regarding the source of the dividend income is equally applicable to the source of profit from the sale of the stock. As the rule of mobilia gives this stock a situs in California, all income from it was from sources in California. Its sale to a Philippine customer through a Philippine broker does not mean that the profit from its sale was income from Philippine sources. Respondent made a profit from the sale of property located in California, so the profit is derived from sources in California, and the mere fact that the certificates, the evidences of title, were in the Philippines does not alter this conclusion. First National Bank v. Maine, supra; Beidler v. South Carolina, supra; Baldwin v. Missouri, supra; and Farmers' Loan & Trust Co. v. Minnesota, supra.

[9] At this point it should be noted that the general principle in relation to situs for the purposes of taxation of intangible personal property embodied in the maxim mobilia sequuntur personam has a well-established exception to the effect that there may be a business situs of intangibles distinct from the domicile of the creditor. But respondent has not divided his activities so as to bring himself within this exception. He did not set his property aside in a Philippine trust or engage in business in the Philippines. In consequence, nothing appears here to indicate that the mobilia rule is not applicable to this case.

[10] By virtue of express statutory provision the Philippines do not apply the maxim of mobilia sequuntur personam so as to avoid their taxation of nonresidents on dividends received by them from Philippine corporations or on the income from sales of property having a situs in other jurisdictions. That the Philippines may impose such a tax does not mean that under our theories and our act such income is derived from the Philippines. Rather it simply indicates that the Philippines have adopted a theory and philosophy of taxation different from that adopted by California, which has uniformly applied the well-recognized principle of mobilia sequuntur personam in determining the situs of intangibles for purposes of taxation.

In accord with the foregoing analysis it is our conclusion that respondent is not entitled to a credit for taxes paid to the Philippines upon the dividend income and the gain from the sale of these stocks.

The judgment is reversed with direction to the trial court to enter judgment for the appellant in accordance with the views herein expressed.

We concur: GIBSON, C. J.; EDMONDS, J.; SHENK, J.; CARTER, J.; SPENCE, Justice pro tem.

TRAYNOR, J., took no part in the consideration or decision of this case.



17 Cal.2d 423

ROBINSON v. McCOLGAN.

S. F. 16377.

Supreme Court of California.

Feb. 20, 1941.

Rehearing Denied March 20, 1941.

Taxation ⇐104

Dividends received by residents of China on stock of California corporation were not subject to California income tax, though stock certificates were held in a living trust in California for sole purpose of receiving dividends and forwarding them to owner, since stock had a situs in China under the rule "mobilia sequuntur personam". St. 1935, p. 1093, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Mobilia Sequuntur Personam".

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Janet D. Robinson against Charles J. McColgan, Franchise Tax Commissioner of the State of California, for refund of income tax paid under protest. From a judgment directing the refund, defendant appeals.

Affirmed.

Rehearing denied; TRAYNOR, J., not participating.

Earl Warren, Atty. Gen., and H. H. Linney, James J. Arditto, and Valentine Brookes, Deputies Atty. Gen., for appellant.

Edward Hale Julien, of San Francisco, for respondent.

McCutchen, Olney, Mannon & Greene, of San Francisco, amici curiae for respondent.

CURTIS, Justice.

This is an appeal by the defendant, as Franchise Tax Commissioner of the State of California, from a judgment directing a refund of the income tax for the year 1936 paid by plaintiff under protest.

There is but a single question of law presented for decision, to-wit: Was plaintiff, a nonresident of the United States, taxable under the California personal Income Tax Act of 1935, St.1935, p. 1090, on income from dividends declared on shares of stock of a California corporation, the stock certificates being in the custody of plaintiff's agent, a California national bank?

The facts upon which this appeal is based were stipulated and are substantially as follows: During the year 1936 plaintiff, a citizen of the United States, was a resident of the International Settlement in Shanghai, China, and thus was a nonresident both of California and of the United States. During said year she received as income dividends in the amount of $78,780.50 on common stock of W. P. Fuller & Company, a California corporation. The stock certificates were not used in connection with any business operations carried on here by plaintiff, but were simply held by the Bank of America in a living trust in San Francisco for the sole purpose of receiving the dividends thereon and forwarding the same to plaintiff. This trust had no fixed situs in California, but could be removed from the state at any time by the plaintiff, the trustor, without any previous consent of the trustee bank. The latter had no duties under this trust other than as custodian of these certificates of stock to send the income from the trust to the plaintiff, the trustor. The only asset of this trust was the aforementioned stock, and the trustee bank had no power to sell, invest or reinvest the trust corpus or property, nor had it any active duties of trust management.

Plaintiff reported these dividends on her income tax return for the year 1936 and paid as tax on this income the amount of $5,140.86. In due course plaintiff filed a refund claim, which was rejected by the defendant as Franchise Tax Commissioner, whereupon plaintiff brought this action to recover said sum. The cause was submitted on the foregoing stipulated facts, and the trial court rendered judgment decreeing that plaintiff recover from defendant as Franchise Tax Commissioner the aforesaid amount as income taxes erroneously paid for the year 1936. Defendant Tax Commissioner has appealed from this judgment.

Appellant's alleged authority for imposing the tax on respondent was found in sec. 5 of the California Personal Income Tax Act of 1935, which provided in part as follows: "There shall be levied, collected and paid for each taxable year upon the entire net income of every resident of this State and upon the net income of every nonresident which is derived from sources within this State, taxes in the following amounts * * *." Stats.1935, Ch. 329.

In support of his contention that income from the dividends declared on the stock in question was properly the subject of this tax provision, appellant devotes practically all of his argument to a discussion of constitutional principles, with particular emphasis on the *power* of California to tax a nonresident living outside of the United States on intangibles, the evidences of which are physically present within this state. In this connection appellant relies strongly on the Estate of McCreery, 1934, 220 Cal. 26, 29 P.2d 186, which followed the doctrine of Burnet v. Brooks, 1933, 288 U. S. 378, 53 S.Ct. 457, 77 L.Ed. 844, 86 A.L.R. 747, a federal estate tax case, which involved only the element of physical presence of securities within the United States and none of the elements of business *situs*. In the aforementioned California case this court upheld the *power* of the legislature to subject to the California inheritance tax stock in a California corporation belonging to a nonresident alien, represented by certificates physically present, but having no business *situs* in California at the time of decedent's death. The difficulty we find with this line of argument adopted by appellant is the fact it assumes, apparently without question, that the dividends declared on this nonresident's stock by a California corporation were "derived from sources within this state" within the meaning of the Act. But in our opinion the determination of source of this income is the crux of the problem presented here for consideration, and it is, therefore, to the matter of statutory interpretation that we first turn our attention. It is only if this issue is decided against respondent that the principle of constitutionality becomes important to our decision in this case.

The significant words to be construed in sec. 5 quoted above are "income * * * derived from sources within this State". In this connection we refer to this court's pertinent discussion of statutory interpretation in its decision rendered today, involving issues closely related to the instant case —Miller v. McColgan, Cal.Sup., 110 P.2d 419—wherein the rule of mobilia sequuntur personam was applied in holding that dividends declared by a Philippine corporation were *income from sources within California* because they were the product of intangible property (corporate stock) having a *situs* in California at the domicile of the owner, a resident of California. By analogy it appears to be indisputable that here the dividends, subject of a naked California trust, have their source in corporate stock whose *situs* is at the residence of respondent in Shanghai, China, so that the income sought to be taxed by appellant would not be included within the meaning of sec. 5 as we construe the legislative intention expressed therein. It is our conclusion that since the issue of statutory construction in favor of respondent is decisive of this case, we need not consider here the constitutional questions involved in multiple taxation of non-residents having evidence of their ownership of intangible property within the taxing jurisdiction.

The judgment is affirmed.

We concur: GIBSON, C. J.; EDMONDS, J.; SHENK, J.; CARTER, J.; SPENCE, Justice pro tem.

TRAYNOR, J., took no part in the consideration or decision of this case.

17 Cal.2d 426

HOLMES v. McCOLGAN.

L. A. 17306.

Supreme Court of California.

Feb. 20, 1941.

Rehearing Denied March 20, 1941.

1. Taxation ⇐104

Under Personal Income Tax Act enacted in June, 1935, applicable to net income accrued after January 1, 1935, defining net income and gross income, and providing that method of computing gains from sales of realty, which gains are included in gross income, shall follow federal practice under which gain is the excess of sale price of property over its cost, where owner by discovery, location, and purchase of interest in mining property and mining lease gave option to purchase in November, 1934, and option was exercised in January, 1935, difference between cost and selling price of property and mining lease was "income" subject to tax and not "capital" not subject to tax, since accretions to capital are taxable as "income", not when such accretions occur, but when gain is realized by sale. St.1935, pp. 1094, 1095, 1123, §§ 6, 7(a, d), 36; Revenue Act 1934, §§ 111–113, 26 U.S.C.A.Int.Rev. Acts, pp. 691–701.

See Words and Phrases, Permanent Edition, for all other definitions of "Capital" and "Income".

2. Statutes ⇐226

The policy of the legislature in following federal provisions in the Personal Income Tax Act makes available to the state a groundwork of relevant federal experience and judicial pronouncements which should be followed to insure effective administration of the act. St.1935, p. 1090.

3. Statutes ⇐225¾

Where legislation is framed in the language of an earlier enactment on the same or analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment.

4. Statutes ⇐226

Where statute is patterned after legislation of another state or of the federal government which has been judicially construed in the jurisdiction of its enactment, there is a strong presumption of intent to adopt the construction as well as the language of the statute.

5. Constitutional law ⇐190, 283
Taxation ⇐54

The Personal Income Tax Act applicable to net income accrued after January 1, 1935, which statute was enacted on June 13, 1935, as applied to income received on sale of mining property and lease in January, 1935, pursuant to an option given in previous year, is not invalid on the ground that it is retroactive in effect and violative of the "due process of law" clauses of the State and Federal Constitutions. St.1935, p. 1090; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by M. A. Holmes against Charles J. McColgan to recover money alleged to have been illegally collected as income taxes. A general demurrer to the complaint was sustained without leave to amend and judgment was rendered for the defendant, and plaintiff appeals.

Affirmed.

Rehearing denied; TRAYNOR, J., not participating.

Ralph D. Brown, of Los Angeles, for appellant.

Earl Warren, Atty. Gen. (H. H. Linney, James J. Arditto, and Valentine Brookes, Deputies Atty. Gen., Roger J. Traynor, of Berkeley, of counsel), for respondent.

GIBSON, Chief Justice.

This action was brought to recover money alleged to have been illegally assessed and collected as personal income taxes for the calendar year 1935. A general demurrer to the complaint was sustained without leave to amend and judgment was rendered in favor of defendant. Plaintiff appeals from the judgment.

The following facts are set forth in the complaint: In 1933 and 1934 plaintiff and certain of his children became the owners by discovery, location and purchase of an interest in mining property situated in Kern County, California, known as the Silver Queen, and a mining lease of a portion thereof known as the Emrick-Holmes lease.

In November, 1934, for a cash consideration of $4,000 they gave an option to purchase a 60% interest in the Silver

Queen for $1,000,000 in money and $900,000 from the proceeds of the property to be paid on a graduated percentage schedule of the production therefrom. At approximately the same time they granted an option for the purchase of the Emrick-Holmes lease for a cash consideration of $100,000.

The options were exercised in January, 1935, and the sellers received for their 60% interest in the Silver Queen a cash payment of $271,000, a series of notes totalling $725,000, and an agreement covering payments to be made from production; and for the Emrick-Holmes lease they received $100,000 cash. Plaintiff received $108,400 as his share of the cash payment on the purchase price of the Silver Queen and $16,666.66 as his share of the sum paid for the Emrick-Holmes lease.

There was no increase in the value of the property between January 1, 1935, the applicable date of the Personal Income Tax Act, St.1935, p. 1090, and the date of sale. The defendant Franchise Tax Commissioner treated the difference between the cost of the property and the selling price thereof as income and imposed and collected a personal income tax thereon.

Appellant contends that no part of the proceeds of these sales is income within the meaning of the Act and that the increase in value of the property which accrued prior to January 1, 1935, and was realized by sale subsequent thereto, but prior to the enactment of the law on June 13, 1935, cannot legally be taxed as income. He advances the theory that on January 1, 1935, the property constituted a capital asset, and that the proceeds from the sales therefore represented a return of capital and not income. He contends that the Act cannot be applied to these proceeds without violating Article I, section 13 of the Constitution of the State of California and the 14th Amendment to the Constitution of the United States. Briefly, it is his position that the Act does not provide for the taxation of the gains in question; and that if it did it would be unconstitutional.

[1] An examination of the Personal Income Tax Act makes it evident that the legislature intended to tax the gains in question. Section 36 makes the tax applicable to net income received or accrued after January 1, 1935. Section 6 of the Act defines net income as the gross income computed under section 7 less the deductions allowed by section 8. Section 7(a) defines gross income as including gains from sales of property, real or personal. Section 7(d) provides that the method of computing such gains shall follow the federal practice as set forth in sections 111, 112 and 113 of the federal Revenue Act of 1934, 26 U.S.C.A. Int.Rev. Acts, pp. 691–701, which sections and the sections referred to therein are incorporated by reference. Under section 7(d) of the California Act appellant's gain, by reference to the provisions of the federal Act, is the excess of the sale price of the property over its cost. Its realization after January 1, 1935, brings it directly within the provisions of the Act.

Despite the applicability of the Act, however, its constitutionality is brought into question by appellant's contentions that the gain in question is capital and therefore not taxable as income, and that the Act, adopted on June 13, 1935, cannot be applied retroactively to January 1, 1935.

The first contention seeks to revive an issue squarely presented to this court in Fullerton Oil Co. v. Johnson, 2 Cal.2d 162, 167-172, 39 P.2d 796, 798, and decided adversely to appellant's contention in an opinion which fully considered the question he raises.

That case involved the Bank and Corporation Franchise Tax Act, St.1929, p. 19, which imposed a tax measured by net income and which incorporated by reference the federal method for computing gain or loss in its provisions for the depletion allowance for oil and gas wells. The adoption of that method brought gains accruing before the effective date of the Act but realized thereafter into the measure of the tax, and the court stated that "the main point to be determined" was whether such gains were capital and not income and therefore constitutionally beyond the province of the tax. To this question it gave a clear answer: "* * * it is our opinion the tax here involved is one measured by income and not capital. It is true that by the 1931 amendment respondent is deprived of the opportunity of using the January 1, 1928, values as a base, and that it must use the cost or March 1, 1913, values as a base. It is further true that in thus computing the depletion allowance any increase in value in the properties occurring between 1913 and 1928 would thus be included in the tax base. That fact, however, does not make

the tax one measured by capital as distinguished from income as those two terms are usually understood, and are used in the act here involved. Under the federal Income Tax Act, the federal courts have established the principle that 'income' within the meaning of the Income Tax Act is 'realized gain,' and that such realized gain is taxable in the year of its realization regardless of when it accrued. Thus under the federal act increases in the value of capital assets accruing subsequent to March 1, 1913, are taxable as income not in the year such increases in value occur, but in the year such increases in value are actually realized by sale or other transfer. Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 41 S.Ct. 386, 65 L.Ed. 751, 15 A.L.R. 1305; Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521, 9 A.L.R. 1570. * * * We can see no constitutional difference between accretions to capital prior to the date of the taxing statute and those occurring subsequent thereto. If increases in the value of property constitute income, and constitute income in the year in which realized rather than in the years when such increases in value accrue, it would seem that constitutionally speaking it makes no difference when such increases in value accrue—whether before or after the effective date of the taxing statute. This very point has already been decided in accordance with the above views by the United States Supreme Court."

[2-4] In the light of this judgment of the court, and the compelling reasons for following established federal practice to insure effective administration of the Act, the legislature adopted the federal method of computing capital gains and losses in the Personal Income Tax Act as it did in the Bank and Corporation Franchise Tax Act. A departure from federal practice in this respect might easily create myriad administrative difficulties inimical to the interests of both the state and the taxpayers. The legislature has consistently followed the federal provisions generally in the Personal Income Tax Act. This policy makes available to the state a groundwork of revelant federal experience and judicial pronouncements. "It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. * * * A similar principle applies where a statute is patterned after legislation of another state, or of the federal government, or, indeed of a foreign country, which has been judicially construed in the jurisdiction of its enactment." Union Oil Associates v. Johnson, 2 Cal.2d 727, 734, 43 P.2d 291, 295, 98 A.L.R. 1499.

[5] The limited retroactivity of the Act to which appellant objects is characteristic of the generally accepted practice of making a tax law applicable, beginning usually on January 1, to that part of the year which precedes its enactment. When a similar objection was raised to the federal Income Tax Act of 1913, 38 Stat. 114, the United States Supreme Court stated in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 36 S.Ct. 236, 242, 60 L.Ed. 493, L.R.A.1917D, 414, Ann. Cas.1917B, 713: "The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1, to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the 5th Amendment, and as inconsistent with the 16th Amendment itself. But the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax, without apportionment, and so far as the limitations of the Constitution in other respects are concerned, the contention is not open, since in Stockdale v. Atlantic Ins. Co., 20 Wall. 323, 331, 22 L.Ed. 348, 351, in sustaining a provision in a prior income tax law which was assailed because of its retroactive character, it was said: 'The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.' "

The principle of the Brushaber case is applicable here. It is reiterated in Roth Drugs, Inc., v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022, upholding the validity of the Retail Sales Tax Act of 1933 even though

retroactively applied to gross receipts from retail sales. In Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87, 118 A.L.R. 1142, the United States Supreme Court went much beyond the Brushaber case in upholding a Wisconsin tax on dividends which was retroactive from 1935 to 1933. The constitutional validity of such retroactive provisions is now too well established to be questioned.

The judgment is affirmed.

We concur: CURTIS, J.; SHENK, J.; EDMONDS, J.; CARTER, J.; SPENCE, Justice pro tem.

TRAYNOR, J., took no part in the consideration or decision of this case.



17 Cal.2d 396

HARNED v. WATSON.

L. A. 17602.

Supreme Court of California.

Feb. 18, 1941.

Rehearing Denied March 18, 1941.

1. Breach of marriage promise ⇐34

In action for breach of promise to marry wherein defendant contended that his promise to marry was contingent upon happening of a future event, whether plaintiff's answer to a question on cross-examination that every time question of marriage was discussed defendant made date of marriage contingent upon his straightening out of his finances established promise to marry contingent upon happening of future event when considered with the rest of the evidence, was for jury.

2. Breach of marriage promise ⇐34

In action for breach of promise to marry wherein defendant contended that his promise to marry was contingent upon happening of a future event, whether proposal was conditional was for the jury.

3. Breach of marriage promise ⇐8

In action for breach of promise to marry wherein defendant contended that his promise to marry was contingent upon happening of a future event and the evidence showed that condition occurred, conditional promise was rendered absolute and defendant could not escape liability.

4. Breach of marriage promise ⇐23

Evidence warranted an award of damages on ground that there was a breach of an unconditional promise to marry within a reasonable time.

5. Breach of marriage promise ⇐23

Where it was shown that friendship of parties was not secretive and that defendant attended church and took communion with plaintiff and took her on trips with his closest friends and to their homes, sent presents to his friends signed by both parties, invited his friends to apartment plaintiff and defendant were sharing and introduced her to members of his family and defendant's friends treated plaintiff with respect, evidence warranted implied finding that plaintiff was "chaste" so as to authorize award of exemplary damages for seduction under promise to marry.

See Words and Phrases, Permanent Edition, for all other definitions of "Chaste".

6. Breach of marriage promise ⇐23

In action for breach of promise to marry wherein plaintiff sought exemplary damages for seduction, chastity of the plaintiff was not required to be proven by direct evidence but could be shown prima facie by presumption from other facts and circumstances surrounding the transaction.

7. Evidence ⇐151(1)

In action for breach of promise to marry wherein plaintiff sought exemplary damages for seduction, permitting plaintiff to testify that defendant's promise to marry induced her to submit to sexual intercourse was not objectionable on ground that testimony was "conclusion" of the witness, since such testimony was the best evidence of the state of mind of the plaintiff, it being a fact peculiarly within her own knowledge.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

8. Appeal and error ⇐1064(1)

In action for breach of promise to marry where there was sufficient evidence to warrant an award of punitive damages for seduction, the withdrawal of an instruction that there was no evidence to sustain allegation of seduction was not prejudicial error.

9. Breach of marriage promise ⇐14

Where plaintiff, a 45 year old woman, induced by promise of marriage of defendant, a 70 year old man, gave up her millinery business which was her only means of livelihood and lived with defendant for nearly a year and was seduced under promise of marriage and defendant refused to marry plaintiff, plaintiff was entitled to bring an action for breach of marriage promise and seduction.

10. Breach of marriage promise ⇐31

Evidence authorized verdict for $2,000 actual damages for breach of marriage promise and $8,000 exemplary damages for seduction under promise to marry in favor of 45 year old woman and against 70 year old man.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Amy Harned against Harry W. Watson for breach of promise to marry. From an adverse judgment, the defendant appeals.

Affirmed.

Prior opinion, 102 P.2d 368.

Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for appellant.

Cantillon & Glover, Thomas B. Sawyer, John E. Glover, and Richard Cantillon, all of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal from a judgment after verdict whereby the jury awarded the plaintiff $2,000 actual damages and $8,000 exemplary damages as the result of the breach of an alleged agreement of the defendant to marry the plaintiff.

Plaintiff, a woman forty-five years of age, first met defendant at a social function in 1935. She had been married but had obtained a decree of divorce many years before and for the past sixteen years had been making her living as a milliner, earning an average of $200 per month in 1935. The defendant, a man seventy years of age, was married at the time of the first few meetings of the parties. The wife died in July, 1936, and the defendant soon began to frequent plaintiff's apartment and to take her to luncheons and various social events. According to plaintiff, the defendant first asked her to marry him and she accepted in November, 1936, although no definite date for the marriage was fixed at that time. As a result of a quarrel there was a break in the relationship in January, 1937, and marriage was not again discussed until June 3 of that year. On that date the engagement was affirmed.

Plaintiff carried on her millinery business at her apartment, and as a result of defendant's presence most of the time, her business fell off rapidly. Her further testimony in this regard was that she expected to marry soon and thus did not attempt to hold her business.

In September, 1937, defendant suggested that she quit her millinery work and that they look for another apartment for her which would be suitable for them both after they were married. An apartment was found and partially furnished by defendant. When the time came to move in, defendant suggested that he move in also. On objection to this by the plaintiff, the defendant assured her that they would be married within a short time and placed his mother's wedding ring on her finger "to seal the bargain". The parties lived together at this apartment from October, 1937, to September 17, 1938. During this period both parties admitted that they indulged in sexual intercourse.

Although the defendant denied all plaintiff's testimony that he had promised to marry her the record is replete with evidence weakening such denial. He admitted telling her that he loved her; he accompanied her to church and took communion by her side; he introduced her to his daughter and intimate friends; he escorted her to his clubs; he sent presents to his friends with cards bearing her name and his; he wrote letters and poems of endearment; praised her for her sweetness and her beauty; gave her passes to the races on which she was designated as his wife; took her on trips in the company of his friends; and paid many of the expenses for the upkeep of the apartment.

The date of the marriage was discussed many times after the original proposal, but each time the plaintiff was put off with some excuse. At the time of the affirmance of the engagement on June 3, 1937, defendant stated that he had certain affairs to straighten up and that then they would get married. When they moved into the apartment the defendant stated that they would marry as soon as his son, who was expected any day, arrived. The son came and went, but no marriage resulted. After the son's depar-

ture plaintiff again tried to get a definite date set for the wedding. The defendant asked for "ten more days". It seems he wanted to close a deal with a Mr. Dahlberg. The ten days passed and no marriage. Finally, on September 17, 1938, plaintiff made a final attempt to fix a wedding date. The reply was, "Well, a little bit more time and my health will be all right." There was no evidence that defendant was in ill health at the time and plaintiff just "couldn't see it". She "just couldn't go any further, * * *". The defendant moved out of the apartment and the parties have not been together since that date.

The complaint, as amended, alleges, in part, that at defendant's request, plaintiff promised to marry defendant, though no definite date was set; that she is still ready and willing to marry defendant; that after said promise of marriage, the defendant seduced plaintiff about November 15, 1937, by means of his said promise and plaintiff's reliance thereon; that on June 3, 1937, the offer of marriage was renewed; that from time to time thereafter the marriage date was discussed; that upon plaintiff's demand on September 17, 1938, that defendant marry her he refused to do so.

The jury awarded plaintiff $2,000 actual damages and $8,000 punitive damages.

Defendant's first contention is that the promise to marry, if any, was contingent upon the happening of a future event, namely, when his "financial affairs were straightened out"; that there is a total absence of either pleading or proof that such a contingency has occurred; and that therefore the suit should have been dismissed.

[1, 2] In making an award of damages we must assume that the jury found from the evidence that there was an unconditional promise to marry within a reasonable time. Appellant argues that a conditional contract was established, as a matter of law, because nowhere in the record is there any testimony that the contract was unconditional. We cannot agree with appellant. Referring to the first proposal in November, 1936, the plaintiff testified: "* * * he said, 'I have become to feel that I can't do without you'; and asked me, would I marry him." It is clear that from such testimony the jury could find that there was an unconditional contract. Even though there was a break in the relationship in the early part of 1937, this contract apparently was not adversely affected thereby. This is evidenced by the testimony of the plaintiff. Respecting this breach in their prior friendly relations and their subsequent reconciliation, the plaintiff testified: "* * * Mr. Watson said, * * * 'and I wondered if you felt that the engagement of marriage was ever broken or if it is off; is it off?' I said, 'No, Harry, it has never been off, as far as I was concerned.' And he said, 'It had not been with him'; and if I so felt the same as he did, he did not see why we couldn't continue the engagement again." This reaffirmation of their engagement was based upon their original unconditional agreement of marriage. It is true that following the above-quoted testimony the defendant's financial affairs were discussed and that certain things should be straightened out before marriage. It is further true that in answer to the question on cross-examination, "But every time he discussed the question of marriage he always made the date of the marriage contingent upon his straightening out of his finances and his other things, did he not?" the plaintiff answered "Yes, he did." However, this was an answer to just one of many questions asked and it was within the province of the jury to decide whether this one answer was determinative when considered with the rest of the evidence. Whitaker v. Whitaker, 137 Cal.App. 396, 30 P.2d 538; Parker v. Herndon, 19 Cal. App. 451, 126 P. 183. It is quite common after a proposal and acceptance to discuss, in a practical way, the existing situations of the parties, financial and otherwise, but such discussion does not necessarily mean that the marriage itself is conditional on the straightening out of such affairs. Whether such proposal is conditional or not is a question for the jury to determine.

That the alleged condition was no more than an excuse is shown by the fact that different reasons for not marrying or setting a date were given by the defendant at different times. Once it would be after certain mortgages were cleared up; another time after his son came out; still another after a certain deal with a Mr. Dahlberg; and finally, when all other excuses had been used, "* * * when I get my health in shape".

[3] Even if we assume that the promise to marry after the son came out was a condition as to time and not just an excuse, the evidence shows that such condition occurred. The son did come to Los Angeles and apparently objected to the marriage.

The contingency upon which this particular promise was made, having occurred, the conditional promise was rendered absolute.

The appellant relies, to some extent, on the case of Bailey v. Brown, 4 Cal.App. 515, 88 P. 518, 519. Just one quotation from the record of that case, as disclosed in the opinion, is sufficient to demonstrate its inapplicability here. The plaintiff there testified: "The time agreed upon that we were to be married was after my mother's death." There was apparently no dispute as to this and no evidence to the contrary. The mother was still living and the court properly ruled that there was a failure to prove the cause of action alleged.

[4] Under the facts and circumstances above related we are of the opinion that there was sufficient evidence to justify the jury's implied finding that there was an agreement of marriage unfettered by any condition. In this regard the language in the case of Murphy v. Davis, 19 Cal.App.2d 316, 65 P.2d 917, 918, is particularly pertinent. It is there stated: "Appellant's second contention is that 'there is a fatal variance between the alleged contract to marry in respondent's pleadings and the proof,' and in this behalf he contends that the complaint alleged that 'the defendant promised to marry the plaintiff within a reasonable time,' whereas the proof was that defendant promised to marry plaintiff when he got his 'affairs straightened out' or when his 'lawsuits were terminated.' A contract to marry is ordinarily evidenced by several expressions and many circumstances. The record shows that the above expressions were merely two, among many, of defendant's intention to marry the plaintiff. Many of his promises were made without including any statement of the time for performance; and in the absence of such a statement the law will imply that it shall be performed within a reasonable time, depending, of course, upon the circumstances of each particular case. 4 Cal.Jur. 456; 4 R.C.L. 147. Under the above rule the record contains a plethora of substantial evidence that the defendant promised to marry the plaintiff within a reasonable time, including many circumstances from which an inference to the same effect may be fairly drawn. It is not the province of this court to disturb a finding of fact as to the terms of the oral contract if there be any substantial evidence to sustain the finding."

Appellant's second contention is that there was no basis for the award of punitive or exemplary damages. This contention is based on the following propositions: The plaintiff relied only on seduction as a ground for exemplary damages as shown by the complaint and by the instructions given by the court. This being true it was necessary to prove seduction. In order to make such proof the plaintiff had the burden of affirmatively proving her chastity before the illicit intercourse took place. This the plaintiff completely failed to do and, therefore, there was no basis for the award of exemplary damages. In this respect appellant further argues that the plaintiff cannot rely on any presumption of chastity. This latter argument is supported first by the observation that it has been established in Swett v. Gray, 141 Cal. 83, 74 P. 551, that an allegation of chastity, at the time of the act, is an essential element in stating a cause of action for damages for seduction; that presumptions of law need not be averred in a complaint (citing Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767; Henke v. Eureka Endowment Ass'n, 100 Cal. 429, 34 P. 1089); that therefore there is no presumption of chastity. In further support of his argument that there is no such presumption and that chastity must be affirmatively proved, appellant refers to the criminal cases of People v. Roderigas, 49 Cal. 9; People v. Wallace, 109 Cal. 611, 42 P. 159; and People v. O'Brien, 130 Cal. 1, 62 P. 297; which he claims so hold.

Although there is authority for the proposition that there is a presumption of chastity in breach of promise cases (see 9 C.J. p. 349, § 64; 11 C.J.S., Breach of Marriage Promise, § 28), appellant's argument that there is no presumption of chastity where seduction is pleaded and that it must be affirmatively pleaded is well reasoned and convincing. Furthermore, it must be admitted that the criminal seduction cases cited do hold that there is no presumption of chastity which would negative a defendant's constitutional right of a presumption of innocence. Such cases might be distinguished from a civil case in which seduction is pleaded, but we do not deem it necessary to indulge in any discussion of the rather complex field of presumptions. We are of the opinion that there was sufficient affirmative evidence from which the jury might, and apparently did, infer that the plaintiff was chaste at the time she consented to the illicit relationship.

[5, 6] First, the actions of the appellant himself, in relation to the plaintiff, point

to a belief on his part that she was in no way a "fallen woman". The friendship of the parties was not a secretive, after dark affair. He attended church and took communion with her; took her on trips with his closest friends and to their homes; sent presents to his friends signed by both parties; invited his friends to the apartment the parties were sharing; and introduced her to members of his family. In turn, appellant's friends, who were professional men and other respected members of the community, treated plaintiff with respect and introduced her to their friends and families. One P. C. Gernert, who considered himself appellant's "dearest and best pal", requested and permitted plaintiff to act as hostess for his young adopted daughter at a Hallowe'en party. Plaintiff had, for years, worked as a milliner and in that capacity served many young business girls. She was permitted to carry on the business in her apartment and her landlady's young daughter was permitted to help her with her work. From the evidence referred to and from a review of the entire record we cannot but conclude that there was sufficient evidence from which the jury might infer chastity. That the jury may so infer is brought out by the very cases relied on by the appellant for the proposition that there is no presumption of chastity. In People v. O'Brien, supra [130 Cal. 1, 62 P. 298], it is stated: "That there may be an inference of chastity of a woman by the jury, and that the jury, in the absence of evidence to the contrary, should so infer, must be admitted." It might be here noted that nowhere in the record is there the slightest hint that plaintiff was of unchaste character. The court in People v. Roderigas, supra, in commenting on the necessity of affirmatively proving chastity, stated: "Character in this respect is a fact, and one which must be alleged in the indictment, and established by the prosecution, in order to [secure] a conviction of the accused. It need *not*, however, be proven by evidence given *directly* upon the point, but may be shown prima facie, by presumption from other facts and circumstances attending the transaction; as, for instance, that the unmarried female—the subject of the injury—was at the time residing with her parents, or other relatives, or her guardian, or in some respectable household, or *by proof of other like circumstances consistent with, and the usual concomitants of, chaste female character.*" (Italics added.)

[7] Appellant further claims that the trial court erred in admitting certain testimony of respondent in regard to her seduction. She was asked the question "Was it his promise that induced you to submit yourself for sexual intercourse?" to which she answered, "Yes". Appellant objected at the time on the ground that the question called for a conclusion and opinion of the witness. The objection was overruled and appellant here claims that such was error on the same ground. The trial court properly overruled the objection. One of the essential elements to be established in the proof of seduction is reliance on the promise of marriage. The state of mind therefore is a fact to be proved, the best evidence of which is the testimony of the victim herself, such fact being peculiarly within her own knowledge. Such testimony was apparently permitted in the case of People v. Votaw, 38 Cal.App. 714, 177 P. 485. As to fraud and reliance generally such testimony was held proper in the cases of Fagan v. Lentz, 156 Cal. 681, 105 P. 951, 20 Ann.Cas. 221, and Luitweiler Pumping Engine Co. v. Ukiah Water & Implement Co., 16 Cal.App. 198, 116 P. 707, 712. That a party might testify directly to his own intent or motive has been well established by the cases of Fleet v. Tichenor, 156 Cal. 343, 104 P. 458, 34 L.R.A.,N.S., 323, and People v. Moore, 48 Cal.App. 245, 191 P. 980.

[8] The trial court first instructed the jury that there was no evidence to sustain the allegation of seduction and that it could not award punitive damages. The court later told the jury to disregard such instruction. The appellant now complains that the giving and withdrawal of such instruction so confused the jury that it was prejudicial error sufficient to compel a reversal. We have already determined that there was sufficient evidence to uphold the award of punitive damages as a result of seduction and we do not feel that any prejudicial error was committed.

[9, 10] We are not unmindful of the fact that this is not the usual breach of promise and seduction case, in which advantage was taken of a young and innocent girl. The plaintiff was a middle-aged woman who should have had sufficient worldly wisdom to guard against the situation in which she now finds herself. However, it cannot be denied that, on the faith of the promises of the defendant, she has suffered injury. She has given up her millinery business which was her only means of live-

lihood, and she will undoubtedly have difficulty in regaining it. Her relationship with the defendant was apparently well known, so that she must now suffer the silent or outspoken criticism of her friends and the community in which she must live. Such actions on the part of the plaintiff, in permitting the situation to exist, are not to be condoned, but when such acts occurred, actions for damages for breach of promise and seduction were permissible under the laws of this state. Evidence was sufficient to warrant the verdict of the jury; therefore, such verdict and the resultant judgment must be affirmed.

The judgment is affirmed.

We concur: SHENK, J.; TRAYNOR, J.; CARTER, J.



43 Cal.App.2d 166

LOLLI v. MARKET ST. RY. CO. et al.

Civ. 11403.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1941.

As Corrected March 11, 1941.

1. Negligence ⇐97

In personal injury suit, verdict should be for defendant, if jury finds plaintiff guilty of any negligence, however slight, which was sole proximate cause of, or proximately contributed to cause, any injuries complained of.

2. Negligence ⇐13, 65

There are no degrees of negligence or contributory negligence recognized in California.

3. Street railroads ⇐98(8)

It is duty of person crossing or about to cross street railway company's tracks to exercise his faculties of sight and hearing and watch and listen for cars coming from any direction.

4. Negligence ⇐4

The test of what constitutes "negligence" is standard of ordinarily prudent man under normal circumstances, and presence of unusual or extraordinary circumstances affecting transaction modifies application of general rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

5. Negligence ⇐4, 13

In California, "negligence" is not divided into well defined degrees, but the rule is that every person must exercise reasonable care, and what is "reasonable care" depends on factors of time, place, person and surrounding circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence" and "Reasonable Care".

6. Negligence ⇐80

Generally, one who is aware of danger and neglects to take reasonable precautions to avoid injury cannot recover damages therefor, subject to certain limitations, as when one seeks to rescue another from imminent peril.

7. Negligence ⇐80

One acting recklessly and rashly in seeking to rescue another from imminent peril by placing himself in position of danger not necessary to effect rescue and failing to act as ordinarily prudent person would act under similar circumstances cannot recover damages for resulting injury.

8. Negligence ⇐80

In determining whether one neglecting to take reasonable precautions to avoid injury in seeking to rescue another from imminent peril is precluded from recovering damages for such injury, questions whether danger was caused by imperiled party alone, by another, solely by party from whom recovery is sought, or by several parties' concurrent acts, whether rescuer realized that there was immediate peril or merely sought to aid one presumably injured under circumstances wherein there was no such peril, and circumstances of approach to position of party in peril, must be considered.

9. Trial ⇐267(1)

In personal injury suit, trial court had right to modify plaintiff's requested instructions, stating correct legal principles applicable to evidence and reasonable inferences therefrom, or to give other instructions, on question of contributory negligence.

10. Negligence ⇐136(31)
Street railroads ⇐117(17)

In action for injuries to one struck by defendant's street car while standing be-

tween parallel tracks to investigate possible injuries to occupants of damaged automobile, whether plaintiff's conduct constituted negligence and whether such negligence was slight or reckless were fact questions for jury under evidence.

11. Negligence ⇐135
Street railroads ⇐114(7, 13)

In action against street railway company and others for injuries to one struck by street car while standing between parallel tracks in investigating possible injuries to occupants of damaged automobile, evidence *held* sufficient to warrant implied finding by jury either that defendants were not negligent or that they were negligent, but plaintiff was also negligent, even to extent of recklessness, in assuming position of danger.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Bruno Lolli against the Market Street Railway Company and others for personal injuries. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. B. Bianchi and Aylett B. Cotton, both of San Francisco, and F. E. Hoffmann, of San Mateo, for appellant.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondents.

WARD, Justice.

Plaintiff appeals from a judgment entered upon the verdict of a jury in favor of defendants in an action to recover damages for personal injuries. A motion for new trial was automatically denied by failure of any action thereon within the statutory period. Code of Civ.Proc., sec. 661. The appeal is primarily directed to challenging certain instructions upon contributory negligence given at defendants' request or upon the court's own motion.

The action arises out of an accident which occurred at about midnight on the Mission street viaduct in San Francisco, over which the Market Street Railway Company maintains street car tracks running north and south. Repair work was in progress in connection with the track used for southbound traffic necessitating excavation between the rails of such track and about sixteen or eighteen inches on each side thereof for a distance of some forty feet. The excavation was well illuminated by thirty red lanterns and twenty flares, and there was sufficient space left to the west of the excavation for the use of southbound vehicular traffic. Plaintiff, driving in a southerly direction on Mission street, had just about reached the block where the excavating was being done, when another car passed him, drove into the excavation, zigzagged, and finally came to a stop at the south end thereof, its left front wheel torn off. Plaintiff drove by the car in the excavation, parked his car at the west curb about forty-five or fifty feet farther on, and walked back to the place of the accident. On ascertaining that the driver of the automobile was not hurt, but was intoxicated, he proceeded to the left side of the car, facing south, to investigate possible injuries to other occupants of the car. As he stood between the two street car tracks, he was struck by a northbound street car of defendant company and injured.

In support of the appeal, the plaintiff urges that the trial court erred in instructing the jury on the subject of contributory negligence and its several elements, for the reason that under the circumstances of this case, that is, where the conduct charged to be negligent occurred in an effort to render assistance to persons in peril, no lack of care short of recklessness—of which he contends there was no evidence—will bar a recovery.

[1-5] The court in effect instructed in the usual manner and in substance on the subject of contributory negligence, among the instructions given being that if the jury found the plaintiff "was guilty of any negligence, however slight, which was the sole proximate cause or which proximately contributed to cause any injuries complained of, then your verdict should be for" the defendants; that there are no degrees of negligence or contributory negligence recognized in this state; that it is the duty of any person crossing or about to cross the tracks of a street railway company to exercise his faculties of sight and hearing and watch and listen for cars coming from any direction. The court also instructed that the "test of what constitutes negligence on his part is the standard of an ordinarily prudent man under normal circumstances" and that "the presence of unusual or extraordinary circumstances affect-

ing the transaction will always modify the application of the general rule". In substance these instructions correctly state recognized rules. In California negligence is not divided into well defined degrees. Rather, the rule is that every person must exercise reasonable care. What is reasonable care is dependent on the factors of time, place, person and surrounding circumstances.

[6-9] The general rule is that one who is aware of danger and neglects to take reasonable precautions to avoid injury is not permitted to recover. This rule is subject to certain limitations; for instance, when one seeks to rescue another person from imminent peril. In such case the general rule that negligence on the part of an injured party, no matter how slight, precludes recovery, is not always applicable. In attempting to rescue another, one may assume a dangerous position which under other circumstances would deprive him of redress. However, if the rescuer acts recklessly and rashly by placing himself in a position of danger not necessary to effect the rescue, and does not act as an ordinarily prudent person would act under similar circumstances, recovery is not permitted. Henshaw v. Belyea, 220 Cal. 458, 31 P.2d 348; Petersen v. Lang Transp. Co., 32 Cal. App.2d 462, 90 P.2d 94. Each case must be decided upon the facts presented. Whether the danger was caused by the imperiled party alone, by another person, or solely by the defendant, or by the concurrent acts of several parties, are questions that must be considered; also, whether the "rescuer" realized that there was immediate peril or, under circumstances wherein there was no imminent peril, merely sought to render aid to one presumably injured. The circumstances of approach to the position of the party in peril must also be considered. These and other facts may play an important part in the right of the "rescuer" to recover for injury sustained. These circumstances likewise bear upon the propriety of giving to a jury instructions on contributory negligence. In the instant case, appellant presented instructions on that subject. Assuming that correct legal principles were stated applicable to the evidence and reasonable inferences that could be drawn therefrom, the court had a right to modify such instructions or to give others.

[10] Whether appellant's conduct constituted negligence, and, if so, whether it was slight or reckless were questions of fact under all the circumstances of the case. At appellant's request certain instructions were given; others refused, presumably because they were either repetitions or covered by other instructions. The following given instruction is a fair sample: "In determining whether or not plaintiff was guilty of negligence which proximately contributed to the injury which he sustained, you are instructed the test of what constitutes negligence on his part is the standard of an ordinarily prudent man under normal circumstances. And the law leaves it for the jury to determine what such an individual would do under such circumstances. The presence of unusual or extraordinary circumstances affecting the transaction will always modify the application of the general rule. And, if you find from the evidence in this case that there were unusual or extraordinary circumstances affecting the transaction, it is your province to determine whether or not the plaintiff under such unusual or extraordinary circumstances acted as an ordinarily prudent man would have acted." Not one direct reference to "recklessness" or "rashness" appears in any of the offered instructions. Appellant relies upon Petersen v. Lang Transp. Co., supra, wherein a verdict in favor of a defendant was reversed on the ground that an instruction involving recklessness was refused. In the present case the record does not disclose the offer of such instruction.

[11] The conclusion reached by the jury in this case relative to the negligence of the plaintiff or the defendants is not definitely ascertainable. Suffice to say that an implied finding that defendants were not guilty of negligence would have to be sustained in view of all the evidence in this case. If the implied finding is that defendants were negligent, but that plaintiff was also negligent, even to the extent of recklessness, in assuming a position near the damaged automobile immediately adjacent to the path of an oncoming street car, the evidence in this case would warrant an affirmance of such finding.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

43 Cal.App.2d 146

HAYWARD LUMBER & INVESTMENT CO. v. PRIDE OF MOJAVE MINING CO. et al.

Civ. 2608.

District Court of Appeal, Fourth District, California.

Feb. 18, 1941.

1. Mechanics' liens ⇐136(2)

A notice of a materialman's lien upon realty was fatally defective in so far as notice gave wrong section number in describing land.

2. Mechanics' liens ⇐136(2)

Under a notice of a materialman's lien against property described as "section 22 * * * and those certain mining claims in said section known as Pride of Mojave, Four Star and Enterprise", reference to mining claims was not sufficient identification of property to render lien enforceable against property described in complaint to foreclose lien as "Northwest quarter (1-4) of Section 33, * * * and those certain mining claims located within said quarter-section and known as 'Pride of Mojave', 'Four Star' and 'Enterprise'." Code Civ.Proc. § 1203.

3. Mechanics' liens ⇐136(1)

A notice of a mechanic's lien which entirely omits to describe real estate sought to be charged with lien is fatally defective.

4. Mechanics' liens ⇐158

A notice of a materialman's lien upon realty is not an instrument susceptible of reformation, and if notice is void or insufficient to identify the property there is no method of reforming notice. Code Civ.Proc. § 1203.

5. Evidence ⇐20(1)

It is common knowledge that extensive mining operations have been carried on in Kern county ever since the creation of the county.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Hayward Lumber & Investment Company against Pride of Mojave Mining Company and others to foreclose a materialman's lien upon real property. From a judgment sustaining a demurrer to a third amended complaint without leave to amend and dismissing the action, plaintiff appeals, opposed by C. C. Calkins and others.

Affirmed.

Philip T. Lyons, of Los Angeles, for appellant.

Alfred Siemon and Bennett Siemon, both of Bakersfield, and W. W. Kaye, of Los Angeles, for respondents.

KLETTE, Justice pro tem.

This is an appeal from a judgment sustaining a demurrer to a third amended complaint without leave to amend, and dismissing the action. The complaint was to foreclose a materialman's lien upon real property in Kern county described as follows:

"Northwest quarter (1-4) of Section 33, Township 11 North, Range 12 West, S. B. B. & M., and those certain mining claims located within said quarter-section and known as 'Pride of Mojave', 'Four Star' and 'Enterprise'."

The notice of lien, a copy of which was attached to the complaint as an exhibit, described the property as follows:

"Section 22, Township 11 North, Range 12 West, S. B. B. & M., and those certain mining claims in said section known as Pride of Mojave, Four Star and Enterprise."

[1] It will be noted that the notice of lien describes the property as section *22,* while the complaint describes it as the *northwest ¼ of section 33.* In so far as the notice of lien gives the wrong section number, it is fatally defective. Bishop v. Hayward Lumber & Investment Co., 19 Cal.App.2d 234, 65 P.2d 125; D. I. Nofziger Lumber Co. v. Waters, 10 Cal.App. 89, 101 P. 38. In the first of the above cases, the notice of lien described the property as section 3, while the foreclosure proceeding described it as section 30. In the second of the above cases the notice of lien described the property as lot 18 in block 5, while the property sought to be impressed with the lien was lot 18 in block 4. In each of these cases the court held that the lien could not be enforced against the property described in the complaint.

[2] Appellant urges, however, that the reference to the three mining claims is a sufficient identification of the property. This contention is untenable. In the case of Fernandez v. Burleson, 110 Cal. 164, 42 P. 566, 52 Am.St.Rep. 75, plaintiffs per-

formed labor on the Bare Bar mining claim. The notice of lien filed by them referred to the claim as being in Virginia Bar Mining District, in Siskiyou county, California, and described it by monuments, metes, and bounds. This description did not fit the Bare Bar claim, but did fit an adjoining claim, the Otto Bar. The court held the description insufficient to charge the Bare Bar with a lien.

[3, 4] Appellant then relies on section 1203 of the Code of Civil Procedure, which provides that certain mistakes shall not invalidate the lien, and calls attention to the fact that the case of Fernandez v. Burleson, supra, was decided before this section was adopted. This is correct. However, the case of Bishop v. Hayward Lumber & Investment Co., supra [19 Cal. App.2d 234, 65 P.2d 127], was decided long after the adoption of section 1203, supra, and contains the following statement of the law:

"The lien upon which the appellant's foreclosure proceedings rest is not one of defective description of the premises claimed and found to be owned by the plaintiff, but presents an instrument in which no description whatever is given of her property, and falls under the rule announced in the case of Penrose v. Calkins, 77 Cal. 396, 19 P. 641, where it is said: 'A notice of a mechanic's lien which entirely omits to describe the real estate sought to be charged with the lien is fatally defective.' And likewise, in the case of Fernandez v. Burleson, 110 Cal. 164, 42 P. 566, 52 Am.St.Rep. 75, where it is said: 'Where there is no description in the notice of lien sufficient to identify the mining claim upon which the work was actually done with reasonable certainty, to the exclusion of other premises, the notice of lien is insufficient.' And in which case it is further held that the notice of lien is not an instrument susceptible of reformation. In other words, if the notice of lien is void or insufficient to identify the property and therefore is void, there is no method of reforming such an instrument, for the simple reason that the law requiring the filing of a notice of lien is intended to give the general public notice thereof, and the reformation founded upon the plaintiff's complaint, and judgment to that effect would be wholly ineffective to give notice of the lien to the general public as required by the Code of Civil Procedure."

[5] The court holds that the mere reference to certain mining claims in the notice of lien is not sufficient to cure the defect in the erroneous description of the property. They are described as being in *section 22,* and not in the *northwest quarter of section 33,* as set forth in the complaint. It is a fact of common knowledge that extensive mining operations have been carried on in Kern county, ever since the creation of the county, and from all that appears, there may be many mining claims bearing the same name as those mentioned in the notice of lien.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



43 Cal.App.2d 84

BRINTLE v. BOARD OF EDUCATION OF CITY OF LONG BEACH et al.

Civ. 12786.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1941.

Rehearing Denied March 19, 1941.

Hearing Denied April 17, 1941.

1. Municipal corporations ⇐211

The position of director, associate, or assistant director of a bureau or department of educational research is not included among positions for which certificates may be issued under statute, and hence is not within terms of statute authorizing acquisition of permanent tenure in position "requiring certification qualifications." School Code, §§ 5.121, 5.122, 5.124, 5.131, 5.142, 5.150, 5.160 to 5.167, 5.420 to 5.490, 5.500, 5.502, 5.770 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Requiring Certification Qualifications".

2. Schools and school districts ⇐48(2)

Under rule "expressio unius est exclusio alterius", legislature in enumerating types of certificates which might be granted by county board of education intended to exclude authority to grant certificates for other types of employment. School Code, §§ 5.150, 5.160 to 5.167.

3. Municipal corporations ⇐211

In statute providing for permanent tenure for positions "requiring certification qualifications", the quoted phrase was intended to refer to particular classes of certificates enumerated in the School Code. School Code, §§ 5.131, 5.142, 5.150, 5.160 to 5.167, 5.420 to 5.490.

4. Schools and school districts ⇐133

One who was occupied in educational research during practically all of nine years, did no classroom teaching, and held no credentials or certification authorizing him to teach, did not acquire permanent tenure even as a classroom teacher. School Code, §§ 5.500, 5.502, 5.770 et seq.

5. Officers ⇐11

Statutes enacted to establish tenure for state employees must be strictly construed, and no person can gain a permanent tenure or be advanced to a higher class in the service except by following the statutes and rules adopted by administrative board. School Code, §§ 5.121, 5.122, 5.124, 5.131, 5.-142, 5.150, 5.160 to 5.167, 5.420 to 5.490, 5.500, 5.502, 5.770 et seq.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Shirley Lance Brintle against the Board of Education of the City of Long Beach and others, for writ of mandate to compel reinstatement in position. From a judgment denying the petition, petitioner appeals.

Affirmed.

Tanner, Odell & Taft and Robert A. Odell, all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellant filed his petition for a writ of mandate requiring respondent Junior College District and the Board of Education of the city of Long Beach to reinstate him in his position of "assistant to the supervisor of educational research" in the Long Beach junior college, with the status of permanent tenure and to pay him the salary for such position for the time elapsing since his discharge at the end of his last year with the school. This appeal followed a judgment denying appellant's petition.

Appellant's contention that he be reinstated as a permanent employee is based upon the following facts: appellant was employed by the respondent Junior College District as counsellor for the 1930–1931 school year; as counsellor-registrar for 1931-32; as dean of records for 1932-33 and 1933-34; as vice-principal and dean of men for 1934-35 and 1935-36; as vice-principal with supervision of evening junior college for 1936–1937; as vice-principal for 1937–1938; and as assistant to the supervisor of educational research after December 6, 1937. Appellant was notified on May 9, 1938 that his services would not be required for the next ensuing school year. During all of that time appellant held a special secondary research credential issued by the state board of education which authorized him to serve in the public schools as director, associate or assistant director of a bureau or department of educational research. At all times mentioned herein he held a certificate for such service in the public schools of Los Angeles county in which the respondent Junior College District is located. Not until December 10, 1937, did appellant obtain general secondary school and administration credentials from the state board of education.

Despite various positions held by him, appellant contends that he was actually employed to do educational research work and that more than ninety per cent of his time was consumed in doing such work and that this position required certification qualifications during the school years of 1930–1931, 1931–32, and 1932–33, and that by virtue of the provisions of section 5.500 of the School Code, he became a permanent employee when he was employed for the 1933–34 school year in the same position. But the findings of the trial court, contrary to appellant's demands, were as follows: that appellant was not employed for educational research work until December 6, 1937; that prior thereto, in addition to his duties as counsellor, dean of records and vice-principal, appellant engaged in research activity in connection with the administering of achievement and intelligence tests of the students and the percentage of drafts and charts incidental to enrollment and the progress of students at said Junior College; that employment to do educational research work was not a position requiring a certification of qualifications.

From the facts so found, the decision of the court was that appellant was not em-

ployed for three consecutive years in a position requiring certification qualifications; that he was not re-elected for the 4th year to a position requiring certification qualifications and that accordingly appellant did not acquire permanent tenure.

In view of the findings, our task is to determine: (1) Whether the findings are supported by the evidence, and (2) whether appellant while actually employed to fill the various positions held prior to December 6, 1937, is entitled to base his right of tenure as "assistant supervisor of educational research" upon the fact that he did engage in research activity while employed as counsellor, dean of records and vice-principal.

Section 5.500 of the School Code provides: "Every employee of a school district of any type or class, who after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is re-elected for the next succeeding school year to a position requiring certification qualifications shall, except as hereinafter otherwise provided, at the commencement of said succeeding school year, be classified as and shall become a permanent employee of the district." It is thus apparent that permanent tenure may only be acquired in a "position * * * requiring certification qualifications". Since appellant does not claim to have acquired permanent tenure as a counsellor, counsellor-registrar, dean of records, dean of men or vice-principal, but only with respect to educational research work, it follows that if the latter type of work does not require certification qualifications within the meaning of section 5.500 the judgment of the trial court must be upheld.

By section 5.121 of the School Code, there is "created a commission of credentials, to consist of the superintendent of public instruction, and four persons appointed" by him. By section 5.122 it is authorized to issue credentials to candidates who can "meet the standard set by the state board of education". By section 5.124 this board is empowered "to authorize the commission of credentials to issue credentials upon which county boards of education may grant the certificates enumerated". Sections 5.160 to 5.167. The minimum general standards for all types of credentials is prescribed by sections 5.131 and 5.142. Section 5.150 authorizes the state board of education to prescribe the qualifications upon which county, and city and county boards of education may grant certificates: "(a) To teach in junior colleges, senior high schools, four-year high schools, junior high schools, elementary schools, and kindergartens. (b) To supervise instruction and to administer schools as supervisors, principals, and superintendents. (c) To act as school librarians. (d) To act as school attendance officers. (e) To supervise the health and development of pupils." By section 5.160 the county boards of education are empowered to grant the certificates enumerated in sections 5.161 to 5.167, which provide for the following certificates: High school, junior high school, elementary school, kindergarten-primary, special certificates (authorizing the holder to serve as librarian or to teach the branches of learning named in such certificate) and supervisor of health.

[1, 2] None of the foregoing provisions of the School Code authorizes or requires the granting of a special secondary certificate or credential, such as that held by appellant, authorizing him to act as director, associate or assistant director of educational research. The failure of the legislature to authorize the granting of such credential leaves no doubt that in enumerating and describing the various certificates which the county boards are authorized to grant by virtue of sections 5.150 and of 5.161 to 5.167, the legislature described all of the positions "requiring certification qualifications". Applying the familiar rule of expressio unius est exclusio alterius, it must be held that the legislature, in enumerating the several types of certificates, intended to exclude the authority to grant certificates for other types of employment not coming within the enumerated classes. (Secs. 5.161 to 5.167.) Since the position of "director, associate or assistant director of a Bureau or Department of educational research" is not included among the positions for which certificates may be issued, it cannot be one "requiring certification qualifications".

[3] That the legislature, in employing the phrase "positions requiring certification qualifications" intended to refer to the particular classes of certificates enumerated in the School Code is clear when the provisions of Chapter II of Division 5, part 3 (secs. 5.420 to 5.490), of the Code are considered. This Chapter II sets forth the general qualifications which must be met by persons who are employed in positions requiring certification qualifications. By

section 5.420 the governing boards of school districts are empowered "to employ for positions requiring certification qualifications, only persons who hold legal certificates in full force and effect and on file at the time such employment becomes effective". The succeeding sections prescribe the qualifications and type of certifications and type of certificate required for employment as principal, teacher, librarian, supervisor, administrator and physical inspectors. Nowhere in this chapter do we find even the suggestion of an educational research certificate. The rights of employees other than those requiring certification qualifications are set forth in sections 5.770 et seq. The term of employment of the employes there mentioned cannot "extend beyond the close of the next ensuing school year". It is needless to consider those sections, however, for appellant bases his claim to permanent tenure solely upon the provisions of section 5.500.

[4, 5] (2) From the foregoing it clearly appears that even though appellant's position had been one requiring certification qualifications, his only prospect for a permanent tenure would have been that of classroom teacher. According to section 5.502 persons employed in administrative or supervisory positions requiring certification qualifications can become permanent employees as classroom teachers only but not as administrators or supervisors. Since appellant was occupied during practically all of his nine years in doing research work and did no classroom teaching at all, and since he held no credentials or certification authorizing him to teach during the entire period of his employment, we find no codal provision by which appellant, however so competent, could have acquired permanent tenure even as a classroom teacher. In view of the language of the cited sections, he is not, merely because he engaged in research activity while holding various positions of responsibility entitled to permanent tenure as assistant to the supervisor of educational research. Our conclusion announced in Allen v. State Board of Equalization, 110 P.2d 73, this day filed is apropos. There certain employees of the State Board of Equalization, while holding positions of "collector" performed the services of "inspector" for over two years. They sought in vain to collect the differential between the salary of the two positions because they had not been certified as eligibles for the higher position prior to doing the work. Statutes enacted to establish tenure for state employees must be strictly construed. No person can gain a permanent tenure or be advanced to a higher class in the service save only by following the statutes enacted by the legislature and the rules adopted by the administrative board. Since the position held by appellant did not require certification qualifications, he is not entitled to be classified as a permanent employee. A decision favorable to appellant upon the remaining questions raised could be of no avail.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



43 Cal.App.2d 847

KAMP v. SECURITY NAT. BANK OF PASADENA.

Civ. 12793.

District Court of Appeal, Second District, Division 2, California.

Feb. 27, 1941.

Appeal and error ⇐773(2)

Where transcripts of appeal were filed July 19, 1940, appellant filed three requests for additional time within which to file opening brief which time expired October 11, 1940, no further requests for time were made and no briefs were filed and on January 17, 1941, an order was issued to show cause why appeal should not be dismissed for want of prosecution, but no cause was shown either prior to, or at time of the hearing, appeal was dismissed.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by H. Kamp against the Security National Bank of Pasadena, etc. From an adverse judgment, plaintiff appeals.

Appeal dismissed.

Bernard Brennan, of Los Angeles, for appellant.

Alfred G. Allen, of Pasadena, for respondent.

PER CURIAM.

The transcripts on appeal herein were filed July 19, 1940. Thereafter appellant filed three requests for additional time within which to file his opening brief, which time expired October 11, 1940. No further requests for time having been made, and no brief having been filed, on January 17, 1941, an order was issued to appellant to show cause on February 26, 1941, why the appeal should not be dismissed for want of prosecution. No cause having been shown, neither prior to nor at the time of the hearing.

It is ordered that the appeal herein be, and the same hereby is, dismissed.



CARBONE v. SUPERIOR COURT IN AND FOR NAPA COUNTY et al.*

Civ. 6564.

District Court of Appeal, Third District, California.

Feb. 19, 1941.

Rehearing Denied March 21, 1941.

Hearing Granted April 17, 1941.

1. Bastards ⇐8

The paternity of an illegitimate child may be established in the same suit in which support of the child is sought to be enforced, or may be separately established. Civ.Code, §§ 137, 196a, 231.

2. Bastards ⇐16, 94

Costs, counsel fees, and maintenance of an illegitimate child may be enforced against the father after paternity has been established, but not in suit for support before paternity has been established. Civ.Code, §§ 137, 196a, 231.

3. Bastards ⇐16

Rights or obligations under statute expressing purpose to enforce father's obligation to support and educate illegitimate offspring may vest in absence of proof of parentage of the child. Civ.Code, § 196a.

4. Bastards ⇐16

In statute providing for proceeding to compel support of illegitimate child, references to divorce statutes manifest intent that parent's obligation to support illegitimate child could be enforced in manner provided for in divorce statutes after paternity has been established, but not before. Civ. Code, §§ 137, 196a.

5. Bastards ⇐16, 94

In proceeding to compel support of illegitimate child, costs and maintenance cannot be imposed pendente lite against alleged father, either during trial or on appeal, before paternity has been finally established. Civ.Code, §§ 137, 196a, 231.

Petition by Diane Lee Carbone, a minor, for writ of mandamus to compel the Superior Court of Napa County, Percy S. King, Judge, to make an order for costs, counsel fees and maintenance of the minor petitioner pending trial of a suit for support under Civil Code, sec. 196a.

Writ denied.

Allen Spivock, of San Francisco, for petitioner.

Rutherford, Rutherford & Rutherford and Wallace Rutherford, all of Napa, for respondents.

THOMPSON, Justice.

By means of a writ of mandamus the mother and guardian ad litem of an illegitimate child seeks to compel the Superior Court of Napa County to make an order for costs, counsel fees and maintenance of the child pending the trial of a suit for support under the provisions of section 196a of the Civil Code. It is claimed that section of the code, as amended in 1939, authorizes the allowance of such payments from an alleged father of an illegitimate child, pendente lite, even before the paternity has been determined, just as a husband or wife may become liable therefor in a suit for divorce under section 137 of the same code.

The petition alleges that a complaint was filed in the Superior Court of Napa County by Peggy Fredericks, the mother and guardian ad litem of Diane Lee Carbone, an illegitimate infant child, under section 196a of the Civil Code, claiming that the defendant, Leo Carbone, is the father of the child, and demanding judgment for her support. The defendant in that action was never married to Peggy Fredericks. That suit has not been tried, nor has the paternity of the child been established. An order to show cause was issued against the

* Subsequent opinion 117 P.2d 872.

defendant, directing him to furnish reason why he should not pay costs, counsel fees and maintenance during the pendency of the action. After hearing, the proceeding to show cause was dismissed. This petition for a writ of mandamus was then filed.

The only question to be determined is whether the alleged father of an illegitimate child, to whom the mother was never married, may be compelled to pay costs, counsel fees and support money under section 196a of the Civil Code before the paternity of the child has been established.

[1-4] It is true that the paternity of an illegitimate child may be established in the same suit in which the support of the child is sought to be enforced. Sec. 196a, Civ. Code; Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806. The paternity of the child may also be separately established under section 231 of the Civil Code. There is no doubt that costs, counsel fees and maintenance of an illegitimate child may be enforced against the father after the paternity has been first established. We are, however, of the opinion that costs, counsel fees and maintenance may not be enforced against a defendant in a suit for support of an illegitimate child, under section 196a of the Civil Code, until after the paternity of the child has first been established. Schallman v. Haas, 33 Cal.App. 28, 164 P. 336. The very purpose of the last-mentioned section, as it is expressed therein, is to enforce the legal obligation of "the father as well as the mother, of an illegitimate child" to support and educate their offspring. No rights or obligations under that section may vest in the absence of proof of the parentage of the child. That section, as amended in 1939, merely authorizes the court "to order and enforce performance" of the previously-determined obligations thereunder, in the same manner that alimony or maintenance may be enforced by execution or otherwise in a divorce proceeding under section 137 of the Civil Code. If the legislature had intended by the enactment of section 196a to authorize the collection of costs, counsel fees or maintenance pendente lite against a defendant merely because he was accused of being the father of an illegitimate child, it would have been very easy to have so expressed it. Section 137 of the Civil Code clearly provides that: "During the pendency of any such [divorce] action the court may, in its discretion, require the husband or wife, as the case may be, to pay * * * alimony," etc. No such language appears in section 196a. Evidently the legislature meant, by reference to the various sections with relation to divorce proceedings, that a parent's obligation to support his illegitimate child could be enforced in the same manner provided for in those sections after the paternity had been first established. Before that status has been determined there is no obligation to support the child which could be enforced by either equity or law.

[5] It would be a very unjust and dangerous rule that would permit the imposition of costs and maintenance pendente lite against an innocent person merely because he was wrongfully accused of being the father of an illegitimate child. Such a rule might encourage irresponsible persons to collect from various innocent individuals in a succession of suits maintained without merit.

It is argued that society has an interest in seeing that the parents of children properly maintain and care for their offspring. That is true. But society is presumed to possess a higher standard of justice than to attempt to enforce the maintenance and support of illegitimate children upon innocent persons, or upon anyone until his parentage of the child has been first established in the manner required by law.

In the Schallman case, supra, in which a hearing by the Supreme Court was denied, after the paternity of an illegitimate child had been first established in a suit brought for that purpose under section 196a of the Civil Code, an order for costs and counsel fees was subsequently made for the purpose of prosecuting the appeal. That order was reversed. In response to the contention of the respondent that section 196a authorized the allowance of costs and counsel fees pendente lite, just as they are allowed in divorce proceedings, the court said [33 Cal.App. 28, 164 P. 338]: "But there is no analogy between divorce suits or any other action between a husband and wife pertaining to or involving their marital relation and obligations and an action founded upon section 196a of the Civil Code. No more than in any other of the various classes of actions has a court the inherent power, if, indeed, it can have or be given any power in that respect at all, to require a litigant in a case of this character to provide his adversary with the means necessary to defray the costs and expenses incident to the prosecution

or resisting of an appeal or for the support of such adversary, pending the disposition of the cause on appeal. This proposition necessarily follows from the fact that the essential issue to be determined in an action of this kind is contested. The gist or gravamen of this action is the paternity of the alleged illegitimate child."

On principle it is equally true that costs, counsel fees and maintenance during the trial of a cause under section 196a may not be charged against an alleged father of an illegitimate child, until the paternity has been finally established. If such payments may not be collected for prosecution of an appeal from the judgment they certainly are improper charges to be imposed during the trial of the cause.

In the Kyne case, supra, the paternity of the illegitimate child was determined at a trial of the cause. The court ordered the defendant to pay for the support of the child from the date of its birth. From that judgment an appeal was perfected. The question of the right to impose upon the defendant costs, counsel fees or maintenance pendente lite was not involved in that case. There is nothing in that case in conflict with what we have previously said regarding the necessity of first proving the paternity of the illegitimate child before the obligation for its support or the costs of suit may be imposed upon a litigant.

The writ of mandamus is denied.

We concur: PULLEN, P. J.; TUTTLE, J.



43 Cal.App.2d 155

MAXON v. AVERY.

Civ. 2601.

District Court of Appeal, Fourth District, California.

Feb. 20, 1941.

Hearing Denied April 17, 1941.

1. Joint tenancy ⇐3

The test of person's competency to create joint tenancy with right of survivorship is whether he was mentally competent to deal with subject before him with full understanding of his rights and actually understood nature, purpose, and effect of what he did.

2. Appeal and error ⇐1050(1)

In action by incompetent's guardian to set aside joint tenancy and quiet plaintiff's title to note and trust deed, executed to ward, his wife, and defendant as joint tenants, with right of survivorship, by purchaser of ward's ranch, admission of purchaser's opinion testimony that ward was of sound mind and capable of transacting business as to his property at time of transaction was not sufficiently prejudicial to justify reversal of judgment for defendant, even if technically erroneous because witness was not intimate acquaintance of ward. Code Civ.Proc. § 1870, subd. 10.

3. Appeal and error ⇐1047(3)

In action, tried without jury, by incompetent's guardian to set aside joint tenancy and quiet plaintiff's title to note and trust deed, executed by purchaser of ward's ranch to ward, his wife, and defendant, as joint tenants, with right of survivorship, court committed no error prejudicial to plaintiff in striking out testimony that ward's wife made a motion "around the head" during conversation between ward and witness three years before transaction in question, in view of other evidence on issue of ward's mental incompetency, as appellate court cannot presume that trial court would have accorded stricken testimony any greater weight than such other evidence.

4. Joint tenancy ⇐3

In action by incompetent's guardian to set aside joint tenancy and quiet title to note and trust deed, executed by purchaser of ward's ranch to ward, his wife, and defendant as joint tenants, with right of survivorship, evidence *held* sufficient to sustain trial court's finding as to ward's mental competency at time of such transaction.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Donald A. Maxon, guardian of Norton H. Tharp, an incompetent person, against Rose V. Avery, to set aside a joint tenancy with right of survivorship and quiet plaintiff's title to certain money, a note, and a trust deed. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. R. Bailey, Walter C. Haight, and John F. Downey, all of Visalia, for appellant.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondent.

BARNARD, Presiding Justice.

This is an action to set aside a joint tenancy with the right of survivorship and quiet the plaintiff's title in and to certain money and a certain note and trust deed.

On or about June 2, 1936, Norton H. Tharp, who was then 76 years of age, sold a ranch, which was his separate property for $13,500, receiving $3,500 in cash and a note for $10,000 secured by a trust deed upon the property. The note and trust deed were made out in favor of Tharp, his wife, and Rose V. Avery, who was a niece of his wife, as joint tenants with the right of survivorship, and the cash received was deposited in a bank under a similar arrangement. The couple had no children, and Tharp's wife died on November 15, 1936. On January 11, 1937, Tharp was adjudged incompetent and Donald A. Maxon was appointed as guardian of his person and estate.

The guardian brought this action alleging that on June 2, 1936, Tharp was weak in body and mind and unable to care for his property; that the defendant occupied a confidential relationship with him; that without his knowledge or understanding and in violation of that relationship she had procured the placing of the proceeds of this ranch in such joint tenancy; and that the creation of this joint tenancy was procured by fraud and undue influence.

The court found in all respects in favor of the defendant, but findings and judgment were entered after Tharp had died. On a former appeal (Maxon v. Avery, 32 Cal.App.2d 300, 89 P.2d 684, 685), taken on the grounds that the findings were not supported by the evidence and that the judgment was void, having been entered before the administrator of Tharp's estate was substituted as the party plaintiff, this court reversed the judgment on the latter ground and with respect to the first ground, said: "Conceding, but not holding, that the evidence would have supported contrary findings and a judgment in favor of the appellant, it would have to be held that the findings and judgment as entered are amply supported by the evidence. In fact, they are supported by a preponderance of the evidence."

On a rehearing, after vacating the former findings and judgment, the court again entered substantially the same findings of fact, finding, among other things, that it was not true that at the time in question Tharp "was weak in mind, or was unable unassisted to care for himself or his property" except that he was, on account of age, unable to perform the physical labor of caring for his real property; that he personally conducted the negotiations for the sale of this property; that at all times during said transaction he was mentally competent; that he freely discussed the details of this transaction, the disposition to be made of the moneys to be received therefrom and the terms of the trust deed and note, not only with his wife but also with other competent disinterested persons who gave him independent advice particularly as to the disposition to be made of said moneys and the payees to be named in said note and trust deed; that after full consideration and discussion and with full knowledge and understanding and of his own free will Tharp consummated said sale and made the disposition in question of the proceeds thereof; that it was not true that the defendant occupied a confidential relationship with Tharp; that it was not true that she caused or procured the making of the joint tenancy with respect to the proceeds of the sale; and that there was no fraud or undue influence. Another judgment was entered, from which the plaintiff has appealed upon a clerk's transcript covering the proceedings after the going down of the remittitur on the other appeal and with a stipulation that the reporter's transcript filed in connection with the other appeal should be used and considered on this appeal.

No contention is now made that the evidence is not sufficient to sustain the findings and judgment. The appellant admits that the sale of the farm was fair and just and for an ample consideration, but contends that the court made four errors in connection with the receipt of evidence which were prejudicial and without which it would have been established that at the time in question Tharp "was of such unsound mind as not to fully comprehend the transaction".

[1] The test to be applied in such a case as this is whether the party was mentally competent to deal with the subject before him with a full understanding of his rights; whether he actually understood the nature, purpose and effect of what he did. Carr v. Sacramento C. P. Co., 35 Cal. App. 439, 170 P. 446. In Hellman Com-

mercial T. & S. Bank v. Alden, 206 Cal. 592, 275 P. 794, 799, the court said: "One may be incompetent to some extent and yet have sufficient mentality to comprehend the nature and effect of a transaction and therefore execute a valid contract."

[2] Appellant's first two assignments of error relate to two questions asked of the lady who bought this farm from Mr. Tharp. The first question was "I will ask you to state, based on your observation and your talk and your dealings with him, during this period of months, whether or not in your opinion he was of unsound mind?" The second was, "State whether or not, in your opinion, Mr. Tharp, during these negotiations, as you saw and observed him, was capable of transacting business as to his property?" Objections to both questions were overruled and the answer to each was unfavorable to the appellant. It is argued that this witness was not qualified to express an opinion on such matters since she was not an intimate acquaintance, within the meaning of subdivision 10 of section 1870 of the Code of Civil Procedure. Reliance is placed upon the case of the Atkins Corporation v. Tourny, 6 Cal.2d 206, 57 P.2d 480. In that case the witness had known the party in question a week and had had five conversations with her. The court held that it was error to allow the witness to give his opinion concerning the sanity of the party but found it unnecessary to decide whether that error, standing alone, would justify a reversal.

In the instant case, this witness had had four interviews with Tharp over a period of nearly two months. Some of these interviews lasted several hours during which Mr. Tharp showed her the boundaries of his property, showed her a number of things about it, including the location of several springs, and told her about his riparian rights.

No definite rule has been established as to just what is required to constitute one an intimate acquaintance of another. This witness had considerable opportunity to observe Tharp and his actions and words in connection with the actual handling of his property. It is conceded that he made a good sale of the property and there is no evidence that the respondent influenced him or attempted to influence him in connection with the sale or with the disposition of the proceeds thereof. It may be noted that these questions were directed more to the appearance of Tharp, under a particular set of circumstances, rather than to a general opinion as to his mental condition. The testimony thus brought out was in fact unnecessary and merely cumulative because the testimony of this witness, as to what was said and done by Tharp during this period, led naturally to the same conclusion and was most persuasive. Whether or not the admission of this testimony was technically erroneous it cannot be held, under the circumstances of this case, to have been sufficiently prejudicial to justify a reversal. De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059.

The same may be said with respect to the third assignment of error, which relates to a similar question asked of a bank official who acted as escrow agent in connection with the sale of this farm.

[3] In the remaining instance it is claimed that the court erred in striking out that part of the testimony of one witness in which he testified that during a conversation between Tharp and himself, Tharp's wife made a motion "around the head" and in which, in response to the question "She made a motion with her hand going around her head?", the witness replied, "Yes, I guess, I don't know that is what he mean." He first testified that Tharp did not see his wife make this motion, and later testified that he did see it. It is argued that such a motion is commonly understood as indicating that the person to whom it refers is "out of his head" and that this testimony was admissible because Mr. Tharp said nothing, although he saw his wife make the motion. Aside from any other consideration, this incident occurred three years prior to the transaction in question. If we assume this evidence had a bearing on the issues, there was no jury, there was a great deal of other evidence on that issue, and it can hardly be presumed that the court would have accorded it any greater weight had it been admitted.

[4] While there was evidence that Tharp's mental condition rapidly deteriorated after his wife's death and while there is some evidence that might be said to be technically sufficient to have supported a finding that he was not in full possession of his faculties at the time of this transaction, a rereading of the transcript convinces us that the evidence largely preponderates in favor of the findings as made.

This conclusion is supported not only by the direct evidence indicating that Tharp fully understood what he was doing in this transaction, but by the nature of the appellant's evidence given in an attempt to prove the contrary. While some of these witnesses expressed the opinion that Tharp was then of unsound mind the reasons given for such opinions were so unsubstantial, in most cases so clearly inadequate, and in many cases so trivial, it can well be seen why the trier of fact refused to give any weight thereto. As examples, one of these witnesses stated, as reasons for his opinion, that Tharp frequently had trouble in starting his 12-year-old Star automobile, and that he was asking $25 an acre for his land when the witness thought it was worth not more than $2.50 an acre. It may be here observed that in this transaction Tharp sold the land for $20.45 per acre. Another witness thought he was of unsound mind because he was somewhat forgetful at times, and because he expressed an intention or desire of going different places at different times. One of Tharp's nephews drew the same conclusion because Tharp got angry on two occasions when the witness' cattle trespassed upon Tharp's land. And the appellant administrator, the husband of Tharp's niece, testified that Tharp was not mentally competent to transact business at the time in question, although when asked whether he had had any occasion to observe Tharp's ability to conduct business transactions during the spring and summer of 1936, he replied: "No, other than he could not start his car, and such as that."

No undue influence or fraud appears, and the manner in which the proceeds of this sale were disposed of were not unnatural or unreasonable since the evidence shows that Tharp was very fond of his wife's niece, the respondent, that he resented his nephews' allowing their cattle to trespass upon his property and had had other controversies with them, and that he had expressed the desire that his sister's family receive none of his property. Under the circumstances here appearing it cannot be assumed that a different ruling with respect to any of these items of evidence, would have affected the result, and any possible error was not prejudicial. Cooper v. McDonald, 32 Cal.App.2d 114, 89 P.2d 412.

The judgment is affirmed.

We concur: MARKS, J; GRIFFIN, J.

LADAS et al. v. JOHNSON'S BLACK & WHITE TAXICAB CO. et al.

Civ. 6435.

District Court of Appeal, Third District, California.

Feb. 25, 1941.

Rehearing Denied March 27, 1941.

Hearing Denied April 24, 1941

1. Appeal and error ⇐989

Where judgment denying recovery for death of pedestrian was challenged on ground that there was in the record no evidence of contributory negligence, issue before the District Court of Appeal was whether there was substantial evidence in entire record to support finding of contributory negligence.

2. Automobiles ⇐244(53)

In action for death of pedestrian who after alighting from street car sought to cross street in rear of car but was struck by taxicab approaching from opposite direction, evidence did not sustain denial of recovery on ground of contributory negligence.

3. Automobiles ⇐164(1)

A motorist approaching street car stopped at regular place must exercise great care in passing to avoid injuring passengers alighting from or boarding car.

4. Automobiles ⇐164(3)

Motorist passing street car on side opposite gates must at his peril anticipate sudden appearance of persons around rear end of car.

5. Automobiles ⇐164(3), 168(4)

Motorist passing street car on side opposite gates must signal approach and have automobile under control as precaution against injuring person passing around rear of car.

6. Automobiles ⇐206

Pedestrian who after alighting from a street car sought to cross street in rear thereof had right to assume that operators of motor vehicles entering intersection from opposite direction would exercise a proper degree of care. Vehicle Code, §§ 560, 562, St. 1935, p. 188.

7. Automobiles ⇐244(59)

In action against taxicab company for death of pedestrian who sought to cross street in rear of street car after alighting therefrom, evidence that cab driver saw

street car stop at lighted intersection, that he saw two people emerge from behind rear of car, that he recognized them as women, that the pedestrians were struck when within 10 or 12 feet of curb while car was traveling about 10 or 12 miles an hour warranted application of "last clear chance" doctrine.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Antone Ladas and others against Johnson's Black and White Taxicab Company and others, to recover damages for the death of Amelia Ladas from injuries sustained when struck by a taxicab. Judgment for defendants, and plaintiffs appeal.

Reversed.

Busick & Busick, of Sacramento, for appellants.

Butler, Van Dyke & Harris, of Sacramento, for respondents.

PULLEN, Presiding Justice.

This action was for the recovery of damages for the death of Amelia Ladas, the wife of Antone Ladas, and the mother of Steve, Margaret and Athena Ladas. From a judgment in favor of defendants this appeal was taken.

About 9:30 p. m. on the 20th day of December, 1938, Amelia Ladas and her 15-year-old daughter, Margaret, alighted from a south-bound street car at Tenth and V streets in the city of Sacramento, and as they were proceeding easterly across the street, Mrs. Ladas was struck by a north-bound taxicab driven by Wendell Danforth and belonging to defendant Johnson's Black and White Taxi, a corporation. Mrs. Ladas died the next day from the injuries sustained.

The cause was tried by the court, sitting without a jury, and upon submission a judgment was rendered in favor of defendants, finding that defendants were guilty of negligence, but that the deceased had been guilty of contributory negligence. It is the contention of appellants that there is in the record no evidence of contributory negligence upon the part of the deceased, and that the judgment should be reversed.

Tenth street is approximately 48 feet in width from curb to curb and runs north and south. In the street are two sets of car tracks, the most westerly rail of which is about 14 feet 10 inches from the westerly curb of Tenth street. V street, also 48 feet wide, runs east and west and crosses Tenth street at a right angle. The pedestrian lanes upon these streets at this point are unmarked.

The driver testified that he was traveling north on Tenth street "straddling the east rail of the car track", which was 14 feet 10 inches from the east curb of Tenth street. It is undisputed that Mrs. Ladas was struck by the right front fender of the taxi and she was picked up at a point about five or six or seven feet north of the northerly edge of the north pedestrian lane across Tenth street, and about seven feet west of the east curb line of Tenth street.

In regard to other physical facts the court found,

"That it is true that on or about the 20th day of December, 1938, at or about the hour of 9:30 p. m. of said day, Amelia Ladas was walking in a general easterly direction across said Tenth street, and at a point thereon immediately north of the intersection of Tenth and V Streets; that it is true that at said time the said Amelia Ladas was walking in a place provided for pedestrians to cross said Tenth street; that it is true that at said time and place defendant Wendell Danforth, while acting as the agent, servant and employee of Johnson's Black and White Taxi Company, a corporation, was driving and operating said Chevrolet automobile owned by defendant Johnson's Black and White Taxi Company, a corporation, in a careless and negligent manner and in a general northerly direction on and along said Tenth street with V street, and across the crosswalk hereinbefore referred to."

The findings with reference to the conduct of Mrs. Ladas, the deceased, are:

"That it is not true that at the said time and place, the said Amelia Ladas was walking in a careful or prudent manner across said street, but on the contrary, the court expressly finds that at said time and place the said Amelia Ladas, although walking in a crosswalk, was herself careless and negligent, in that said Amelia Ladas, immediately prior to crossing said street, did alight from a south-bound street car, and did thereafter, without exercising due or any care or caution whatever, step from behind said street car directly into the path of said automobile then and there

being driven and operated by defendant Wendell Danforth, and in this regard the court further expressly finds that the said Amelia Ladas did then and there carelessly and negligently fail to maintain any lookout whatever for traffic proceeding along said street before stepping from behind said street car or before endeavoring to proceed across said street."

[1] The issue then comes down to an examination of the entire record to see if there is substantial evidence to support the finding of contributory negligence on the part of Mrs. Ladas. The testimony of the taxi driver that she was attempting to cross the street at a point considerably north of the pedestrian lane need not be taken into account, for the court definitely found that in that particular his testimony was untrue and that she was in the pedestrian lane.

[2] As to her acts and that of the driver of the taxi, the record discloses that she and her daughter alighted from the front entrance of a south-bound street car. According to a Mr. Bergerson, also a passenger on the car, who alighted before Mrs. Ladas, the door of the street car from which they alighted was right in the crosswalk so one could look directly down V street toward Ninth street. Miss Bergerson, who also preceded Mrs. Ladas in alighting from the car, testified the car stopped just about the center of the pedestrian lane. Margaret Ladas testified the car stopped in the pedestrian lane. At any rate, the undisputed testimony was the passengers alighted either within or practically within the pedestrian lane. The Bergersons, immediately upon alighting, crossed in front of the standing street car and proceeded easterly across Tenth street. Mrs. Ladas and her daughter stood in the pedestrian lane and waited until the car started, and after it had passed them they also started easterly across Tenth street, walking in the pedestrian lane and reached the center of Tenth street. Margaret, who was walking on her mother's left or on the side furthest from the oncoming taxi, testified she looked toward the south and then saw the lights of an oncoming automobile a considerable distance south on Tenth street, but believing they had time to pass in front of the automobile, proceeded on their way across the street. At that time the taxi had not yet reached the south crosswalk. According to a map in evidence the daughter indicated the taxi, at the time they were in the center of the street, as approximately 40 feet south of the pedestrian lane on the south side of the intersection, which point would be about 64 feet from where the two women then stood. When Mrs. Ladas and her daughter reached a point some 15 or 16 feet easterly of the center of the street, the daughter again glanced to the right or south, and saw the car almost upon them. She took a big step but was struck by the taxi, throwing her about six feet northerly of the pedestrian lane with her feet in the gutter. Her mother was found lying about five feet north of the pedestrian lane, with her feet about three or four feet from the east curbing of Tenth street. The cab, according to Mr. Bergerson, had come to a stop about 15 or 16 or 17 feet north of where Mrs. Ladas was lying. Mr. Bergerson, who, with his sister, had passed in front of the standing street car from which Mrs. Ladas and her daughter were alighting, continued easterly across Tenth street, and then southerly along the easterly pedestrian lane across V street, had reached a point on the sidewalk at the southeasterly corner of Tenth and V streets when he heard what sounded like a package drop. He turned around and saw someone lying in the street. He heard no automobile horn, nor the application of any brakes. All agree the entire intersection was well lighted by street lights.

Danforth, the driver of the cab, testified he was between the alley and V street when he saw the street car at a stop. (The alley is 160 feet south of V street.) He also testified as he was crossing the pedestrian lane he saw Mrs. Ladas walking out from behind the street car and they then started to run across the street in a sort of southeasterly direction, and he struck them with his right front fender, and that he was practically stopped when Mrs. Ladas struck his fender. He claims he did not knock either the mother or daughter any distance at all. According to the points indicated on the map in evidence the taxi driver indicated that it was about 12 feet from the point where he first saw the deceased emerge from behind the street car to the point of impact. During the time it took these women, the elder of whom was 54 years of age, to travel that distance, they were at all times in view of the taxi driver. Mr. Butler, a civil engineer, by measurements, located a blood spot on the pavement (accepted as the place

where Mrs. Ladas' head struck the pavement) as seven feet northerly from the northerly edge of the crosswalk, and six feet easterly from the east rail of the street-car track.

The foregoing is a summary of the material evidence bearing upon the case, and from such evidence we cannot find sufficient evidence to justify the holding of contributory negligence upon the part of the deceased.

It is to be noted that the taxicab was straddling the easterly rail of the car track and the deceased was struck by the right front fender of the taxi; in other words, according to the evidence, Mrs. Ladas traveled about 17 feet from the point where she alighted from the street car to the point of impact, and did not step directly into the path of the approaching taxi, as suggested by the findings in that regard. The driver of the taxi testified that when he first saw the street car come to a stop he was between the alley and V street. He could not recall seeing anyone cross in front of the street car and proceed in front of the street in front of him; but when he first saw Mrs. Ladas and her daughter they were walking out from behind the street car, the car then being in motion and clearing the pedestrian lane. He also testified Mrs. Ladas and her daughter were considerably north of the crosswalk. That has been found to be untrue. He admitted he did not sound his horn and that the intersection was well lighted. According to the points indicated upon the map by the driver of the taxi, Mrs. Ladas would have traveled about 12 feet while he was going six feet to the point of impact. He also testified he stopped at the instant of impact, but all the witnesses place his cab as 15 to 18 feet north of where Mrs. Ladas was picked up.

Analyzing the testimony as found by the court and as revealed by the physical facts the deceased and her daughter were in the pedestrian lane. They waited for the street car to move and travel far enough for the rear of the car to clear the pedestrian lane. They then started across the street and had reached a point beyond the most easterly street car rail, where they were struck by the right front fender of the taxi as it was straddling the easterly rail. The taxi, according to the driver, was traveling from 10 to 12 miles an hour when he first saw Mrs. Ladas and her daughter. It does not appear when, if ever, he slackened that speed.

[3-5] As said in McGarry v. Coyle, 120 Cal.App. 182, 7 P.2d 312, 313: "There can be no question that it is the duty of an automobile operator, approaching a street car which has stopped at a regular stopping place, to exercise very great care in passing, to avoid injuring persons alighting from or seeking to board the car. Such operator, in passing a street car on the side opposite the car gates, is bound at his peril to anticipate the probable sudden appearance of persons around the rear end of the car, and must give signals of his approach and have his automobile under control as a precautionary measure to avoid injury to them."

[6] Plaintiff and her mother had a right to assume that operators of motor vehicles entering the intersection from the south would exercise a proper degree of care.

Section 560 of chapter 10 of the Vehicle Code, St.1935, p. 188 relating to pedestrians' rights and duties, provides: "(a) The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter."

And by section 562 of the same code it is provided the driver is not relieved from the duty to exercise due care for the safety of any pedestrian upon the roadway.

In Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551, 559, an action for the death of a pedestrian, the court said: "Under the law Mr. Lowell in his use of the crosswalk had the right of way; and while proceeding with ordinary care, he was justified in assuming, in the absence of reasonable warning of danger, that his right of way would be respected. * * * Just what observation he made, while so proceeding, concerning traffic approaching from the south is not known. He was not required in the exercise of his right of way to keep looking continuously to the south * * *. There being no definite evidence as to the precautions otherwise taken by him in his course, the presumption is that during his progress he used reasonable care and vigilance for his own safety. [Citing cases.] To ignore that presumption 'would be in effect to presume negligence on the part of one in excuse of

negligence on the part of another.' [Citing cases.] If, though he saw Wilson approaching from a distance, Mr. Lowell, as a result of his observation, deemed himself secure in the protection of his right of way, or miscalculated the distance or the speed of the truck, he would not necessarily be chargeable with contributory negligence as a matter of law." Citing and quoting from White v. Davis, 103 Cal.App. 531, 284 P. 1086.

[7] The record here indicates that the driver of the cab saw the street car stop at a street corner when he was between the alley and V street; he saw two people emerge from the rear of the moving car; he recognized they were women, the younger woman on the outside; the street lights were lighted; the pedestrians were struck when they were within 10 or 12 feet of the easterly curb; he was traveling about 10 or 12 miles an hour, and stopped within two or three feet after striking Mrs. Ladas. These facts and circumstances give rise to the application of the last clear chance doctrine. In Sego v. Southern P. Co., 137 Cal. 405, 70 P. 279, 280, it is said:

"Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury. But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. * * *

"Defendant, knowing her danger, did not use ordinary care in protecting her from danger. In that case, technically speaking, plaintiff was not guilty of contributory negligence, for her negligence did not proximately contribute to the injury. In cases of that character, it may be well said that the later negligence is the proximate cause of the injury, and that the earlier negligence of the party injured is too remote to be classed as contributory negligence."

The judgment must be reversed. It is so ordered.

We concur: THOMPSON, J.; TUTTLE, J.

43 Cal.App.2d 176

HANSEN v. STATE BOARD OF EQUALIZATION et al.

Civ. 6430.

District Court of Appeal, Third District, California.

Feb. 21, 1941.

1. Mandamus ⇐72

While a writ of mandate will issue to correct an abuse of discretion, if the case is otherwise proper, an officer in whom public duties are confided by law is not subject to the control of the court in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions.

2. Intoxicating liquors ⇐72

Since there is no inherent right in a citizen to sell intoxicants, court will not interfere with action of state board of equalization in refusing to grant a specific license therefor unless it clearly appears that board has abused the broad discretion vested in it with respect thereto by the Constitution. St.1935, p. 1123, as amended; Const. art. 20, § 22.

3. Intoxicating liquors ⇐69

The constitutional provision authorizing state board of equalization to license the manufacture, importation and sale of intoxicating liquors and to deny or revoke any specific liquor license for good cause shown, vested in the board broad discretionary powers in the matter of granting or refusing to grant liquor licenses. Const. art. 20, § 22.

4. Intoxicating liquors ⇐69

Under constitutional provision authorizing state board of equalization to deny or revoke a specific liquor license on the ground of public welfare or morals, whether or not "good cause" existed for the denial of a specific liquor license was a matter for determination by the board and not by the court. St.1935, p. 1123, as amended; Const. art. 20, § 22.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Cause".

5. Intoxicating liquors ⇐74

In proceeding for writ of mandate to require state board of equalization to issue liquor licenses, evidence taken at hearing before board as to peculiar character and high moral tone of community in which ap-

plicant sought to engage in liquor business, justified a finding that there was "good cause" for denial of the specific licenses upon the ground that the granting thereof would be contrary to public welfare and disclosed no abuse of discretion on the part of the board warranting an interference by the court. St.1935, p. 1123, as amended; Const. art. 20, § 22.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding by Anton E. Hansen for a writ of mandate directed to the State Board of Equalization of California to require the board to issue certain licenses provided for by the Alcoholic Beverage Control Act. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Ralph O. Marron, of Monterey, and Robert M. Holstein, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, of San Francisco, for respondent.

TUTTLE, Justice.

This is an appeal from the judgment rendered in favor of respondents upon the sustaining of a demurrer to the amended petition of appellant for a writ of mandate, requiring respondents to issue an off-sale distilled spirits license and other licenses described in the Alcoholic Beverage Control Act of the state of California. (Stats. 1935, chapter 330, p. 1123, as amended; Deering's General Laws, Act 3796.)

The original petition was amended after a demurrer thereto was sustained. The demurrer to the amended petition was sustained without leave to amend. Permission to further amend was not requested by appellant.

The individual respondents are members of respondent State Board of Equalization, and are made parties in their official capacity. We shall refer herein to the respondents as the board.

We do not deem it necessary to give an extended summary of the amended petition. Respondents concede that it sets forth all the formal procedural steps required by the statute mentioned. It is further alleged that a public hearing was held by the board in connection with the application. A copy of the testimony taken at such hearing was made part of the petition, and was thus brought before the trial court on demurrer. The factual situation, from the record, appears to be as follows:

The premises for which the licenses were sought are described as in a business district of Pacific Grove, five blocks from the nearest school and five hundred feet from the nearest church, which is maintained in a Salvation Army meeting hall. Appellant was either a lessee or permittee of the premises, the property belonging to a third person, and proposed to deal in alcoholic beverages exclusively.

No alcoholic beverage business has ever been maintained in Pacific Grove, and all property in the city has been conveyed to its present owners subject to restrictive covenants running with the land against the use of any of such property for the business of manufacturing or vending alcoholic beverages; these restrictions are still effective and have been enforced since a time prior to the establishment of the city of Pacific Grove; and an organization known as the Pacific Grove Retreat Association has existed since June 1, 1875, for the express purpose of preserving and enforcing such restrictions upon the use of the real property within the city.

The city itself was originally conceived and laid out as a religious camp meeting ground by the Methodist Church; a considerable number of the persons residing in Pacific Grove have moved to that city because of the nature of the community.

It was stipulated at the hearing that the city was an outstanding recreational center for children and young adults; that parents and children had made their home in Pacific Grove because of this unusual recreational development and the general moral tone of the city. There is no industry in the city, and no adjacent agricultural industry, the entire city being a purely residential area. The city is comparatively free of crime, particularly crimes involving drunkenness. The city maintains and operates a high school for special instruction during the summer months, at which attend a considerable number of persons of high school age, including a goodly number from outside of the city and the state, and those who come from outside of the city are in the main without chaperonage or adult attendance during the summer school course.

The persons who participated in the protest and hearing were the officials and

leading citizens of said city. The protest was presented upon the official and formal resolution of the city council.

Appellant contends that the petition shows that the board, in refusing to grant the license, acted arbitrarily, wilfully, and without cause. Section 22, article XX of the Constitution of California, provides as follows: "* * * The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. * * *"

[1] The cases relied upon by appellant lay down the well-recognized rule that mandamus will issue to correct an abuse of discretion, if the case is otherwise proper. Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874. On the other hand—as stated in 16 Cal.Jur. page 809, sec. 28: "It is a familiar rule governing the issuance of the writ of mandate that an officer in whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions."

In an attack of this character, upon a finding and order of an administrative board, the attitude of a reviewing tribunal is well expressed in the following language found in the case of Maxwell v. Civil Service Commission, 169 Cal. 336-339, 146 P. 869, 871: "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere."

[2] It must be borne in mind here that "Unlike the rule with respect to the right to deal in ordinary commodities considered in the numerous cases cited and relied upon by respondent, there is no inherent right in a citizen to sell intoxicants (Ritz v. Lightston, 10 Cal.App. 685, 103 P. 363; Foster v. Board of Police Commissioners, 102 Cal. 483, 37 P. 763, 41 Am.St.Rep. 194)." State Board of Equalization v. Superior Court, 5 Cal.App.2d 374-377, 42 P. 2d 1076, 1077.

In the case of Guzzi v. McAlister, 21 Cal.App. 276-278, 131 P. 336, 337, the court stated, concerning an alcoholic beverage license under a city ordinance with provisions somewhat similar to the constitutional provisions here under consideration: "* * * If, in the opinion of the city council, the public welfare demanded that no license for the sale of liquor be granted, for a good and sufficient reason, at the particular place, or to these particular persons, it is not within the province of the courts to determine otherwise."

[3-5] The constitutional provisions mentioned above are designed to give the board broad discretionary powers in the matter of granting or refusing to grant licenses of this character. Whether or not "good cause" for the denial of the license existed was a matter for determination by the board, and not by the courts. We cannot agree with the contention of appellant that "the purpose of the Alcoholic Beverage Control Act is clearly to permit any qualified person desiring to secure a license for the sale of alcoholic beverages to secure such license provided he and the premises for which the license is sought meet the requirements of the act and the rules and regulations which the board is by the provisions of the act empowered to promulgate." Such a rule would deprive the board of any discretion whatever, and would be in direct conflict with the Constitution. We are satisfied the petition shows that the board had before it ample evidence to justify a finding that there was good cause for the denial of the license upon the ground that the granting of the same would be contrary to public welfare.

We find no abuse of discretion upon the part of respondents, and, accordingly, the judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

MITCHEL et al. v. BROWN et al.

Civ. 2604.

District Court of Appeal, Fourth District, California.

Feb. 25, 1941.

Rehearing Denied March 24, 1941.

Hearing Denied April 24, 1941.

1. Deeds ⇐90, 93

Deeds are to be construed in like manner as contracts and the intent of the grantor must be determined if possible from the terms set forth in the instrument. Civ.Code, §§ 1066, 1636, 1638, 1641.

2. Contracts ⇐147(1)

A contract must be so interpreted as to give effect to mutual intention of parties. Civ.Code, § 1636.

3. Contracts ⇐152

The language of a contract governs its interpretation if language is clear and explicit and does not involve absurdity. Civ. Code, § 1638.

4. Contracts ⇐152

The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping interpret the other. Civ.Code, § 1641.

5. Contracts ⇐143

It is not the province of the court to alter a contract by construction or make a new contract for the parties nor to rewrite the clear terms of the lawful contract. Civ. Code, §§ 1066, 1636, 1638, 1641.

6. Mines and minerals ⇐55(5)

Where grantors owning undivided half interest in minerals underlying 160 acre tract of land before executing deed conveying 2½ per cent. interest in minerals inserted in handwriting the words "an undivided one half of" before the description of the 160 acre tract so that the deed read 2½ per cent. of all oil, gas, etc., in an undivided one half of land in question, and there was no evidence that grantors intended to convey 2½ per cent. of all oil and gas underlying entire 160 acres or that grantees accepted deed under such belief, grantors intended and deed conveyed 2½ per cent. of the oil and gas recovered from land they actually owned which was an undivided one half interest in 160 acres and not entire tract.

7. Appeal and error ⇐1008(3)

Where appeal depends solely upon the construction to be given to the language of the contract from the instrument itself, reviewing court must determine the meaning of the contract as a matter of law and the rule precluding reviewing court from disturbing the determination of the trial court where there is substantial evidence to support his conclusions has no application.

8. Appeal and error ⇐842(8)

Where only issue before trial court was the construction and effect to be given certain words of deed conveying an interest in oil and gas underlying certain tract of land and there was no evidence other than the deed itself construction of the deed was a "question of law" for reviewing court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

Appeal from Superior Court, Kern County; Wm. D. Dehy, Judge.

Action to quiet title and for other relief by J. Burris Mitchel and others against Arthur Polk Brown and others. From a judgment for the plaintiffs, defendants appeal.

Reversed.

Borton, Petrini, Conron & Borton, of Bakersfield, for appellants.

Newby & Newby and Dee Holder, all of Los Angeles, and Alfred Siemon and Bennett Siemon, both of Bakersfield, for respondents.

KLETTE, Justice pro tem.

On October 27, 1936, Arthur P. Brown, and Maybelle B. Brown, his wife, two of the defendants and appellants, executed and delivered to the Mitchel Company, Ltd., a corporation, the predecessor in interest of plaintiffs and respondents, a mineral deed, which, omitting the opening and closing clauses, the description of property not involved in this case, and the consideration stated, was as follows:

"Witnesseth:

"That said First Parties, * * * do by these presents grant, bargain and sell unto second party and to its successors and assigns forever, an undivided two and one-half per cent (2½%) of all oil, gas, gasoline, and other hydrocarbon substances, and/or minerals now underlying and within or that may be hereafter produced, saved, sold and delivered from the following described property situate in the

County of Kern, State of California, to-wit:

"All those pieces or parcels of land in Section 21, Township 27 S, Range 24 E., M. D. B. M. in the County of Kern, State of California, according to the Official Plat of the survey of said land, returned to the General Land Office, described as follows:

"Parcel No. 1:
(Describes property not involved in this case.)

"Parcel No. 2:
(Describes property not involved in this case.)

"Parcel No. 4:
(Describes property not involved in this case.)

"J.E.Mc N.P. 10/27/36

" 'An undivided ½ of' Parcel No. 5:
"The NW ¼ of said Section 21.

"The acceptance of this Deed by Second Party shall constitute an agreement, whereby it agrees to pay its proportionate share of any and all taxes levied against any oil, gas, gasoline, hydrocarbon substances and minerals underlying said land, or that may be hereafter produced from said land, as assessed by the County Assessor.

"Notice is hereby given that Parcels No. 1, 2, 4 and 5 are subject to an oil and gas lease wherein first parties herein and Charles A. Reed and Rosa B. Reed, husband and wife, are lessors, and the Mitchel Company, Ltd., a California corporation, is lessee.

"Said two and one-half per cent (2½%) interest so conveyed hereby shall be deducted from the royalty interest of first parties, from the above mentioned leases or any other leases that hereafter may be made, covering said above described property.

"To have and to hold said two and one-half per cent (2½%) interest of all oil, gas, gasoline, hydrocarbon substances and other minerals unto Second Party and its successors and assigns forever."

The complaint is in three counts, the first to quiet title to 2½ per cent of all oil, gas, etc., underlying the northwest quarter of section 21, which is parcel No. 5 of the deed; the second to reform the deed to conform to the intent of the parties, that plaintiffs have a 2½ per cent interest in all gas and oil underlying the northwest quarter of said section 21; and the third for declaratory relief.

The answer places in issue the material allegations of the complaint, and alleges that the words, "an undivided ½ of", contained in said deed, were interlined in handwriting, and that the intention was to convey a 2½ per cent interest in the oil and gas of an undivided one-half interest in said quarter section. The answer admits, by failing to deny, that the interests of James P. George and Evangeline M. Ogden, two of defendants and appellants, were acquired with knowledge of the alleged rights of plaintiffs and respondents.

At the trial, the second count, that to reform the deed, was abandoned by plaintiffs and respondents, and the hearing had on the first and third counts of the complaint, being to quiet title and for declaratory relief, respectively. No witnesses were sworn, and the only evidence before the court was a copy of the deed, and a stipulation of counsel, made in open court, that at the time the deed was executed, defendants and appellants, Arthur P. Brown, and Maybelle B. Brown, only owned an undivided one-half interest in the land in question.

The only issue therefore before the trial court, and before this court, on the appeal, is the construction and effect of the words, "an undivided ½ of", inserted in the deed, in handwriting, before its execution and delivery.

The court found in favor of plaintiffs and respondents on practically all of the material allegations of the complaint, and rendered judgment, that plaintiffs and respondents, were entitled to 2½ per cent of all oil, gas, etc., underlying said 160 acres of land. Defendants and appellants have appealed from this judgment.

Several of the findings are not supported by the evidence, or the admissions of the pleadings. There was no evidence before the court to sustain the finding that it was the intention of the parties to the deed to convey 2½ per cent of all oil, gas, etc., underlying the 160 acres of land, nor to support the finding that the predecessors in interest of plaintiffs and respondents, accepted said deed under the belief they were to receive 2½ per cent of all oil, gas, etc., from said land, in accordance with the original intention of the parties. The finding of the court, that plaintiffs and respondents, are entitled to 2½ per cent of all oil, gas, etc., under said quarter section, and that the title thereto be quieted in

them, is based upon a construction of the deed, with which we do not agree.

[1-5] Deeds are to be construed in like manner as contracts, and the intent of the grantor arrived at, if possible, from the terms set forth in the instrument. Sherriff v. Sherriff, 32 Cal.App. 681, 163 P. 878; Firth v. Los Angeles Pacific Land Co., 28 Cal.App. 399, 152 P. 935; Marlin v. Robinson, 123 Cal.App. 373, 11 P.2d 70; sec. 1066, Civ.Code. A contract must be so interpreted as to give effect to the mutual intention of the parties. Sec. 1636, Civ.Code; Marlin v. Robinson, supra. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity. Sec. 1638, Civ.Code. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. Sec. 1641, Civ.Code. It is not the province of the court to alter a contract by construction, or to make a new contract for the parties, nor can the court rewrite the clear terms of a lawful contract. Wells v. Union Oil Co., 25 Cal.App. 2d 165, 76 P.2d 696; Grey v. Tubbs, 43 Cal. 359; Greene v. Vargas, 7 Cal.App.2d 127, 45 P.2d 347; Hill v. General Petroleum Corp., 128 Cal.App. 284, 16 P.2d 1035.

[6] Applying these rules of construction to the deed before us, we can only conclude that it was the intention of the grantors to convey 2½ per cent of the oil, gas, etc., recovered from the land they actually owned, which was an undivided half interest in 160 acres, and that they did not intend to convey that percentage of all the oil recovered from the entire tract, as held by the trial court. The grantors were in the position of having a deed before them to execute, which conveyed 2½ per cent of all oil, gas, etc., in certain land, including 160 acres of land in which they held only an undivided one-half interest. Before signing, they inserted in handwriting, the words "an undivided ½ of", before the description of the property in which they held only a one-half interest. This left the deed reading 2½ per cent of all oil, gas, etc., in an undivided one-half of the land in question. Their intention in so doing was quite clear. It was to limit the 2½ per cent royalty to the undivided interest which they owned, and exclude it as to the interest they did not own. If, as contended by respondents, they still intended to convey a 2½ per cent of the oil in the entire 160 acres of land, they were doing a meaningless and useless act. As to all of the other land described in the deed, they were only conveying a 2½ per cent interest, and it is not reasonable to suppose that they intended to convey 2½ per cent of the oil, etc., of the entire 160 acres of land, which would be the equivalent of 5 per cent of the one-half interest held by them.

[7, 8] When an appeal depends solely upon the construction to be given to the language of a contract, from the instrument itself, the reviewing court is called upon to determine the meaning thereof, as a matter of law. Under such circumstances, the rule on appeal, which precludes the appellate court from disturbing the determination of the trial court, where there is substantial evidence to support its conclusions, has no application. Texas Company v. Todd, 19 Cal.App.2d 174, 64 P.2d 1180; Wall v. Equitable Life Assur. Soc., 33 Cal.App.2d 112, 91 P.2d 145. Under the circumstances of this case, no evidence, other than the deed itself, having been received, the construction of the deed is a question of law for this court to determine on appeal.

Our conclusion is, that the only reasonable construction to be placed upon said deed is, that it only conveyed a 2½ per cent interest in the oil, gas, etc., in the property which was owned by the grantors, to-wit, an undivided one-half interest in the quarter section, and not in the entire 160 acres of land, and that the findings and judgment are not supported by the evidence.

The judgment appealed from is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.

43 Cal.App.2d 199

PEOPLE v. MARTIN.

Cr. 2168.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1941.

Appeal and error ⇐787

Where appellant's opening brief was long overdue under court rule and court granted appellant extension of 30 days to file opening brief but opening brief was not filed, notwithstanding lapse of over 4 months after filing of reporter's transcript and frequent requests from clerk's office and appellant's counsel did not appear in opposition to motion to dismiss appeal, appeal was presumably not prosecuted in good faith and was dismissed for lack of prosecution. Rules of the District Court of Appeal, rule 2, § 15; rule 5, § 1.

Appeal from Superior Court of City and County of San Francisco; Lile T. Jacks, Judge.

Proceeding by the People against Charles Martin. From an adverse judgment, defendant appeals.

Appeal dismissed for lack of prosecution.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PER CURIAM.

In November of 1940 this cause was placed on the calendar, and heard on November 25th. The appellant's opening brief was then long overdue under rule II, section 15. At that time, counsel for appellant stated that he was engaged in trial work and requested an extension. The court granted appellant thirty days to file the opening brief. In spite of frequent requests from the clerks' office, the brief has not yet been filed. Since the filing of the reporter's transcript on October 21, 1940, appellant has had over four months to file his brief. Under such circumstances, and counsel for appellant not appearing in opposition to the motion, this court is entitled to presume that the appeal has not been prosecuted in good faith. Under authority of rule V, section 1, the appeal is dismissed for lack of prosecution by appellant.

43 Cal.App.2d 126

PEOPLE v. ANDREW.

Cr. 605.

District Court of Appeal, Fourth District, California.

Feb. 17, 1941.

Rehearing Denied March 4, 1941.

1. Criminal law ⇐511(2)

Evidence tending to connect a defendant with commission of crime in corroboration of testimony of an accomplice is not required to establish precise facts testified to by accomplice, but, even though circumstantial and slight, is sufficient if it tends to connect accused with commission of offense. Pen. Code, § 1111.

2. Criminal law ⇐511(3)

Evidence corroborating testimony of accomplice may be circumstantial or gained from defendant's admissions, statements, testimony or conduct as a witness. Pen.Code, § 1111.

3. Criminal law ⇐511(2)

Evidence that defendant after being informed that accomplice had filed a complaint against him sent accomplice money each week for ten weeks, sought to see accomplice in jail, and sent accomplice communications requesting loyalty, tended to connect defendant with offense and was sufficient to corroborate testimony of accomplice against defendant who made inconsistent statements while testifying in his own behalf. Pen. Code, § 1111.

4. Indictment and information ⇐176

Where indictment charged that act of sex degeneracy took place on or about April 20, testimony that act occurred at about 4 o'clock in the morning of April 21 did not create a "fatal variance". Pen.Code, § 288a.

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

5. Criminal law ⇐823(1)

In prosecution for act of sex degeneracy alleged to have occurred on or about April 20, instruction requiring jury to find as basis for conviction that act was committed upon April 20 did not mislead jury and was not prejudicial, where in body of instruction and in other instructions court referred to time that offense was alleged to have been committed as on or about April 20. Pen. Code, § 288a.

6. Criminal law ⇐1172(1)

A court will not set aside a verdict and grant a new trial because of erroneous instruction in record where instruction was not calculated to mislead and jury was bound to find as it did.

7. Indictment and Information ⇐171

A variance between allegations and proof as to date on which offense was committed is not material unless defendant was misled in making his defense or placed in danger of being twice in jeopardy.

8. Criminal law ⇐822(12)

An instruction on corroboration of accomplices that corroborative evidence need not establish actual commission of offense nor extend to all details of accomplice's statement, but that it is sufficient if it tends to connect defendant with commission of offense, taken in connection with other instructions including one in language of statute relating to corroboration of accomplices, was sufficient. Pen.Code, § 1111.

9. Criminal law ⇐1038(3)

The defendant could not complain of instruction given upon subject of corroboration of accomplices where he had failed to request an instruction in language desired. Pen.Code, § 1111.

10. Criminal law ⇐564(5)

Testimony that crime was committed in certain town was sufficient to show place of offense, notwithstanding absence of testimony as to county in which town was located.

11. Criminal law ⇐304(6)

The court would take judicial notice of county in which town where crime was committed was located.

12. Criminal law ⇐1023(10)

An appeal does not lie from the sentence.

Appeal from Superior Court, Orange County; Harry C. Westover, Judge.

Don Andrew was convicted of the act of sex degeneracy covered by § 288a of the Penal Code, and he appealed from the judgment and from an order denying his motion for a new trial, and also took a purported appeal from the sentence.

Purported appeal from the sentence dismissed and the judgment and order affirmed.

George Stahlman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., of Los Angeles, for respondent.

MORAN, Justice pro tem.

Appellant was charged with having committed a violation of the provisions of section 288a of the Penal Code, with and upon the person of one Roy Jones, on or about the 20th day of April, 1940, in the County of Orange. Trial by jury was had and a verdict returned finding appellant guilty as charged. A motion for a new trial was made and denied. Notice of appeal was given from the order denying the motion for a new trial and from the judgment, and there is also a purported appeal from the sentence pronounced against appellant.

The grounds of appeal presented and argued in appellant's opening brief are (1) alleged insufficiency of the evidence to support the judgment, in that the evidence produced to corroborate the testimony of the accomplice was not sufficient to support the verdict of guilty returned against him; (2) that there is a variance between the proof of time of the occurrence of the act charged and the time it is alleged to have been committed in the information; (3) alleged error by the court in giving certain instructions, and (4) that no venue was proven at the trial.

The most important facts are briefly as follows:

Appellant was the owner of a house located at 1975 Diamond street, Laguna Beach, California. Appellant and said Roy Jones had been very close friends for several years, had lived together during various periods of time and appellant had at different times employed Jones to work for him and was so employing him at the time of the alleged commission of the offense mentioned.

Jones testified that on the evening of Saturday, April 20, 1940, he went to said house owned by appellant, and remained there that night, that at about 4 o'clock Sunday morning appellant came in, got in bed with him and that they then and there committed said alleged act of sex degeneracy with which appellant is charged. Jones further testified that he and appellant had committed the same act on numerous occasions prior to that time.

On April 28, 1940, said Roy Jones was arrested on another similar charge to that filed against appellant and was thereafter incarcerated in the Orange county jail. A day or two after Jones was taken into custody appellant was arrested on the charges filed against him herein. He was thereafter released from custody, presumably on bail, and remained at liberty until after the trial of this case. During this period of time that appellant was at liberty he sent Jones $5 a week for several weeks, the total amount, according to appellant's testimony, being $50; appellant also went to said county jail and endeavored to see Jones, but not being permitted to do so, then wrote or printed and sent to said jail for Jones three different communications, which read in part as follows: (1) "Roy Jones * * * Can't see you. They won't let me. Please don't testify against me." (2) "Ask if you can receive any books or magazines. Anything you wish will be sent. * * * Regardless of what the law does or tries to do it cannot break down those sincere friendships of which there are so few. One who does not stick by his friend in time of trouble is not worthy of the name. Just remember that. * * * When and if you are released and you wish to make a trip and are allowed to, a ticket will be provided by the company, to any point in the U. S. you wish to go. So don't worry about your condition when you get out. * * * A new and different venture will be invested in soon and part or all of the profits will be yours, so that you will be self-maintaining when you are free." (3) "It won't be so very long now and probably you will be out. It would be nice to take a vacation somewhere when you do, mountains or something, and you can if you want to." Appellant also took the witness stand at the trial of this case and testified in his own behalf.

[1] The first contention of appellant to be made on this appeal is that the evidence corroborating the testimony of said accomplice is insufficient to meet the requirements of section 1111 of the Penal Code. The rule as to what extent corroboration is necessary to connect or tend to connect a defendant with the commission of a crime appears in the case of People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356, where the court states: "The evidence tending to connect a defendant with the commission of the crime may be slight and, when standing by itself, entitled to but little consideration. * * * The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense."

[2] In the case of People v. King, 33 Cal.App.2d 538, at page 542, 92 P.2d 510, at page 512, the court stated: "Such corroboration may be circumstantial or gained from the defendant's admissions, statements, testimony or conduct as a witness. As the court said in People v. Todd, 9 Cal.App.2d 237, 49 P.2d 611, 614: 'Furthermore, evidence showing a consciousness of guilt, * * * may serve as a requisite corroborative circumstance * * *.'"

The information filed against appellant charged him with having on or about the 20th day of April, 1940, committed a violation of the provisions of section 288a of the Penal Code, with and upon the person of said Roy Jones.

[3] Aside from the testimony of said accomplice, we find the following facts and circumstances, among others, established by the corroborating evidence, most of them appearing in said communications and the testimony of appellant; Jones was arrested on or about April 28, 1940; appellant was arrested a day or two later; some one informed appellant that Jones had filed a complaint against him; appellant sent Jones $5 a week for ten weeks; appellant was released from custody a short time after his arrest and thereafter went to the jail to see Jones. He was not permitted to do so, so then sent Jones the three communications hereinbefore mentioned. Appellant while testifying in his own behalf made inconsistent statements and many replies to questions propounded to him that are not consistent with his innocence.

We conclude that the attempt of appellant to influence said accomplice not to testify against him, coupled with his promises of reward, and the other facts and circumstances, hereinbefore mentioned, that appear from the corroborating evidence, are not consistent with the theory

of innocence but strongly evidence a consciousness of guilt, and, standing alone, implicate the appellant and most conclusively tend to connect him with the commission of the crime; and consequently that said corroborating evidence more than meets the requirements of section 1111 of the Penal Code.

[4] Appellant contends that there is a fatal variance between the proof of the time of the occurrence of the act charged and the time that it is alleged to have been committed in the information; and, that the jury entirely disregarded the instructions of the court with reference thereto.

The court charged the jury as follows: "* * * and in this action or in this class of actions it is necessary that the defendant be found guilty of the specific act charged. In this action the offense is alleged to have taken place on or about the 20th day of April, 1940. In order for you to convict the defendant you must find beyond a reasonable doubt that the specific act alleged in the Information was committed by the defendant. Now, I mean by that, Ladies and Gentlemen of the Jury, that if you convict the defendant you must convict because you find that he committed the act charged upon the 20th day of April, 1940."

Appellant argues that the jury could not, therefore, convict appellant unless it found that he committed the act charged on the 20th day of April, 1940. There was no evidence that the offense was committed on April 20, 1940, the only evidence as to the time of the commission thereof being that of the accomplice, who testified that it occurred at about 4 o'clock, Sunday morning, April 21, 1940. The court was, therefore, in error in fixing the time as of "the 20th day of April, 1940" in the last part of this instruction.

In the body of this instruction the court charged the jury: "In this action the offense is alleged to have taken place on or about the 20th day of April, 1940." In all of the other instructions the court referred to the time that the offense was alleged to have been committed as "on or about the 20th day of April, 1940".

The information charged that the offense was committed "on or about the 20th day of April, 1940"; and the jury found the defendant guilty "as charged in the Information".

[5, 6] It is evident that the members of the jury were fully and properly instructed that the offense was alleged to have been committed "on or about the 20th day of April, 1940", and that said erroneous instruction did not tend to mislead them. A court will not set aside a verdict and grant a new trial, even if it should find in the record an erroneous instruction which was not calculated to mislead the jury and where the jury was bound to find as it did. People v. Salorse, 62 Cal. 139, 144.

The accomplice, Roy Jones, testified that said alleged offense was committed at about 4 o'clock, Sunday morning, April 21, 1940. This was the only evidence fixing the time of the commission of the offense. The appellant was, therefore, fully informed and knew the facts and circumstances surrounding their occurrence with sufficient definiteness as to time to meet the issue with a defense, if any defense thereto existed. People v. Barnett, 99 Cal.App. 409, 414, 278 P. 885.

The appellant testified that he was not at his home, where said offense was alleged to have been committed, on the night of Saturday, April 20, 1940, nor at any time thereafter prior to his arrest, which occurred more than a week later, and he also denied that he committed the act charged. He did not present any other evidence in support of this alibi.

[7] It is, therefore, quite apparent that he was not misled in making his defense. The testimony shows that the offense charged was committed in the early morning of the day following the date alleged in the information. In these circumstances, the variance as to date would not be material, unless defendant was misled in making his defense or placed in danger of being twice in jeopardy. People v. Becker, 140 Cal.App. 162, 164, 35 P.2d 196.

A full consideration of the proof in this case shows that there was not such a material variance.

[8] Appellant contends that there was no instruction given in this case whereby the jury was instructed that the corroborating testimony, standing alone or without the aid of the accomplice's testimony, must tend to connect the defendant with the commission of the crime; and cites the case of People v. Compton, 123 Cal. 403, 56 P. 44, in which the court held that corroborating testimony standing alone, or

without the aid of the accomplice's testimony, must tend to connect the defendant with the commission of the crime.

Appellant also contends that the court erred in giving the following instruction: "You are further instructed that to corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case it is sufficient."

The language set forth in the foregoing instruction is identical with the rule contained in the case of People v. Yeager, 194 Cal. 452, 472, 229 P. 40.

The court also gave another instruction in the exact language of section 1111 of the Penal Code; and, at the request of appellant, gave further instructions clearly showing that the testimony of the accomplice must be corroborated by independent evidence, that is evidence sufficient to connect the defendant with the charge.

We believe that the instructions given by the court upon corroborative evidence as hereinabove mentioned are more than adequate and do not come within the criticism of the case of People v. Compton, supra.

[9] Furthermore, appellant cannot now complain of the instructions given by the court upon corroborative evidence, for if he had wanted an instruction including the identical language contained in the case of People v. Compton, supra, he should have requested it. People v. Olds, 86 Cal.App. 130, 260 P. 321.

Appellant contends that there is no testimony as to where Laguna Beach is located either in Orange county or in any other county in the state of California.

[10, 11] There is evidence in the record that the crime was committed in Laguna Beach, and the court will take judicial cognizance of its location and could have properly instructed the jury that Laguna Beach was in Orange county. People v. Wright, 79 Cal.App. 523, 250 P. 204; People v. Christian, 48 Cal.App. 646, 649, 192 P. 182; People v. De Soto, 33 Cal. App.2d 478, 92 P.2d 466; and, In re Meisner, 30 Cal.App.2d 290, 291, 86 P.2d 124.

[12] An appeal does not lie from the sentence. People v. Valencia, 30 Cal.App. 2d 126, 86 P.2d 122.

After carefully reviewing the record of this case, we reach the conclusion that the conduct of the appellant, his testimony and the communications sent to the accomplice, sustain the sufficiency of the evidence to support the verdict as to corroborating circumstances, indicating consciousness of guilt, which standing alone tend to connect the appellant with the commission of the crime; that the fact that the crime appeared to have been committed in the early morning following the day charged in the information does not constitute a material variance for the reason that it comes within the charge of time set forth in the information "on or about the 20th day of April, 1940"; and that the appellant was not misled nor prejudiced by said erroneous instruction; that the trial court fully covered the law as to corroborating evidence by the instructions given upon that subject; and that the court can take judicial notice that Laguna Beach is in Orange county.

The purported appeal from the sentence is dismissed, and the judgment and order denying the motion for a new trial are and each is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

43 Cal.App.2d 134

PEOPLE v. LANG TRANSP. CORPORATION et al.

Civ. 6370.

District Court of Appeal, Third District, California.

Feb. 18, 1941.

1. Appeal and error ⇐910

In action by state and truck driver against transportation corporation and driver of its truck for damages to bridge which collapsed and injuries to individual plaintiff, where defendant corporation made no specific objection to state's evidence of overweight of such defendant's truck and load on ground that such question was not within issues applicable to state and did not request that jury be so advised, appellate court must assume on state's appeal from judgment on jury's verdicts for defendants that weight of such truck became issue in state's case, though directly set up as cause of bridge's collapse by individual plaintiff only.

2. Bridges ⇐27

In state's action against transportation corporation and driver of its truck for damages to bridge, burden was on plaintiff to prove overweight of truck and load, if overweight thereof was in issue.

3. Appeal and error ⇐1002

In state's action against transportation corporation and driver of its truck for damages to bridge, where plaintiff showed truck's registered gross weight on registration dates before and after accident and weight of load at time of accident, testimony of defendant corporation's witnesses that truck was lightened by about 1,000 pounds between first registration date and time of accident and that approximately 1,000 pounds was added to its weight after accident created conflict in evidence as to weight of truck at time of accident, thus removing such issue from appellate court's consideration on state's appeal from judgment on jury's verdicts for defendants.

4. Appeal and error ⇐1002

The jury's finding on fact issue, as to which evidence was substantially conflicting, will not be disturbed on appeal from judgment on jury's verdict.

5. Bridges ⇐27

In state's action against transportation corporation and driver of its truck for damages to bridge as alleged result of negligence in driving truck into bridge, causing it to collapse, testimony of director of public works on cross-examination as to complaints before accident by citizens of community in which bridge was located that bridge was dangerous and had been scene of numerous accidents was admissible to show notice to state of defective character of bridge.

6. Trial ⇐85

An inadmissible portion of document, remainder of which is admissible in evidence, cannot be reached by general objection to admission of entire document, but inadmissible portion must be specified.

7. Bridges ⇐27

In state's action for damages to bridge, alleged by defendants to have been in defective or dangerous condition, evidence of prior or subsequent accidents thereat is admissible to prove existence of such condition, actionable negligence, and notice to state of such condition.

8. Bridges ⇐27

In state's action against transportation corporation and driver of its truck for damages to bridge, evidence of prior accidents thereat, as shown by transcript of meeting between Director of Public Works and citizens of community in which bridge was located, was admissible to show notice to state of defective character of bridge, as alleged by defendants.

9. Bridges ⇐27

In state's action against transportation corporation and driver of its truck for damages to bridge, defendant corporation was properly permitted to show that long timbers were installed as wheel guards on bridge after accident in order to offset inference from plaintiff's previous evidence as to safe use of bridge by defendant corporation's trucks after accident that it was not unsafe for proper use.

10. Evidence ⇐539

A structural engineer, who had studied stresses and strains of various types of buildings, was qualified to testify as expert on question whether bridge of given dimensions and materials could support given load, though his actual experience in building bridges was limited to two rather small structures.

11. Evidence ⇐555

A structural engineer, testifying as expert on question whether bridge of given

dimensions and materials could support given load, was within his right in adopting findings of American Society for Testing Materials as basis for his conclusions as to strength and quality of certain specific metals used in bridge.

12. Appeal and error ⇐971(2)

The trial court's ruling as to expert witness' qualification will not be disturbed by appellate court, unless abuse of discretion appears.

13. Appeal and error ⇐237(2)

Where expert witness, basing his testimony as to certain matter partly on another expert's testimony, properly testified as to many other matters, a motion to strike out such derivative testimony was necessary to present question on appeal as to whether trial court erred in admitting it.

14. Trial ⇐93

Where expert witness, basing his testimony as to certain matter partly on another expert's testimony, properly testified as to many other matters, motion made at close of his testimony to strike out all of it was properly denied as too broad.

15. Appeal and error ⇐1050(1)

In state's action against transportation corporation and driver of its truck for damages to bridge, admission of defendants' bridge design expert's testimony, based on testimony of expert on bridge stresses, as to what load bridge could carry, did not warrant reversal of judgment on jury's verdict for defendants, even if erroneous.

16. Evidence ⇐555

In state's action against transportation corporation and driver of its truck for damages to bridge, a metallurgist's expert testimony as to test of iron in bridge to determine its fitness for its particular use was not inadmissible because of his use of tentative specifications of American Society for Testing Materials, in view of testimony that such specifications had become standard in year during which action was tried.

17. Bridges ⇐35

The state, negligently maintaining bridge, cannot avoid liability for resulting damages by proving violation of law by another.

18. Negligence ⇐82

As comparative negligence rule is not recognized in California, neither party to action for injuries proximately contributed to by both parties' negligence can recover damages.

19. Bridges ⇐27

In state's action against transportation corporation and driver of its truck for damages to bridge, state was entitled to presumption that defendant corporation would use due care in traversing bridge, but was also required to use due care in maintenance of bridge before it could recover.

20. Bridges ⇐27

In state's action against transportation corporation and driver of its truck for damages to bridge, giving of instruction that plaintiff, in maintaining bridge, was entitled, if itself not negligent, to rely on presumption that law would be obeyed, and hence was not required to anticipate danger which could come only from violation of law by another, was not error.

21. Bridges ⇐27

In state's action against transportation corporation and driver of its truck for damages to bridge, instruction that, before jury could find against defendants, it must find from evidence that they were negligent in operation of truck, that plaintiffs sustained damages as proximate result of such negligence, and that plaintiffs did not proximately contribute to its damage by its own negligence, was not erroneous as in effect shifting burden of proving contributory negligence, as such instruction merely defined issues and did not mislead or confuse the jury.

22. Trial ⇐295(1)

Instructions must be considered in their entirety and are unobjectionable as whole, if, as so considered, they state law of case fairly and clearly, though they may be amenable to just criticism in some respects by selecting isolated passages from single instructions.

23. Appeal and error ⇐1047(3)

In state's action for damages to bridge, trial court's refusal to strike out metallurgical expert's testimony on ground that he applied more severe bending tests than that authorized by specifications of testing standard *held* not error warranting reversal of judgment on jury's verdict for defendants, in view of evidence that, though tests were started with smaller pin than specified, pin of required diameter was used as soon as iron was started to bend so that it would hold in testing machine.

24. Appeal and error ⇐1050(1)

In state's action against transportation corporation and driver of its truck for damages to bridge, admission of testimony of one who lived near bridge as to identity of iron rods, taken from river after bridge collapsed, as parts of bridge, was not error warranting reversal of judgment on jury's verdict for defendants.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by the People and Charles Huron against the Lang Transportation Corporation and another for damages to a bridge and personal injuries to plaintiff individual. Judgment for defendants, and the People appeal.

Affirmed.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

Jerome D. Peters, of Chico, and Orville A. Schulenberg, of Los Angeles, for respondent.

PER CURIAM.

Plaintiff commenced an action against defendants for damages to a bridge, and from the judgment in favor of defendants this appeal is taken.

For many years prior to October 27, 1936, the date of the accident here in question, the state had maintained a wrought iron, through truss type bridge over the Sacramento river at Red Bluff, as part of its highway system. The bridge consisted of five 153-foot spans with a small pony truss at the easterly end, some 48 feet long. On the day in question the easterly 153-foot span collapsed and fell into the river, carrying with it two trucks and a trailer. One of the trucks was driven by Charles Huron and was owned by Contract Carriers Inc. The other, a gasoline truck and trailer, belonged to Lang Transportation Company, and was operated by Ray Williams.

The People of the state of California brought an action to recover the damage to the bridge; Charles Huron, one of the drivers, brought an action for personal injuries, and Contract Carriers Inc. an action for damage to its truck, all against the Lang Transportation Company and its driver. These several actions were consolidated for trial, but a mistrial was granted as to plaintiff Contract Carriers Inc. At the conclusion, verdicts were returned in favor of defendants in both cases. Plaintiff Huron has not appealed, and there is before us now an appeal only by the People from the judgment.

The complaint charged the defendants with the negligent driving of the truck into the bridge, causing it to collapse. The answer denied that allegation, and as separate defenses set up unavoidable accident and contributory negligence.

Upon appeal it is urged the verdict is against law in that the evidence showed the truck and its load exceeded the maximum weight permitted by law; in receiving evidence of prior accidents and complaints, and in admitting evidence of precautions taken after the accident and in giving certain instructions.

[1] In considering the first specification that the truck and load of the Lang Corporation was overweight, it appears from the complaint and answer and the opening statement on behalf of the People that the matter of overweight of the Lang truck was not directly an issue, the action being one for negligently driving the truck into the side of the bridge. It does appear, however, that in the action by Huron against the defendants, the overweight of the truck was directly set up as a cause of the collapse of the bridge, and evidence was introduced upon the consolidated trial by the state to establish the fact of overweight. Upon proper objections the court could have limited the applicability of that evidence to the plaintiff who asserted that particular cause of action, but our attention is directed to no specific objection by the Lang Corporation that the question of overweight was not within any of the issues applicable to the state, nor a request that the jury be so advised as to that matter, and we must assume that the weight of defendant's truck became an issue in the case. However, from our view of the case that appellant failed to prove the Lang trucks were overweight, that issue is not important.

[2] It is conceded that the gross weight of any vehicle with its load permitted on any public highway is 34,000 pounds, and the gross weight of any combination of vehicle is 68,000 pounds. The January, 1936, application for license for the Lang truck gave the unladen weight as 19,250 pounds. At the time of the accident the truck carried 2,590 gallons of gasoline, weighing 16,047.64 pounds, and if the truck

weighed 19,250 pounds at the time of the accident, the total weight was 35,297.64 pounds or 1,207 pounds in excess of the statutory limit. The trailer and its load was less than 34,000 pounds. If overweight was an issue, the burden of proving overweight was upon the state. In support of that issue plaintiff showed the registered gross weight of the truck in January, 1936, and January, 1937, as 19,250 pounds, and established the weight of the load at the time of the accident.

[3] As against this evidence the road superintendent of the Lang Corporation testified that subsequent to registration in January, 1936, and prior to the accident, the weight of the truck had been lightened "by about one thousand pounds" by a change from a Mack attachment with two sets of dual wheels to a lighter equipment known as a Fager attachment.

W. S. Carson, a driver for the Lang Corporation testified he knew the truck and trailer in question; that in April, 1936, about six months before the accident, the two sets of dual wheels were removed and one set of duals installed, and at the time of the accident, at the rear there was only one tire on each side, which change would lighten the truck "some thousand pounds". The manager of the Sacramento division testified that prior to the accident and after the registration in January, 1936, the six-wheel attachment was changed on the truck, making a difference of "approximately 1000 pounds" less in weight of the truck.

C. E. Slaughter, the road superintendent for defendant company testified that after the accident the gas motor was taken out and a Cummings Diesel engine substituted, adding approximately 1,000 pounds to the weight of the truck—thus explaining why the weight of the truck appeared unchanged at the registration periods of 1936 and 1937. This testimony, if accepted and believed by the jury, was sufficient to create a conflict as to the weight of the truck at the time of the accident, and removed that issue from our consideration.

Appellant still claims that accepting the testimony of the witnesses, one of whom testified the substitution of equipment reduced the weight of the truck "some thousand pounds", another said it made a difference of "approximately one thousand pounds", and another "about a thousand pounds", the truck was still 297 pounds in excess of the legal limit. To reach that conclusion, however, appellant must interpret the testimony of the witnesses as meaning a reduction of exactly one thousand pounds. This, however, was not the testimony, it was approximate, and may have been more or less than one thousand pounds. Whether, therefore, the issue of overweight was properly presented as an issue by the pleadings, or whether the court erred in not more particularly limiting the testimony to a particular party, is no longer material.

It is to be recalled, too, that there were two heavily laden trucks upon the bridge at the same time. Huron, the driver of the truck of the Contract Carriers Inc., testified he was traveling east and when he had reached the center of the bridge span in question the Lang truck was approaching him from the west. He immediately put on his brakes and had practically come to a stop. The Lang truck had also slowed down, and the two trucks were almost, if not completely, stopped as the cabs of the two trucks were about even with each other when the span collapsed. Inasmuch as the Contract Carriers' truck weighed about 25,000 pounds it cannot be said as a practical matter that the few hundred pounds overweight, if any, of the Lang truck caused the span to collapse.

[4] It is also contended the Lang truck struck the side of the bridge, thereby causing it to collapse. The testimony as to this point is sharply conflicting. The driver of the Lang truck denied at the trial striking the bridge, although an attempt was made to impeach that testimony by testimony that in the presence of others, he had said he did not hit the bridge. Huron also stated he heard the Lang truck strike the bridge and so stated to his employer and to an officer of the state highway patrol. There is some evidence of paint from the Lang truck on the supporting members of the bridge and friction marks on the side of the truck. Pieces of the guard rail were found wedged between the chassis and the truck when the truck was removed from the river bed, but these facts are evidence the jury could, and evidently did, consider in coming to their apparent conclusion the truck did not strike the bridge. There being a substantial conflict upon this issue, the finding of the jury will not be disturbed.

[5] Error is claimed in admitting testimony of complaints by citizens of Red Bluff at a time prior to the accident that the bridge was dangerous and that it had been the scene of numerous accidents. The fact of these complaints was brought out on the cross-examination of Mr. Earl Lee Kelly, then the director of public works, and was specifically offered and admitted to show notice to the state of the defective character of the bridge. Upon this theory the evidence was admissible. Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377.

[6] In the minutes of a meeting between the citizens of Red Bluff and the director there were certain statements contained therein referring to prior accidents, but this testimony was not admitted to prove such prior accidents or that the bridge was too narrow. It was merely a report of the proceedings of that meeting. No specific objection was made to these particular objectionable passages nor motions to strike, the only objection made being general and going to the report as a whole. The principle is well established that if a portion of a document is inadmissible in evidence, and the remainder admissible, the objectionable portion cannot be reached by a general objection to the entire document, but the inadmissible portion must be specified. Estate of DeLaveaga, 165 Cal. 607, 133 P. 307; Ballos v. Natural, 93 Cal.App. 601, 269 P. 972.

Certain cases such as Wilkerson v. City of El Monte, 17 Cal.App.2d 615, 62 P.2d 790, and Thompson v. Buffum, 17 Cal.App. 2d 401, 62 P.2d 171 are cited by appellant in support of its claim that evidence relating to prior accidents was inadmissible, but in those cases the evidence of prior accidents was offered to prove the dangerous condition of the place, rather than to show notice of the condition.

[7, 8] As pointed out in an annotation in 65 A.L.R. page 380 evidence of prior or subsequent accidents may be offered (1) to prove the existence of a defective or dangerous condition; (2) to prove actionable negligence, and (3) to prove notice, and states that the majority of the more recent and better reasoned cases support the rule that evidence of prior accidents is admissible to prove notice. That has long been the rule in California as shown by Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377, supra, and Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118. Here the fact of prior accidents was brought before the jury by the transcript of a meeting between Mr. Kelly and certain citizens of Red Bluff. No motion was made to strike this particular testimony, but aside from that we do not believe it was error to have received it for the purpose for which it was offered.

[9] It is also claimed the court erred in permitting it to be shown that wheel guards had been installed on the bridge after the accident, but appellant invited this testimony when it showed that after the accident certain Lang trucks had safely used the bridge. Upon the theory that long timbers installed as wheel guards had strengthened the bridge, a witness having so testified, respondent was properly permitted to show this to offset the inference of appellant that the bridge, having been subsequently used by Lang trucks without accident, was not unsafe to proper use.

[10-12] An exception is also taken to the ruling of the court in permitting Harvey A. Smith, a licensed structural engineer, to testify as an expert upon the stresses of the bridge. Mr. Smith recounted at some length his experience as a structural engineer. He attended the University of California, worked for about a year in the division of architecture, state of California, drawing and designing; had designed various structures and engaged in general practice as a structural designer, with offices in San Francisco. His entire experience as such structural engineer covered twenty-five or thirty years. It is true his actual experience in the building of bridges was limited to two rather small structures, but it would seem that a structural engineer who had studied stresses and strains of various types of building would be qualified to determine whether a bridge of given dimensions and materials could support a given load, and the trial court so ruled. Mr. Smith was asked as to the strength and quality of certain specific materials but he refused to commit himself as to specific metals stating that that was the province of a metallurgist and that he based his calculations upon certain recognized and established tables of strength of materials as accepted by the American Society for Testing Materials. No one can be a specialist or an expert in all fields, and the witness was within his right in adopting the findings of that recognized society as a basis for his conclusions.

The trial court held him qualified, and the ruling of that court upon the qualification of an expert will not be disturbed unless an abuse of discretion appears. People v. Hinkle, 64 Cal.App. 375, 221 P. 693, 27 Cal.Jur. 41 and cases there cited.

[13-15] Appellant also claims the court erred in permitting O. D. Smith, an expert on bridge design, to base his conclusions upon the testimony of the expert on stresses, Harvey A. Smith. Mr. O. D. Smith in testifying as to what the bridge could carry told the court he had not personally computed the stress on the bridge members but had used in his calculations the figures given by Mr. Harvey A. Smith. Appellant objects now upon the theory one expert cannot give testimony based upon the testimony of another expert. Howland v. Oakland Consolidated, etc., Co., 110 Cal. 513, 42 P. 983. Regardless of the applicability of this rule there seems to have been no objection to the testimony when given by Smith on his direct examination, and when it developed his findings were based in part upon the testimony of another expert, no motion was made to strike it out. Such a motion was necessary, for the witness properly testified as to many other matters. At the close of the testimony by Mr. Smith, a motion was made to strike out all of his testimony, but such a motion was too broad, and properly denied. Regardless of that fact, however, we cannot believe such testimony, even if erroneously admitted, could so affect the case as to constitute reversible error.

[16] The testimony and qualifications of George E. Dalbey, a metallurgist, called as an expert by respondent is also attacked, principally upon the ground that the iron in the bridge had been tested and judged by certain unapproved specifications of the American Society for Testing Materials, rather than the approved or adopted standards. Upon questioning by the court it developed that each year certain tentative specifications are issued by the society and at the end of that year they become the standard specifications for the following year. The witness used the tentative specifications of 1937, and in 1938, when this action was tried, the so-called tentative specifications used by the witness had become standard. We can see no error in thus adopting that standard. The sole purpose of the test was to determine the fitness or unfitness of the material for its particular use. Other objections are urged to the testimony and finding of Dalbey, but we cannot see in them sufficient gravity to justify a reversal, even if true.

[17-20] The court gave the following instruction as submitted by plaintiff, but inserted the italicized words, which appellant now contends were erroneous: "The plaintiff, the People of the State of California, in maintaining the bridge was entitled, *if itself not negligent,* to rely upon the presumption which the law makes, that the law will be obeyed and accordingly was not required to anticipate danger which could come only from a violation of law on the part of another." Appellants cite us to Rodkey v. City of Escondido, 8 Cal. 2d 685, 67 P.2d 1053, wherein plaintiff sought damages against the city for personal injuries sustained while driving over a storm drain. It appeared plaintiff was, at the time, traveling at an excessive rate of speed. The court held that a municipality was not bound to maintain its highways in a condition to preclude the possibility of injury or accident and was not an insurer of the safety of travelers upon its streets, but was obligated only to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner. This clearly and concisely expresses the rule, but we cannot see wherein it is not in accord with the principle of law set forth in the instruction. In the cited case it is held the driver would obey the law and slacken his speed in passing through a residential district where the storm drain was installed. If the storm drain had been installed upon the open road and the city had knowledge of its dangerous installation a different conclusion might have been reached. In the instant case there is no admitted negligence upon either the part of the state or of the truck company. Impliedly the jury found also that the Lang truck was not overweight, but in any event the state could not negligently maintain a bridge and then avoid liability by proving some violation of the law on the part of another. California does not recognize the rule of comparative negligence and if it were established that both parties were negligent, which negligence approximately contributed to the injury, neither could recover. The state was entitled to the presumption as pointed out in the Rodkey case, supra, that the truck company would use due care in traversing the bridge, but the state also was required to use due care in the main-

tenance of the bridge before it could recover. The instruction might well have been omitted under the facts here, but we see no error in its having been given.

[21] Appellant also claims the court gave an instruction that in effect shifted the burden of proof of contributory negligence. The instruction told the jury that before it could find against the defendants it must find from the evidence, first, that the defendants were negligent in the operation of its truck; secondly, that by reason of such negligence and as a proximate result thereof, plaintiff sustained damages, and thirdly, that at the time and place in question plaintiff did not proximately contribute to its damage by its own negligence. This instruction did not stand alone. The jury was correctly instructed as to the meaning and effect of preponderance of evidence and the burden of proof. The jury were clearly told that contributory negligence was an affirmative defense, and that the burden of proving contributory negligence was upon the defendants. The instruction complained of was not attempting to discuss the burden of proof or preponderance of evidence but was merely defining the issues. We cannot believe the jury was misled or confused.

[22] As said in Hamilton v. Hammond Lumber Co., 13 Cal.App.2d 461, 56 P.2d 1257, 1258: "The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism."

What has just been said is also applicable to certain formula instructions, which standing alone might be subject to criticism; but as a whole the jury was fully and fairly instructed, and no miscarriage of justice has resulted for such errors, if any.

[23, 24] Other citations of error are called to our attention. It is claimed the court erred in not striking out the testimony of Dalbey, the expert in metallurgy, because he applied a more severe bending test than that authorized by the specifications of the testing standard. It appears, however, that these tests of bending were started with a smaller pin than specified, but as soon as the iron was started to bend so it would hold in the testing machine, a pin of the required diameter was used. This deviation would not appear to nullify the test, and by bringing the fact of the more severe test before the jury, upon cross-examination, we can assume the jury would take that fact into their deliberations. The refusal to strike out the test was at least not reversible error. The same conclusion can be reached as to the testimony of Mr. Stauffer who lived near the bridge, and was asked to identify certain iron rods taken from the river after the collapse, as parts of the bridge.

This case was strenuously tried by counsel on both sides, and involved many issues and called for considerable technical information. There may have been testimony admitted that could have been omitted, but on the whole, in view of the entire record, the jury seems to have reached a proper determination on the question of responsibility.

The judgment is affirmed.



43 Cal.App.2d 150

JACKSON v. THOMPSON et al.

Civ. 12449.

District Court of Appeal, Second District, Division 1, California.

Feb. 19, 1941.

1. Appeal and error ⇐622

Defendants' "Notice of Ruling" which was served one day after oral announcement by court to parties that court was dismissing action for lack of prosecution, and which was served almost a week before court's order was formally entered in the minutes, was a nullity, and time to file a request for transcript in connection with appeal did not commence to run. Code Civ.Proc. §§ 583, 953a, 953d.

2. Appeal and error ⇐347(2)

Though an order of dismissal under the statute dealing with dismissal of actions for want of prosecution is not a "judgment" in the strict sense of the word, it is nevertheless treated as such for purposes of appeal, and therefore the time for appeal from such

order of dismissal runs from the date of entry of such minute order. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

3. Appeal and error ⇐134(1)

An appeal cannnot be taken from an order or judgment until it is formally entered in the minutes.

4. Judgment ⇐278

The entry of court's oral order in the court clerk's "rough minutes" is not an "official record" of any character, and until official entry has been made in the minutes of the court, the order remains but a mere oral announcement.

See Words and Phrases, Permanent Edition, for all other definitions of "Official Record".

5. Appeal and error ⇐348(2)

The directions of the statute requiring that notice of entry of judgment or order granting a new trial, required by statute dealing with bill of exceptions, by statute dealing with motion for new trial, or by statute dealing with appeals from superior court, must be in writing unless there is a waiver, are strictly enforced. Code Civ. Proc. § 953d.

6. Appeal and error ⇐348(2)

The actual presence of counsel in court at time order or judgment is made does not excuse compliance with requirement for written notice under statute dealing with notice of entry of judgment or order as required by statute dealing with appeals from superior court, unless such written notice be waived in writing or by oral stipulation entered in the minutes. Code Civ.Proc. § 953d.

7. Appeal and error ⇐348(1)

Where defendants' "Notice of Ruling" was served prior to entry on or about May 27th in official minutes of court of order for dismissal of action for lack of prosecution, plaintiff's request on June 10th for transcript was timely, since "Notice of Ruling" was premature and ineffective. Code Civ. Proc. §§ 583, 953a, 953d.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Duncan P. Jackson against Margaret C. Thompson and others. From an order striking from the records and files of the action a "Notice and Request for Transcript" filed therein by plaintiff in connection with an appeal from an order of dismissal, the plaintiff appeals.

Order reversed.

T. H. Canfield, of Santa Barbara, for appellant.

Fred A. Shaeffer, of Santa Maria, for respondents.

WHITE, Justice.

This is an appeal by plaintiff from an order of the superior court of Santa Barbara county striking from the records and files of the action a "Notice and Request for Transcript" filed therein by such plaintiff in connection with his appeal from an order of dismissal made in said action.

There is no dispute concerning the factual situation with which we are here confronted. This action was instituted in the superior court, and during the month of May, 1939, was pending therein. On May 15, 1939, pursuant to motion theretofore duly made by defendants, and in the presence of counsel for all parties, the court orally announced from the bench its order granting said motion and pursuant thereto dismissing the action for lack of prosecution under the provisions of section 583 of the Code of Civil Procedure. The clerk thereupon entered such oral order of the court in the court clerk's "rough minutes", but such order was not formally entered in the minutes of the court until approximately one week later than the date of its rendition. However, on May 16, which was the day following the date upon which the oral order of dismissal was made, defendants' counsel served upon plaintiff's attorney a "Notice of Ruling", evidently intended to be a notice of the entry of the order or judgment of dismissal. After receiving such notice, plaintiff's attorney examined the minute book of the superior court and found that such order of dismissal had not been entered. It might here be noted that no other notice of entry of the order or judgment of dismissal was ever served upon plaintiff. On June 10, 1939, plaintiff filed in the superior court his "Notice of Appeal" from the order of dismissal and on the same day he also filed a "Notice and Request for Transcript". It was this last-named document which was

stricken from the files by the court, and which order forms the basis of this appeal.

[1] Appellant contends that pursuant to the provisions of sections 953a and 953d of the Code of Civil Procedure his time to file a request for transcript did not commence to run until notice of the entry of the dismissal order had been served upon him; and that such notice could not legally be served upon him until the dismissal order made by the superior court had been formally entered in the minutes of the court. In this claim appellant must be upheld. The so-called "Notice of Ruling", having been served on May 16, one day after the oral ruling on the motion to dismiss, but several days prior to the formal entry of such order in the minutes of the court, was a nullity and of no legal effect.

[2] It has been held that an order of dismissal under section 583 of the Code of Civil Procedure, such as the one with which we are here concerned, while not a judgment in the strict sense of the word, is nevertheless treated as such for the purposes of appeal, and therefore the time for appeal from such order of dismissal runs from the date of *entry* of such minute order. Southern Pac. R. R. Co. v. Willett, 216 Cal. 387, 390, 14 P.2d 526.

[3, 4] That no appeal can be taken from an order or judgment until it is formally entered in the minutes is and for a long time has been the unquestioned law of this state. Commencing with the case of Brownell v. Superior Court, 157 Cal. 703, 109 P. 91, it has been uniformly held that the entry of the court's oral order in the court clerk's "rough minutes" is not an official record of any character, and until such official entry has been made in the minutes of the court the order granted remains but a mere oral announcement. It is uncontradicted in the instant case that such official entry of the oral order did not occur until several days after the "Notice of Ruling" was served upon plaintiff's counsel.

[5-7] Since the enactment of section 953d of the Code of Civil Procedure in 1927, the strictness with which its statutory directions are enforced has been emphasized in numerous cases. For instance, in this connection it has been held that the actual presence of counsel in court at the time the order or judgment is made does not excuse compliance with the requirement for written notice unless such written notice be waived in writing or by oral stipulation entered in the minutes. Savage v. Superior Court, 36 Cal.App.2d 521, 523, 524, 97 P.2d 990. Since the purported "Notice of Ruling" was served prior to the entry of the dismissal order in the official minutes of the court, it was premature and of no force or effect. Therefore plaintiff's request for a transcript on appeal was timely.

From the foregoing it follows that the order from which this appeal is taken must be reversed. It is so ordered.

We concur: YORK, P. J.; DORAN, J.



43 Cal.App.2d 110

PEOPLE v. SMITH.

Cr. 3416.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1941.

Hearing Denied March 17, 1941.

1. Larceny ⇐65

Evidence, though circumstantial, was sufficient to sustain conviction of grand theft of automobiles.

2. Criminal law ⇐1159(2)

To determine the weight of the evidence is not the function of the District Court of Appeal, and its duty is to decide only whether the evidence is such as to warrant an inference of guilt.

3. Criminal law ⇐1159(2)

Before the District Court of Appeal can set aside a judgment of conviction, it must be made clearly to appear that on no hypothesis is there sufficient substantial evidence to support the conclusion reached by the trial court.

4. Criminal law ⇐1159(2)

Whether evidence constitutes proof of the fact found is for the jury's determination or the determination of the court sitting without a jury.

5. Criminal law ⇐1159(2)

The finding of a jury or of a court sitting without a jury will prevail unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice.

6. Larceny ⇐58

In prosecution for grand theft of automobiles, evidence was sufficient to establish the identity of parts taken from automobiles after thefts had been proved.

7. Larceny ⇐58

The identification of stolen property by its owner is specifically made, where the owner points out the identification marks and knows that the property is his own.

8. Criminal law ⇐693

Assignment of error as to the trial court's ruling in requiring defendant in grand theft prosecution to answer certain questions asked him on cross-examination relative to his past livelihood and the origin of his moneys would be disregarded, where the questions relative to the origin of his moneys were answered before the objection.

9. Witnesses ⇐277(3)

In prosecution for the theft of two automobiles, wherein defendant denied that he had stolen the two automobiles, district attorney was entitled to cross-examine defendant as to number of automobiles and kinds of automobiles defendant had fixed up for sale. Pen.Code, § 1323.

10. Witnesses ⇐277(4)

After defendant denied on direct examination that he stole automobiles as charged, it was proper for the district attorney to cross-examine the defendant as to all matters about which he was examined in chief. Pen.Code, § 1323.

11. Witnesses ⇐277(3)

Any question which has the tendency to elicit from a defendant the whole truth about any matter on which he has been examined in chief, or which would explain, qualify, or destroy the force of his direct testimony, is legitimate cross-examination. Pen.Code, § 1323.

12. Witnesses ⇐277(3)

In prosecution for theft of automobiles, it was proper for the district attorney to develop any details which would be reasonably calculated to show that defendant's denial in chief that he stole the automobiles was not true. Pen.Code, § 1323.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Urban U. Smith was convicted on two counts of grand theft, and he appeals.

Affirmed.

William J. F. Brown, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant, having been convicted on two counts of grand theft by the court without a jury, takes this appeal from the judgments and from the order denying motion for a new trial.

As grounds for reversal, he urges (1) that the evidence is insufficient to support the judgment and (2) that the court erred in overruling certain objections to questions propounded to appellant upon his cross-examination.

In December, 1939, defendant contacted one Harry Chudacoff to whom he disclosed a desire to purchase six or seven wrecked cars. In the later part of April, 1940, Chudacoff arranged for the purchase of a 1939 Dodge coupe from the Aetna Insurance Company at a price of $185, and he was paid by appellant the sum of $10 for his services in effecting the purchase. The car while going at a speed of 60 miles per hour had hit a telephone pole. Its front end was crushed, the radiator, the shell, grill and entire assembly, both front fenders, the hood assembly, the frame, knee action, right front wheel, hub, tire, tube, steering gear assembly, carburetor, fan, pump assembly, manifold and right door, windshield glasses and door glasses were broken.

Count 1 of the information accused defendant of stealing the car of one John E. Canaday. On May 29, the police discovered a dark blue Dodge de luxe coupe stripped and abandoned at 21st and Harvard boulevard. This was the car stolen from Canaday, who had parked it at 6th and Normandie, two miles distant from the place where it was found by the police. When last seen by Canaday on Sunday, the 26th of May, his coupe was in good condition, contained a Motorola radio and standard equipment. When he saw it on the following Wednesday, it had been stripped of its hood, right door, radiator, carburetor, radio, three hub caps and the front grill. The missing door had been replaced by an old one and wired in its place; the front grill and hood had

been replaced with an old part, and substituted parts had been put on Canaday's car from different cars which were all of different colors.

In the early part of June, Canaday at the request of the police called at the garage where they stated his car was impounded. He recognized it as his own car by the license number, certain private papers of his own and other distinguishing features. About ten days later Canaday called at the same shop where he inspected another 1939 Dodge coupe. He found upon it the parts which he definitely identified as those taken from his own car. His Motorola radio had been installed in this second car and was in the same condition as it was just before his own car disappeared. The right door of his car, which had been installed in the rebuilt Dodge, had been painted a different color but beneath the paint the color of his own car was readily distinguished. By reason of his familiarity with the parts of his own coupe, he recognized all the parts which had been taken from his car and installed in the car inspected by him on the later occasion.

Count 2 of the information accused the defendant of the theft of a four-door Dodge sedan, belonging to one Wilson Evans, on or about June 1, 1940. At the time the Evans car disappeared, it was standing on the parking lot of the Hollywood race track. Its color was light blue, or quadrant gray. It was equipped with Goodyear Lifeguard tires and tubes, the valve tips of which were painted blue. The car was also equipped with a Philco radio. When it was found by the police on June 4th, at a garage at 1015 West Washington, the glass was broken from the front door, the radio and cigarette lighter and the spare tire had all been removed; the car was standing over a pit in the garage. The pan from beneath its motor had been removed and in its place a wrecked pan which had been taken from appellant's wrecked car had been attached. The drive shaft of the Evans car had been supplanted with a wrecked drive shaft. When the investigating officers arrived at the premises mentioned, appellant was working on the Dodge coupe which he had purchased from Chudacoff. He was then about 50 feet distant from the Evans car. Dressed in clothing such as is usually worn by garage mechanics, defendant stated that he was repairing and fixing up the wrecked car which he had purchased. A right-hand door had been installed on his car in place of the original door which had been torn off in the collision prior to his purchase. The new door, recently painted over, originally had the color of the Canaday car. The radiator grill was painted gray on the outside but its inside was still the color of the Canaday car. The Motorola radio had been taken from the Canaday car and installed by appellant in his car. The Philco radio was identified by Evans as that which had belonged in his Dodge and was now found in the rear of appellant's car. Also, in the back of appellant's newly built Dodge was found the spare tire, tube and wheel from Evans' car.

Appellant stated to the officers that he had fixed up the old radiator shell and the old door; that the hood had been wrecked; that he had to get a new one. Thereupon, witness Belknap, who was connected with the automobile theft bureau, approached the officers and appellant, bringing a gray hood from the front end of the garage. The officers scraped the paint and found beneath the color of the Canaday car. Appellant stated to the officers that he did not remember where he had got the hood or the Motorola or the Philco radio, or the floorboard lying beside his car. Taking the ignition key from appellant's car, the officers found it to fit the lock in a wrecked door lying some distance from appellant's car. Defendant did not remember where he got the door. It was thereupon observed that the lock and handle had been removed from the door recently installed in appellant's car. The three hub caps from the Canaday car were installed on appellant's car. One of the wheels on appellant's car had the same color as the Evans car, while the tip of the tube had the same light blue color as those on the tips of the valve stems of the tubes of Evans' car.

Appellant stated to the officers that he was in charge of the garage. Invoices were found showing appellant had given his address as that of the shop where he was found.

At the trial defendant testified that he had his car stored at the Washington boulevard address but denied that it was his place of business or that he paid the rent or that he had a lease upon the premises. He denied that he had been in the vicinity from which the vehicles had been taken and denied the thefts. He testified he had purchased the door and other accessories from a salesman who called upon him, but he

produced no invoices and had no memory of the salesman's name.

[1-5] While the evidence is purely circumstantial, it might have convinced a trier of fact of appellant's guilt as readily as the direct testimony of a Christian martyr that he had witnessed the taking and stripping of the two cars. Even though it had not been so convincing as it appears to us, it is not our function to determine the weight of the evidence. Our duty is to decide only whether the evidence is such that it can be held sufficient to warrant the inference of guilt. Before we can set aside a judgment of conviction for a crime "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below". People v. Newland, 15 Cal.2d 678, 104 P.2d 778, 780. Whether the evidence constitutes proof of the fact found is for the jury's determination. Such a finding will prevail "unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice". People v. Wong Chong Suey, 110 Cal. 117, 121, 42 P. 420, 421.

[6, 7] The evidence was sufficient to establish the identity of the parts taken from the Canaday and Wilson cars after the thefts had been proved. People v. Farrell, 67 Cal.App. 128, 227 P. 210. The identification of stolen property by its owner is specifically made where the owner pointed out the identification marks and knows that the property is his own. People v. Miller, 45 Cal.App. 494, 188 P. 52; People v. McGill, 82 Cal.App. 98, 255 P. 261.

The corpus delicti was established as to the crime of theft of both the Canaday and Evans cars. They were surreptitiously removed from the place where they were parked. They were both valuable properties. When found they had been stripped not only of valuable attachments but even of such parts as a door, hood, radiator, etc. The trial judge had only to determine whether the evidence was sufficient to show that defendant participated in the commission of the crime. Since one of the cars stood in the very garage of which appellant said he was the manager and where he was at work, and since, in addition, he was in possession of parts from both of the cars, the evidence abundantly supports the judgment.

Appellant's contention that he was never shown to have been in possession of either of the stolen cars is frivolous for two reasons. In the first place the Evans car was on the premises where appellant was working on his own car at the time of his arrest, and the accessories and parts from both cars were at the time being installed by appellant in his own car and had been painted with the manifest intention of concealing their identity. No one else at the garage asserted any right to the Evans car. No one else was pointed out as having taken any parts from either car; only appellant with his "improbable explanation" (People v. Melson, 84 Cal.App. 10, 257 P. 555) stood there with the stolen parts and accessories in his very hands.

[8] Appellant assigns as error the rulings of the court in requiring the defendant to answer certain questions asked him on cross-examination relative to his past livelihood and the origin of his monies. But as the questions relative to the origin of his monies were answered before the objection, it must be disregarded.

[9-12] The inquiry as to the number of cars and kinds of cars appellant had fixed up for sale was proper cross-examination. Merely because defendant denied he had stolen the two cars in question was not conclusive against the district attorney who had introduced sufficient proof of such nature as to convince the defendant that he should take the witness stand. After giving his denial on direct examination, it was proper to cross-examine him as to all matters about which he was examined in chief. Penal Code, section 1323. By the code section cited, the court is divested of any discretion in allowing a range of cross-examination beyond the matters brought out upon direct examination. "Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain or qualify or destroy the force of his direct testimony * * * would be legitimate cross-examination". People v. Gallagher, 100 Cal. 466, 35 P. 80, 83. Defendant having testified that he had a businessman's coupe stored in the Washington boulevard garage, having denied that he had any lease on the premises and having denied that he told the police officer that he was the manager of the garage, having denied that he had stolen the cars or that he took parts from them, it was correct practice to develop any details which would be reasonably calculat-

ed to show that his denial in chief was not truth.

The judgments and the order are affirmed.

We concur: McCOMB, J.; WOOD, J.



43 Cal.App.2d 230

STANDARD PIPE & SUPPLY CO. v. MARVIN et al.

SCHUERMAN v. SAME.

Civ. 11568.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1941.

1. Mines and minerals ⇐112(2)

That attempt to bring in oil by drilling well was unsuccessful did not render well or surrounding land immune from mechanics' liens for drilling well, as against contention that there was not involved a "work of improvement" within statute. Code Civ. Proc. § 1183.

See Words and Phrases, Permanent Edition, for all other definitions of "Work of Improvement".

2. Appeal and error ⇐1071(3)

Where under the evidence and findings it was clear that plaintiffs furnished materials for work done in the exploration for oil on a 13-acre tract being worked as a single development under a community lease that finding that the entire tract was necessary for the convenient use and occupation of the dry hole was not supported by the evidence was immaterial, since plaintiffs' liens were for materials furnished to be used and consumed in development of "real property worked as a mine" within statute, and such liens extended to the entire tract. Code Civ. Proc. § 1183.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Property Worked as a Mine".

3. Mines and minerals ⇐112(3)

Where materials are furnished for work done in the exploration for oil on a tract which was being worked by lessee as a single development under a community lease covering the entire tract, no question as to the extent of land required for the convenient use and occupation of the structure or improvement is presented. Code Civ.Proc. § 1183.

4. Mines and minerals ⇐54½

Where undivided one-third interest in tract was subject to mortgage which had been recorded prior to execution of community lease covering tract and prior to any work done, or materials furnished, the lien of the mortgagee was superior to mechanics' lien for materials furnished in exploration for oil. Code Civ.Proc. § 1186.

Appeal from the Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Separate actions by the Standard Pipe & Supply Company and by Emma Schuerman, etc., against L. Jean Marvin and others, to foreclose mechanics' liens which were consolidated. From judgments for plaintiffs, defendant Bertrand O. Woods and others appeal.

Judgments reversed with directions.

Walter W. Hoye, of Los Angeles, for appellants.

R. Dechter and B. L. Hoyt, both of Los Angeles, for respondents.

SPENCE, Justice.

This is an appeal by defendants from a judgment entered in consolidated actions foreclosing mechanics' liens.

Defendants Woods were the owners of a portion of a 13-acre tract upon which an oil well had been partially drilled. Defendants Woods and defendants Capser were the owners in common of the remaining portion of said 13-acre tract. Said defendants, as lessors, thereafter entered into what is commonly known as a community lease with defendant Marvin, as lessee, granting to said lessee the exclusive right to possession of said 13-acre tract for the purpose of exploring for oil and drilling oil wells thereon. Under the terms of said lease, defendants Woods and defendants Capser were to participate equally in the

landowners' share of the oil produced irrespective of the place on said tract where producing wells might be located. The lessee entered upon the premises under said lease and commenced deepening the partially drilled well thereon with the knowledge and consent of defendants. Plaintiffs furnished materials used in said work and the lessee failed to pay for said materials. Oil was not produced from said well and the lessee ceased the performance of work and filed a notice of cessation of labor. Plaintiffs filed liens on said 13-acre tract and brought these actions to foreclose said liens. The cause was tried upon stipulated facts and the uncontradicted evidence of a single witness and judgment was entered in favor of plaintiffs.

[1] Defendants first contend that "The 'dry hole' involved herein is not a 'work of improvement' within the purview of section 1183, Code of Civil Procedure; hence neither said hole nor any of the surrounding land is subject to mechanics' liens for the drilling thereof." We are of the opinion that this contention is without merit and that it may be disposed of upon the authority of Western Well Works v. California Farms Company, 60 Cal.App. 749, 214 P. 491.

[2, 3] Defendants further contend that "The finding of the trial court that the whole of the 13-acre tract described in the consolidated decree herein is necessary for 'the convenient use and occupation' of the 'dry hole', 'found' to have resulted from the deepening of the existing dry hole on said premises, is not supported by the evidence." In our opinion the finding at which this contention is directed is an immaterial finding in this case. Under the evidence and findings, it is clear that the plaintiffs furnished materials for work done in the exploration for oil on the 13-acre tract, which tract was being worked by the lessee as a single development under a community lease covering the entire tract. The liens of plaintiffs were therefore liens for materials furnished to be used and consumed in the development of "real property worked as a mine" within the meaning of the second paragraph of section 1183 of the Code of Civil Procedure and said liens extended to the entire tract. Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 84 P. 47, 113 Am.St.Rep. 308. As was said in California Corrugated Co. v. Stewart, 215 Cal. 120, at page 122, 8 P.2d 1013, at page 1014, "In such cases no question of fact as to the extent of land required for the convenient use and occupation of structure or improvement is presented."

[4] The only further contention of defendants which requires consideration is the contention that "The trial court erred in holding that the claimed mechanics' liens of respondents are senior and superior to the lien of the mortgage of appellants Capser." In support of said contention, defendants cite and rely upon section 1186 of the Code of Civil Procedure. On the trial the parties stipulated that the defendants Capser were the owners of a valid mortgage covering the undivided one-third interest of defendants Woods in and to a portion of the 13-acre tract and that said mortgage had been executed and recorded prior to the execution of the community lease and prior to the time that any work had been commenced or any materials had been furnished for the redrilling in question. The trial court failed to make any finding on this subject but decreed that the liens of plaintiffs were superior to all claims of the several defendants. Plaintiffs concede that the trial court erred in decreeing that plaintiffs' liens were superior to the lien of said mortgage and this concession is in accord with our views. It therefore appears appropriate to reverse the judgment with directions.

The judgment is reversed with directions to the trial court to amend its findings and judgment so that the portions thereof relating to the question of the priority of the mortgage of defendants Capser over the liens of plaintiffs will conform to the stipulation entered into by the parties upon the trial and to the views herein expressed. The parties will bear their own costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

43 Cal.App.2d 211

BALLF v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11189.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1941.

Rehearing Denied March 27, 1941.

Hearing Denied April 24, 1941.

1. Municipal corporations ⇐217(3)

Refusal of the Civil Service Commission of the City and County of San Francisco to certify name of the person standing highest on the list of eligibles for position of general clerk-stenographer in the office of the board of supervisors was in violation of charter imposing imperative duty upon the commission to certify name of person ranking highest on the current list of eligibles for position to be filled.

2. Municipal corporations ⇐217(3)

Where requisition was filed with the Civil Service Commission of City and County of San Francisco for a person to fill position, the commission was required to certify the name of the person ranking highest on the current list of eligibles, and its failure to do so, and the certification of another person, were not justified by provision of rule of commission relating to transfers from one position to another.

3. Municipal corporations ⇐216(2)

The rule-making power vested by a city charter in a municipal agency must be exercised in conformity with all charter provisions, and any rule adopted by such agency which has the effect of opening the way to circumvent or nullify charter provision is to that extent inoperative and void.

4. Mandamus ⇐178

In mandamus proceeding to require Civil Service Commission of City and County of San Francisco to certify the name of person standing highest on current list of eligibles for a permanent position, judgment relieving such person of the necessity of passing a probationary period in the position was error as contrary to charter providing that any appointment to a permanent position shall be on probation for a period of six months.

5. Mandamus ⇐178

In mandamus proceeding to require Civil Service Commission of City and County of San Francisco to certify the name of the person standing highest on current list of eligibles for a permanent position, date of seniority should be fixed as of the date such person was entitled to have his name certified.

6. Mandamus ⇐178

In mandamus proceeding to require Civil Service Commission of City and County of San Francisco to certify the name of person standing highest on current list of eligibles for position with board of supervisors, judgment properly contained provision that such person be granted a leave of absence without pay from position he was then occupying in recorder's office while serving probationary period in new position.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Proceeding in mandamus by Harry A. Ballf against the Civil Service Commission of the City and County of San Francisco and others, to compel the defendant to certify plaintiff's name to the Board of Supervisors as appointee for the position of general clerk-stenographer in the office of such board. From a judgment for plaintiff, the defendants appeal.

Judgment modified and as modified affirmed.

John J. O'Toole, City Atty., and Edmond P. Bergerot and Thomas P. Slevin, Deputies City Atty., all of San Francisco (L. R. Bunney, of San Francisco, of counsel), for appellants.

Harry A. Ballf, in pro. per.

KNIGHT, Justice.

This proceeding in mandamus was instituted in the superior court by the plaintiff, Harry A. Ballf, to compel the defendants, Civil Service Commission of San Francisco and the members thereof, to certify his name to the board of supervisors as appointee for the position of "General Clerk-Stenographer" in the office of said board. Judgment was entered in his favor, and the defendants appeal.

The controversy arises out of the following situation: In March, 1938, Fred Moran resigned as bond and ordinance clerk of the board of supervisors; and shortly afterward Robert J. Dolan, then occupying the position of general clerk-stenographer

(B-408) for a probationary period in the office of the purchaser of supplies, requested transfer to the position left vacant by Moran's resignation. The request was denied, for the reason, among others, that the position sought by him with said board was of a classification different from the one he then held. During the following month, April, 1938, proceedings were initiated to reclassify the position in the office of said board as general clerk-stenographer (B-408), the same classification as the one then held by Dolan. The reclassification became effective on July 1, 1938, the operative date of the salary ordinance of the city for the year 1938–39; and on July 17, 1938, Dolan renewed his application for transfer to said position.

Section 142 of the charter provides that with exceptions not here pertinent "All positions in all departments and offices of the city and county * * * shall be included in the classified civil service of the city and county, and shall be filled from lists of eligibles prepared by the civil service commission * * *"; and section 148 of the charter provides: "Whenever a position controlled by the civil service provisions of this charter is to be filled, the appointing officer shall make a requisition to the civil service commission for a person to fill it. *Thereupon, the commission shall certify to the appointing officer the name and address of the person standing highest on the list of eligibles for such position.* * * *" (Italics ours.) In conformity with the requirements of the latter section the board of supervisors on August 19, 1938, filed a requisition with the commission for a person to fill the newly-created position of general clerk-stenographer (B-408), the appointee to report for duty on August 29, 1938. The respondent Ballf, then occupying a position as general clerk-typist (B-512) in the recorder's office, stood at the top of the current list of eligibles for the position of general clerk-stenographer (B-408); whereas Dolan stood ninth on the same list; and in furtherance of his efforts to secure the position with the board of supervisors, Dolan obtained waivers from all those ranking above him on said eligibility list except Ballf, who, desiring the position himself, declined to give such waiver. Nevertheless, the commission refused to certify Ballf's name to the board of supervisors, and on September 2, 1938, transferred Dolan to the position in question.

[1] We agree with the conclusion reached by the trial court that the action of the commission in so doing was violative of the provisions of said section 148 of the charter above quoted, which imposes the imperative duty upon the commission to certify the name of the person ranking highest on the current list of eligibles for the position to be filled. In fact, appellants themselves concede that such is the mandate of the charter, for in their brief they say: "In most jurisdictions wherein the merit system is in effect the appointing officer may select one of the three highest eligibles. This gives the appointing officer a choice. In this jurisdiction the appointing officer must take the highest eligible." But in justification of their action in disregarding the current list of eligibles and giving Dolan priority over Ballf, appellants rely on the opening clause of the concluding sentence of a rule theretofore adopted by the commission, relating to the matter of transfers of employees from one office to another. It is known as rule 34, and declares, among other things, that whenever, in the judgment of the commission, it is for the best interests of the service, an employee holding permanent appointment under one appointing officer may, upon his written request, be transferred by the commission to a permanent regular position *"of the same class"* under another appointing officer, providing the employee first obtains the approval of the appointing officers of the departments concerned; furthermore, that a person so transferred shall begin as a new appointee and serve a probationary period; and that the acceptance of such transfer by an appointee "shall immediately and automatically cancel all his rights in the position from which he was transferred." Toward the end the rule declares: "In making transfers under this Section, preference shall be given to the appointee who has a clean record and who has had the longest service under Civil Service permanent appointment in his class"; and the rule concludes: *"Unless otherwise ordered by the Commission,* no appointee from a current list of eligibles may transfer to a permanent position carrying regular salary unless such appointee has examination rank higher than that of the highest eligible remaining on such current list." (Italics ours.)

[2, 3] It is manifest, however, that the discretionary power the commission thus

purports to confer upon itself by virtue of the concluding sentence of said rule may not be invoked in a situation such as the one here presented, because, as shown, the charter in mandatory terms declares that in response to a requisition made by the appointing officer the commission must certify the name of the person standing highest on the current list of eligibles for the office to be filled, which in this case was Ballf; and it is a fundamental principle of municipal law that the rule-making power vested by a city charter in a municipal agency must be exercised in conformity with all charter provisions, and that any rule adopted by such agency which has the effect of opening the way to circumvent or nullify charter provisions is, to that extent, inoperative and void. Upon reading the entire rule it is quite obvious that its purpose was to establish a procedural setup to be followed in matters of transfer, none having been provided by the charter; and that it was intended that the discretionary authority the commission conferred upon itself by the concluding sentence of the rule, as well as that embodied in the proviso relating to "clean record" and "longest service", should be exercised in those situations where requests were made by two or more employees holding permanent appointments of the same classification, for transfer to a permanent position of the same classification under a different appointing officer. But here the commission was not dealing with that kind of case. Ballf was not seeking "transfer" to the position with the board of supervisors; nor indeed under rule 34 would he have been permitted to do so, because the permanent position held by him in the recorder's office was of a classification different from the position to be filled in the office of the board of supervisors; that is to say, his position in the recorder's office was that of general clerk-typist (B-512); whereas the position with the board was that of general clerk-stenographer (B-408). His legal right to certification to the latter position arose from the fact that he ranked highest on the current eligible list of appointees for a permanent position of that classification; therefore, when the board filed its requisition with the commission for a person to fill a position of that classification, it was the mandatory duty of the commission under the plain wording of section 148 of the charter to certify Ballf's name to the board. Neither the commission nor the board had any choice in the matter.

[4, 5] We are of the opinion also, however, that the trial court exceeded its authority in incorporating in the judgment provisions relieving Ballf of the "necessity of passing a probationary period" in the position in the office of the board of supervisors, and in fixing July 1, 1938, as the date of the commencement of his seniority therein. Proper provision was made that he was not entitled to the salary of the office until he reported for duty; but the date of seniority should have been fixed as of September 2, 1938, such being the date he was entitled to have his name certified to said board.

With respect to the matter of the probationary period, said section 148 of the charter, which is the basis of Ballf's right to certification, also contains this provision: "Any appointment to a position declared permanent by the commission [and this was such a position] shall be on probation for a period of six months. At any time before the expiration of six months the appointing officer may terminate the appointment." We find nothing in the arguments advanced by respondent which would tend to take the case out of the operation of the foregoing charter provision. The theory upon which the trial court apparently acted in inserting the provision was that if the commission had complied with the terms of the charter in certifying respondent's name to the board, he would, at the time of the entry of the judgment, have served the probationary period. The unequivocal language used in section 148 shows, however, that actual service, rather than constructive, is required.

[6] The trial court also incorporated in its judgment a provision to the effect that respondent be granted a leave of absence, without pay, from his present position in the recorder's office (B-512) while serving the probationary period in the position in the office of said board (B-408). This provision doubtless finds support in section 153 of the charter, which fixes a limitation of six months for a leave of absence to an employee accepting a position in some office of the city and county other than the one in which he is employed and where the duties are in no way related to the duties covered by his civil service classification, which, reasonably construed in the light of the language of the entire section, means

the classification of the position he leaves to accept the position of different classification. A different situation is presented in the case of transferees under rule 34, because there, by the very wording of the rule, the employee is notified in advance that immediately upon his acceptance of the position to which he is transferred all rights to the position he leaves are automatically cancelled.

In accordance with the views above expressed, it is ordered that the judgment be modified by striking therefrom the provision eliminating the necessity of serving the probationary period, and by substituting the date September 2, 1938, for July 1, 1938; that as thus modified the judgment be and it is hereby affirmed; that a peremptory writ issue in conformity with the terms of the judgment as modified, and that respondent recover his costs of appeal.

We concur: PETERS, P. J.; WARD, J.



43 Cal.App.2d 170

POPE ESTATE CO. v. JOHNSON, State Treasurer.

Civ. 11438.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1941.

1. Judgment ⇐725(5)

A judgment for refund of portion of franchise tax for particular year paid under protest was "res judicata" against offsetting additional tax allegedly owed for such year, and hence such additional tax was no defense in mandamus proceedings to compel state treasurer to pay full amount of such judgment. St.1939, p. 2968, § 30.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Taxation ⇐543

In action for refund of portion of franchise tax for particular year paid under protest, the state could raise defense that taxpayer had omitted items from its return for that year, even though claimed deficiency was barred by limitations. St.1939, p. 2968, § 30.

3. Taxation ⇐543

The statute giving right to offset taxes and interest "due" from taxpayer against judgment for refund of taxes did not give right to offset a claimed deficiency for the same year as that involved in the refund proceeding. St.1939, p. 2968, § 30.

See Words and Phrases, Permanent Edition, for all other definitions of "Due".

4. Taxation ⇐543(1)

A suit for recovery of the whole or a portion of a tax paid for a particular year throws open all questions relating to the same tax year, and neither tax collecting authorities nor taxpayer may split up the questions and prosecute question of liability for that year piecemeal.

5. Judgment ⇐592

The rule against piecemeal prosecution of question of tax liability for particular year in suit for recovery of tax for such year is absolute and prevents a second action involving a particular year, even though facts upon which the second suit rests occurred after the first suit was decided.

6. Judgment ⇐592

The rule against piecemeal prosecution of question of tax liability for particular year is not affected by fact that formal parties on behalf of government are different in the two proceedings.

7. Judgment ⇐592

The rule against piecemeal prosecution of question of tax liability for particular year applies even though first suit is by the government for a deficiency and the second by taxpayer for refund, where the same year's liability is at issue.

8. Judgment ⇐540

The scope of the "estoppel" of a judgment depends upon whether question arises in a subsequent action between the same parties upon the same or upon a different claim or demand, and, if claim or demand is the same, a judgment upon the merits is an absolute bar to the subsequent action.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Action by the Pope Estate Company against Charles G. Johnson, Treasurer of the State of California, for writ of mandate ordering defendant to pay judgment for refund of franchise taxes paid under protest. From a judgment for plaintiff, defendant appeals.

Affirmed.

Earl Warren, Atty. Gen., and H. H. Linney and Adrian A. Kragen, Deputies Atty. Gen., for appellant.

Sullivan, Roche & Johnson, of San Francisco, for respondent.

PETERS, Presiding Justice.

The State Treasurer appeals from a judgment directing the issuance of a peremptory writ of mandate ordering him to pay to plaintiff the sum of $3,167.91 with interest. In the trial court the cause was determined upon the petition of plaintiff and the demurrer of defendant.

As disclosed by the petition, the facts are as follows: On April 15, 1934, the plaintiff, a corporation doing business in California, filed with the state franchise tax commissioner its franchise tax return for the year 1933 showing a tax of $919.04, which was paid. Thereafter, in October of 1934, the franchise tax commissioner recommended the assessment of an additional tax against plaintiff for the year 1933 in the sum of $222.51. This additional levy was paid by plaintiff. In 1936 the franchise tax commissioner levied an additional tax against plaintiff for the year 1933 in the sum of $2,706.68. This additional levy was paid by plaintiff under protest. Thereafter, in May of 1937, plaintiff brought an action in the Superior Court of San Francisco for the refund of the amount paid under protest. This action was contested by the state, and on February 6, 1939, resulted in a judgment in favor of the plaintiff. This judgment was in the sum of $3,152.66, with interest, and became final through failure of the state to appeal. After the judgment became final, the plaintiff, on August 22, 1939, made written demand on the defendant state treasurer for its payment. The defendant refused to pay the judgment on the ground that the franchise tax commissioner had re-examined plaintiff's return for the taxable year 1933 and determined that plaintiff owed an additional tax for that year in the sum of $2,036.49. Plaintiff refused to accept this deduction from its judgment, and thereupon instituted the present mandamus proceedings to compel the payment to it of the full amount of the judgment. The trial court overruled the demurrer of defendant and entered its order and judgment from which this appeal is taken.

It is the theory of the appellant that, under section 30 of the Bank and Corporation Franchise Tax Act (Deering's General Laws of California, 1937, Act 8488), as amended in 1939 (Stats.1939, Chap. 1050, p. 2934, at p. 2968) when a taxpayer secures a final judgment for a refund of a portion of its franchise tax paid under protest, the state may reexamine the return for that and other years, and, if it finds that a further tax is due the state, may deduct this amount from the judgment.

Section 30 provides that the taxpayer may bring an action for a refund within one year from the date of payment, or within four years from the date prescribed for filing the return. After providing that the Attorney-General shall defend such action, the section provides that: "The provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for." After setting forth certain procedural matters not relevant to the present case, the section contains the paragraph upon which the state predicates its appeal. It reads as follows: "If judgment is rendered against the commissioner, the amount thereof shall first be credited against any taxes and interest due from the taxpayer under this act and the remainder refunded to the taxpayer or its successor by the State Treasurer on warrant drawn by the Controller."

It is the theory of the appellant that, under this section, although the period within which the state may levy an additional assessment has expired, when the taxpayer sues for a refund and secures a final judgment, the state may offset against such judgment, apparently without notice or hearing, not in the action for the refund, but after judgment for the refund has become final, any sum later determined to be due for the same year involved in the refund proceedings. The appellant argues that claims of the state barred by the statute of limitations, although they can-

not be affirmatively enforced by action, in good conscience, should be allowed as an offset against a judgment for refund. It contends that section 30, quoted supra, is a statutory recognition of that doctrine.

[1-3] The difficulty with the argument of the appellant is that it completely disregards the doctrine of res judicata. When the taxpayer, the respondent, brought the action in the superior court for a refund of a portion of its 1933 tax, it put into issue the question as to whether a refund for the year 1933 was due to it. This placed in issue the question as to the total amount due from the taxpayer for the year 1933. The state, in that action could have raised the defense that, although the $3,000 plus claim for refund was proper, there were other items which the taxpayer had omitted from its return for that year, which, if included, would show that the taxpayer had underpaid its tax some $2,000. This is so even though the claimed deficiency for the year 1933 was barred by the statute of limitations. Lewis v. Reynolds, 284 U.S. 281, 52 S.Ct. 145, 76 L.Ed. 293. Therefore, when the court adjudicated that the taxpayer had overpaid its 1933 tax in an amount in excess of $3,000, it was in effect adjudicating that no other sum was due from the taxpayer. Whatever may be the proper interpretation of section 30, in so far as it may confer the right on the state to offset claimed deficiencies for prior or subsequent years to that involved in the refund proceeding, the section does not confer the right to offset a claimed deficiency for the same year as was involved in the refund proceeding. This is so because section 30 gives the right to offset as against such judgment "any taxes and interest due from the taxpayer". The adjudication that the taxpayer was entitled to a refund for the tax year 1933 is necessarily an adjudication that no other sum was due from the taxpayer under the franchise tax act for that year.

[4-7] The above principles have many times been stated by the federal courts. A suit for a recovery of the whole or a portion of a tax for a particular year throws open all questions relating to the same tax year. Neither the tax collecting authorities nor the taxpayer are at liberty to split up the question and prosecute in the courts the question as to liability for that year piecemeal. The rule is quite absolute in its character and applies so as to prevent a second action in the courts involving a particular year's liability even though the facts upon which the second suit rests occurred after the first was decided. International Curtis Marine Turbine Co. v. United States, Ct. Cl., 56 F.2d 708; Backus v. United States, Ct.Cl., 59 F.2d 242, certiorari denied 288 U.S. 610, 53 S.Ct. 402, 77 L.Ed. 984; Bankers' Reserve Life Co. v. United States, Ct.Cl., 44 F.2d 1000, certiorari denied 283 U.S. 836, 51 S.Ct. 485, 75 L.Ed. 1448; Bertelsen v. White, D.C., 58 F.2d 792, affirmed on different grounds, 1 Cir., 65 F.2d 719; Bowe-Burke Mining Co. v. Willcuts, D.C., 45 F.2d 394; Bindley v. Heiner, D.C., 38 F.2d 489; Chicago Junction Rys., etc., v. United States, Ct.Cl., 10 F.Supp. 156; 46 Yale Law Journal 1320 at p. 1327. The fact that the formal parties on behalf of the government are different in the two proceedings has no effect on the doctrine. Tait v. Western Md. Ry. Co., 289 U.S. 620, 53 S.Ct. 706, 77 L. Ed. 1405; Bertelsen v. White, supra. The rule applies even though the first suit is by the government for a deficiency and the second by a taxpayer for a refund, where the same year's liability is at issue. Bindley v. Heiner, supra. The cases are collected and commented on in an annotation appearing in 130 A.L.R. 374.

The basis of the rule is stated in Guettel v. United States, 8 Cir., 95 F.2d 229, 118 A.L.R. 1060 (see the same case in the lower court, D.C., 17 F.Supp. 725). In this case the taxpayer paid the federal estate tax and thereafter brought suit for a refund of certain designated items alleged to have been improperly included in the tax. After the judgment in that case had become final, the Supreme Court of United States decided a case indicating that the taxpayer was entitled to an additional refund. It was held that the second action was barred. The court stated (95 F.2d page 230):

"The estate tax was an entirety. It was a single tax based upon percentages of the net taxable value of the whole estate. It was not an aggregation of separate taxes upon separate items which went to make up the net taxable value of the estate. A single tax was assessed, and a single tax was paid. Because the tax assessed and paid was in excess of what was legally due the government, it was obligated to repay the entire excess; but the cause of action for the recovery of the whole excess arose

out of one transaction and was a single cause of action, regardless of the number of grounds upon which the tax was excessive. A judgment having been obtained by the appellants for so much of the overpayment of the tax as was due to the inclusion of the value of insurance policies which were not a part of gross estate, this action to recover so much of the overpayment as was due to the inclusion of the value of Missouri real estate would seem to be barred by that judgment.

[8] "'The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. *In the former case a judgment upon the merits is an absolute bar to the subsequent action.*' (Italics supplied.) Tait v. Western Maryland Railway Co., 289 U.S. 620, 623, 53 S.Ct. 706, 707, 77 L.Ed. 1405. The reason for this is that a judgment, if rendered upon the merits, is conclusive not only as to all matters which were decided, but as to all matters which might have been decided. [Citing cases.] The appellants were not at liberty to split up their claim for the recovery of their overpayment of the estate tax, and to prosecute it piecemeal or to present in their first suit only a portion of the grounds upon which they based their claim that the tax had been overpaid, and leave another ground or other grounds to be presented in a subsequent action." It was urged that the taxpayer did not know of his rights at the time the first action was tried. The court held on this point (95 F.2d page 232): "The rule of res judicata is based upon that public policy which requires that a single controversy which is capable of being completely determined in one suit shall be ended by the judgment in that suit, and shall not become the subject matter of subsequent litigation. See Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 48, 18 S.Ct. 18, 42 L.Ed. 355. 'The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the lawmaking body rather than the courts.' Tait v. Western Maryland Ry. Co., supra, 289 U.S. 620, 624, 53 S.Ct. 706, 707, 77 L.Ed. 1405. The same public policy which gives rise to the rule should, we think, prevent its applicability being made dependent upon the knowledge or lack of knowledge of the parties as to their legal rights. Moreover, while a judgment upon the merits may be set aside for equitable reasons in a direct proceeding brought for that purpose, it may not be impeached collaterally."

Under these authorities we think the state is barred from urging in this proceeding that it has the right to offset against the final judgment the claimed deficiency in the 1933 tax of respondent. The final judgment in the refund action amounts to a final adjudication, conclusive on the state and taxpayer alike, that no further tax is due from the taxpayer for that year, and that the taxpayer is not entitled to any further refund for that year. Since this is so, section 30, by its very terms, referring only to the right to offset "due" taxes, has no application.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.



43 Cal.App.2d 153

FINK et al. v. WEISMAN et al.

Civ. 12979.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1941.

1. Appeal and error ⇐799

Where appellants had not served and filed, at least ten days prior to hearing, in writing, their opposition to motion for dismissal of appeal, as required by court rules, opposition to the motion would not be considered. Rules for Supreme Court and District Courts of Appeal, rule 20, § 3.

2. Appeal and error ⇐554(2)

Where appellants had failed to file in the District Court of Appeal either a reporter's or clerk's transcript, or an engrossed bill of exceptions, within time prescribed by law, their appeal from order directing that execution issue on judgment would be dismissed. Code Civ.Proc. § 953d.

Action by Benjamin Fink, interpleaded with William Austin Callaman and others against William Weisman and others, including Herbert L. Lantin, respondent. Judgment was entered in favor of respondent's assignor. From an order directing that execution issue on the judgment, William Austin Callaman and others appeal. A motion to dismiss the appeal was entered by respondent.

Motion granted; appeal dismissed.

Harry C. Mabry, of Los Angeles, for appellants.

Maurice Rose, of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion by respondent to dismiss the appeal upon the ground that neither a clerk's nor reporter's transcript nor engrossed bill of exceptions has been filed in this court, and that the time within which to prepare and file the same has elapsed.

The record discloses that judgment was entered in favor of respondent's assignor February 6, 1934. On September 6, 1939, an order was entered by the trial court directing that execution issue on said judgment. From that order, November 4, 1939, appellants filed notice of appeal to this court. The record also discloses that neither a clerk's nor reporter's transcript nor engrossed bill of exceptions has been filed in this court or requested in the superior court.

[1, 2] At the time of the hearing of the present motion appellants offered to oppose the same upon the ground that notice of entry of the order from which an appeal had been taken was not served upon them in writing, nor had they waived notice of the same in writing or by oral stipulation made in open court and entered in the minutes of the court in conformity with the provisions of section 953d of the Code of Civil Procedure. See, also, Sterling Corporation v. Superior Court, 207 Cal. 370, 371, 278 P. 859. Respondent objected to our considering appellants' opposition to his motion, for the reason that the latter had not served and filed at least ten days prior to the hearing, in writing, their opposition to the motion, as required by Rule XX, section 3, Rules for Supreme Court and District Courts of Appeal (213 Cal. lii, as amended by the Judicial Council October 5, 1932, effective November 5, 1932).

Respondent's objection is valid, and we will not consider appellants' opposition to respondent's motion. Since appellants have failed to file in this court either a reporter's or clerk's transcript or an engrossed bill of exceptions within the time prescribed by law, their appeal must be dismissed.

The present case well illustrates the reason for requiring counsel to strictly comply with the provisions of Rule XX, section 3, supra, for it appears from a certified copy of an affidavit of service filed in this court February 14, 1941, that on September 6, 1939, written notice of the entry of the order from which appeal is here taken was actually served upon appellants, but that an affidavit of service of the notice was not filed in the office of the clerk of the superior court until January 22, 1941. Had counsel for appellants complied with the provisions of the rule above mentioned, this fact would have been brought to the attention of respondent, who in turn would have been prepared to direct this court's attention at the hearing to the fact of service of written notice of entry of the order from which appeal is taken, thus obviating argument upon a point which was moot.

For the reasons above stated the motion to dismiss the appeal is granted and the appeal is dismissed.

MOORE, P. J., and WOOD, J., concurred.

43 Cal.App.2d 184

RICHTER v. ADAMS et al.

Civ. 2595.

District Court of Appeal, Fourth District, California.

Feb. 21, 1941.

Hearing Denied April 21, 1941.

1. Mines and minerals ⇐74

A lease giving right to drill for and remove hydrocarbons from lessor's property conferred no right in lessee to produce oil from other property, and hence lessee was entitled to payment from assignee of lease only out of oil produced from lessor's property, not out of oil from the same well but coming from other properties.

2. Pleading ⇐236(2, 3)

Amendment of a pleading immediately before or during trial is not a matter of right, but is within sound discretion of trial judge.

3. Appeal and error ⇐959(3)

An appellate court will not interfere with action of trial judge in permitting amendment of pleading immediately before or during trial, unless abuse of discretion clearly appears.

4. Pleading ⇐236(2, 3)

The exercise of discretion in permitting amendment of pleading immediately before or during trial must be sound and reasonable, not arbitrary nor capricious, and to a certain extent measure of the soundness of discretion used must be found in facts of each case.

5. Pleading ⇐236(2)

In action by oil and gas lessee to terminate assignees' interest in lease and recover for oil produced thereunder, refusing to permit assignees to amend their pleadings on the day set for trial, to show rendition of judgment several months before, holding that oil produced from their well was in fact produced from property other than the leased property, was an abuse of discretion, where assignees' new attorney had had only five days in which to familiarize himself with extensive record and there was strong indication that defense would be established if amendment were permitted and otherwise assignees would be compelled to pay twice for single wrong.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Edward R. Richter against Hugh Adams and others, for termination of interest in oil and gas lease, and for value of oil produced and sold from leased property. From an amended judgment for plaintiff, defendants appeal.

Reversed.

Hearing denied; CARTER, J., dissenting.

J. W. Heard, Jr., of Bakersfield, for appellants.

Frederick E. Hoar, of Bakersfield, and Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondent.

MARKS, Justice.

This is an appeal from an amended judgment terminating defendants' interest in and to an oil and gas lease dated February 20, 1933, made by Lizzie H. Glide, lessor, to Edward R. Richter, lessee, and the leasehold interest therein described, the hydrocarbons produced from the leased property, and certain oil well and drilling equipment, and also giving plaintiff judgment for $27,888.32 for oil produced and sold from the leased property. We will refer to the leased land as the Glide property and to the well involved as Glide No. 2. This is the second appeal in this case. Many of the facts are clearly set forth in the opinion on the first appeal (Richter v. Adams, 19 Cal.App.2d 572, 66 P.2d 226) and need not be repeated here.

After the reversal of the first judgment the case was again set down for trial. Defendants changed their counsel just before the new trial date. The new counsel appeared on the trial date, October 13, 1937, and asked for time to familiarize himself with the case. The trial judge re-set the case for October 18, 1937, with conditions imposed.

When the cause was called for trial, counsel for defendants presented and asked leave to file amended and supplemental pleadings. The motions were denied except as to one additional defense which was interposed.

In the answer on file it was admitted that much of the oil for which plaintiff demanded payment had been produced in and from the Glide property. By one of the amendments defendants sought to withdraw this admission and place in issue the question of whether or not the oil produced from Glide No. 2 was produced from the Glide property. It was alleged that the oil was not produced from the Glide property but was in fact produced from other property under

lease to the Shell Oil Company and the Texas Company; that defendants had no knowledge of such facts until about April 24, 1936. Attached to the proposed answer were copies of findings of fact and conclusions of law and judgment in cases decided in the superior court of Kern county entitled Shell Oil Company, a corporation, v. Hugh Adams et al., and The Texas Company, a corporation, v. Hugh Adams et al., which actions had been consolidated for trial.

In that case it was found that the Shell Oil Company and the Texas Company properties adjoined the Glide property; that Glide No. 2 at the surface was located 37.88 feet north and 25.58 feet east of the southwest corner of the Glide property; that the well had a total depth of 1780 feet measured from the derrick floor; that only the first 233 feet of that depth was within the Glide property; that all of the balance of the depth of the well was within the Shell Oil Company and the Texas Company properties; that all the oil and gas produced from Glide No. 2 came from the structures underlying the Shell Oil Company and the Texas Company properties; that none of it came from the Glide property; that 217,460.33 barrels of petroleum of the value of $114,379.03 had been produced through Glide No. 2 from the Shell Oil Company and the Texas Company properties; that the landowner's royalty had been paid and that defendants had converted the balance to their own use. Judgment was rendered against defendants for $92,376.71, the value of the oil so converted, less the landowner's royalty. Richter was not a party to this action. The findings and judgment are dated March 20, 1937. We are informed that the judgment became final and was in full force and effect at the time of the trial of this action. Other defenses were tendered in the offered pleadings which would have been good if they had been established.

The trial judge refused to permit the filing of this pleading. It remains for us to determine whether or not such ruling was an abuse of the discretion which the law vests in him.

[1] The lease from Mrs. Glide to Richter gave him the right to drill for and remove hydrocarbons from the Glide property only. Of course, it follows as a matter of law from such a lease that it confers no right in the lessee to produce oil from other property. Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 66 P.2d 1215. This lease was assigned to Adams, and of course the assignee had no greater right to trespass in the property of others than had the original lessee. The contract between Richter and Adams, from the provisions of which this action springs, provided for the payment of $8,500 from the latter to the former, and contained the following:

"Said sum shall be payable in the following manner, to-wit: Twenty-five (25) per cent of all money and proceeds received from the sale of oil, gas, other hydrocarbon substances, water, and/or all other things of value, produced, saved and sold from said premises, or any well or wells drilled or to be drilled on said premises, after the deduction of the one-sixth landlord's royalty, shall be set aside and designated as and made a fund for the payment of said $8,500 to first party herein, and shall be and become the property of the first party herein."

It seems clear that plaintiff was only entitled to payment of this $8,500 out of oil produced from the Glide property. It seems equally clear that if defendants could have established, as the plaintiffs in the oil company cases had established, that oil taken from Glide No. 2 all came from other properties and that none of it came from the Glide property, plaintiff would have been entitled to no part of it and no money judgment should have been rendered in his favor. This same proposition also had an important bearing on the other phase of the case, that is, the forfeiture of defendant's interest in the leasehold. The failure to pay plaintiff his portion of the revenue from the production of the well was an important, if not a principal, ground of that portion of the judgment.

[2-4] The rule that the amendment of a pleading immediately before or during a trial is not a matter of right but is placed within the sound discretion of the trial judge is too well established to need the citation of supporting authorities. It is equally well established that an appellate court will not interfere with the action of the trial judge unless it clearly appears that there has been an abuse of discretion. It is also true that the exercise of his discretion must be sound and reasonable and not arbitrary nor capricious. To a certain extent the measure of the soundness of the discretion used must be found in the facts of each case.

[5] Here, it must be admitted that defendants were dilatory in seeking to amend their pleadings. The judgment in the oil company cases had become final several months before they asked leave to plead the defense which was disclosed by that judgment. However, there are some rather unusual facts appearing in this case. A new attorney had been employed by defendants just before the case was set for trial. This attorney was given five days in which to familiarize himself with the rather extensive record in the case. At the end of that time he presented his pleadings and asked leave to file them. These pleadings presented defenses which, if established, would have been a complete defense to the action. That one of them might have been established is indicated by the judgment in the oil company cases. There it was flatly decided that the oil in question here was not produced from the Glide property. While plaintiff was not a party to that action, the judgment there rendered is a strong indication that a similar result might have been reached in this case had the amendment been permitted and similar evidence presented to that introduced in the oil company cases.

The result of the two judgments, the one before us and the one in the oil company cases, is to compel defendants to pay different parties for their one wrong in converting the same oil. While defendants should be held liable for their wrongful conversion of the oil, they should be compelled to compensate the parties actually damaged by their wrongful acts. They should not be compelled to compensate another who had not been damaged thereby. The effect of the judgment in this case is to hold that Richter was the owner and entitled to the possession of the oil produced from Glide No. 2, while the effect of the judgment in the oil company cases is to hold that the Shell Oil Company and the Texas Company were the owners and entitled to the possession of the same oil. That this contradiction might result in a grave injustice is too clear for argument. Where such a result can be avoided, technicalities of the law should not be permitted to defeat justice.

We cannot escape the conclusion that the trial judge seriously erred in denying defendants the right to file the amended and supplemental pleadings. Such refusal was an abuse of judicial discretion which should not be permitted to stand under the facts of this case. The amended and supplemental pleadings should have been filed under such terms, and with such costs imposed on defendants, as were just.

The judgment is reversed.

We concur: BARNARD, P. J.; GRIFFIN, J.



43 Cal.App.2d 204

In re GUARDIANSHIP OF CARLON'S ESTATE.

FERREL v. CARLON.

Civ. 6450.

District Court of Appeal, Third District, California.
Feb. 24, 1941.

Rehearing Denied March 26, 1941.
Hearing Denied April 24, 1941.

1. Insane persons ⇐71

The probate court was without jurisdiction to authorize guardian of incompetent person's estate to convey title to personalty or lease realty belonging to estate as incidents to compromise of claim based on unenforceable executory contract by incompetent to sell cattle and rent grazing land to claimant. Probate Code, § 1530a.

2. Guardian and ward ⇐37
Insane persons ⇐65

The guardian of minor child or incompetent person exercises trust demanding highest degree of good faith and confidence.

3. Infants ⇐2
Insane persons ⇐4

The law is scrupulously careful to protect interests of minor children and incompetent persons incapable of looking after their affairs.

4. Insane persons ⇐71

The statutes authorizing incompetent person's guardian to compromise claim against estate by transfer of specific assets thereof with court's approval was not intended to authorize sale or confirmation of sale of personalty or approval of leasing or sale of realty in incompetent person's estate with less formality than is required in deceased person's estate. Probate Code, § 1530a.

5. Insane persons ⇐65

The statute authorizing guardian of incompetent person's estate to compromise any

claim against estate authorizes compromise only of valid enforceable claims. Probate Code, § 1530a.

6. Insane persons ⇐71

The statute providing that all proceedings concerning sales by guardians must conform as nearly as possible to code provisions concerning sales by administrators indicates that rules respecting enforcement of executory contracts in deceased persons' estates shall also apply to incompetent persons' estates. Probate Code, § 1534.

7. Insane persons ⇐73

An executory memorandum of agreement by one adjudged incompetent before its terms were carried out to transfer title to his cattle and lease his grazing land to another was invalid and unenforceable against incompetent's estate, in absence of previous order for sale of cattle, payment of consideration, delivery of cattle, or definite description of land and specification of duration and material terms of proposed lease in memorandum.

8. Insane persons ⇐65

A guardian's alienation of property of ward, such as incompetent person, without first procuring court order therefor, is absolutely void.

9. Insane persons ⇐65

Representatives of estate, such as guardians of incompetents' estates, may allow only legal and enforceable claims against estates and must reject all illegal and unenforceable claims.

10. Insane persons ⇐65

A claim, which is unenforceable against incompetent person's estate because of uncertainty of executory contract on which claim is based, bar of statute of limitations, or otherwise, may not be subject of compromise in such estate. Probate Code, § 1530a.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

In the matter of the guardianship of the estate of Timothy H. Carlon, an incompetent person. From an order authorizing W. J. Ferrel, the guardian, to lease the ward's realty and sell his personalty to the estate as incident to an order to compromise a claim against the estate, Jane Alice Carlon, the ward's wife, appeals.

Reversed, with direction.

Hearing denied; CARTER, J., dissenting.

Lafayette J. Smallpage and Forrest E. Macomber, both of Stockton, for appellant.

Gumpert & Mazzera, of Stockton, and C. Ray Robinson, of Merced, for respondent.

THOMPSON, Justice.

Jane Alice Carlon, the wife of Timothy H. Carlon, an incompetent person, has appealed from an order of the probate court of Merced county, authorizing the leasing of real property and the sale of personal property belonging to his estate, incident to an order to compromise a purported claim under the provisions of section 1530a of the Probate Code.

Mr. Carlon is an old man possessed of real and personal property of a value in excess of the sum of $100,000. The appellant is his wife. They have been separated for some time. They executed an agreement settling property rights between them. No question is raised regarding her right to prosecute this appeal. October 10, 1938, he was adjudged to be incompetent and W. J. Ferrel was appointed and qualified as guardian of his estate. July 2, 1938, prior to the adjudication of incompetency, Mr. Carlon and Clyde D. Booth signed a memorandum agreement which was written in a small pocketbook belonging to the person last named. The memorandum was in the following language:

"July 2nd

"Tim agrees to sell cattle to me for $30.00 per head approximate number 1700 exact count to be determined when they come out of the mountains.

"Also I am to rent all grazing land in Mariposa and Tuolumne Co. for 10,000 per year & Mrs Ferratti is to be allowed to run her cattle on the range as in the past and Tim will graze his horses on range land at no cost.

"This does not include any river bottom land.

"I can depend on Tim for advise any time.

"Tim reserves 50 best steers to be sold off clover next season, he to pick them.

"(Signed) T. H. Carlon
"(Signed) Clyde D. Booth"

No part of the foregoing agreement was performed prior to the adjudication of incompetency. There was no delivery of cattle and no payment of any portion of the purchase price thereof. The proposed lease

of land was not executed. Neither the duration, the terms of the proposed lease nor the description of the property were specified in the memorandum signed by the parties. No claim for specific performance of the executory contract was filed with the estate. January 19, 1939, Mr. Ferrel, the guardian, filed in the estate of his ward, a verified petition to compromise the claim of Clyde D. Booth, based on the foregoing written memorandum, pursuant to section 1530a of the Probate Code. There is attached to the petition, as exhibits, the written memorandum heretofore quoted, a proposed ten-year lease of 20,000 acres of land consisting of "all of the real property situated in the counties of Mariposa and Tuolumne, belonging to the estate of said incompetent person" for the yearly rental of $10,000, a bill of sale of 1800 head of cattle and a proposed agreement between the guardian and Clyde D. Booth covering many details of the proposed transaction. Opposition to that petition was filed by the wife of the incompetent person on the grounds that the probate court lacked jurisdiction or authority to compromise the purported claim, to transfer title to the cattle or to grant leave to lease the real property.

Section 1530a of the Probate Code provides that notice of the hearing of a petition to compromise a claim against the estate of an incompetent person shall be given in accordance with section 1200 of that code. That section requires *proof* of the giving of the required notice at the time of the hearing, as a prerequisite to acquiring jurisdiction of the proceeding. In making the order authorizing or rejecting a compromise of a claim against an estate, it is customary for the court to find that notices were previously given as required by law. The record on appeal in this proceeding contains no proof of the giving of notice of the hearing as required by law. The court failed to find that notice of the hearing was given. After a full hearing on the petition the court on May 31, 1939, made and entered its order. The order of the court does not specifically authorize the guardian to sell the cattle belonging to the estate of the incompetent person, nor does it authorize the leasing of the real property. It merely declares that "The court makes its ruling that petition to compromise claim against estate be granted". From that order this appeal was perfected.

[1] We are of the opinion the probate court was without jurisdiction to authorize the conveyance of title to personal property or to lease real estate belonging to the estate of the incompetent person, under section 1530a of the Probate Code, as incidents to the compromising of a purported claim against the estate based on the unenforceable executory contract above quoted.

[2-6] Section 1530a of the Probate Code, upon which the guardian relies, reads in part: "The guardian, with the approval of the court, may compromise any claim against the estate or any suit brought against the guardian as such, by the transfer of specific assets of the estate, or otherwise. To obtain such approval, the guardian shall file a verified petition with the clerk showing the advantage of the compromise."

We assume that the preceding section authorizes the probate court to approve a compromise of only such claims against the estate of an incompetent person as are valid and legally enforceable. Section 708 of the Probate Code provides that neither the administrator of an estate nor the judge may approve a claim which is barred by the statute of limitations. The guardian of a minor child or of an incompetent person exercises a trust demanding of him the highest degree of good faith and confidence. The law is scrupulously careful to protect the interests of minor children and incompetent persons who are incapable of looking after their own affairs. If a guardian be permitted to allow and satisfy an illegal claim against the estate of his ward, even with the approval of the probate court, it would place an unwarranted burden on the court, and open the door for speculation and dissipation of such estates. It is apparent the legislature did not intend to authorize the sale or confirmation of the sale of personal property or approve the leasing or sale of real property in the estate of an incompetent person with less formality than is required in the estate of a deceased person. If those transactions could be consummated in the guise of authorizing the compromise of illegal or unenforceable claims as mere incidents thereto, the estates of incompetent persons and minors might suffer great loss. We therefore conclude that section 1530a is intended only to authorize the compromising of valid, enforceable claims against estates. Section 1534 of the Probate Code indicates that the same rules with respect to enforcing executory contracts in estates of deceased persons shall also apply to the estates of incompetent persons. That section provides:

"Sales by guardians may be at public auction or private sale, as the guardian deems best. All proceedings concerning sales by guardians, giving notice of sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders authorizing the sale of stocks, bonds, or investment certificates and shares of building and loan associations rejecting or confirming sales * * * ordering and making conveyances of property sold, and allowance of commissions, *must conform, as nearly as may be, to the provisions of this code concerning sales by administrators,* unless otherwise specially provided in this chapter."

As applied to the estates of deceased persons, section 850 of the Probate Code declares that executory contracts to convey real estate, made by decedents before their death, may be enforced only when the maker is *bound* by a written contract to make conveyances which "the decedent, if living, *might have been compelled to make.*" 11b Cal.Jur. 201, sec. 800; 2 Bancroft's Probate Practice, 971, sec. 530.

Likewise, with reference to the making of leases of real property in the estates of deceased persons, section 844 of the Probate Code prohibits an executor or administrator from leasing property for a term exceeding one year without first obtaining an order of court so to do. The application for such an order must be made pursuant to sections 840 to 842 of the same code. It is there asserted the order must specify the amount of rental, the duration of the lease and the terms and conditions of the lease. Section 772 of that code provides that sales of personal property may be made only after the giving of public notice thereof containing a description of the property to be sold and a designation of the time and place of sale. It is provided the sale must be held at the courthouse door, at some other public place or at the residence of the decedent. No sale of personal property may be made unless it is present at the time of the sale, except as otherwise directed by the court. All of the foregoing conditions for sales of personal property or for leasing real property would be dispensed with if, in the guise of compromising an unenforceable executory contract in the estate of an incompetent person, the lease and transfer of title to the cattle which are involved in this proceeding, could be approved in this manner.

[7] We are of the opinion the executory memorandum of agreement to transfer title to the cattle and to lease the real property in the present proceeding is invalid and unenforceable since Mr. Carlon became incompetent before its terms were carried out, and because it is uncertain in its terms. There was no previous order for sale of the cattle. There was no consideration paid, and there was no delivery of the cattle. No title passed. The memorandum fails to describe the land so that it may be definitely located, and it fails to specify the duration of the proposed lease or its material terms. That memorandum could not have been enforced, in our judgment, if Mr. Carlon had not been adjudged incompetent. Written agreements to lease property, which were much more specific in their terms than the memorandum which is involved in this proceeding were held to be unenforceable for uncertainty. Wineburgh v. Gay, 27 Cal. App. 603, 150 P. 1003; Laugharn v. Bryant, 5 Cal.App.2d 721, 43 P.2d 312.

[8] It has been repeatedly held that alienation by a guardian of the property of a ward, without first procuring an order of court to do so, is absolutely void. Kendall v. Miller, 9 Cal. 591; Morse v. Hinckley, 124 Cal. 154, 56 P. 896; 108 A.L.R. 940, note; De La Montagnie v. Union Ins. Co., 42 Cal. 290. In the case last cited it is said in that regard: "We think, too, irrespective of adjudicated cases, that the plain intent of the statute is to make void every alienation of the property of the ward, if made by the guardian without the order of the Court; and that the rule, in itself, is one of wholesome application to such sales, whether of the personal or real estate of the ward."

[9] It has been repeatedly held that the representatives of estates may allow only legal, enforceable claims against the estates, and that they must reject all illegal and unenforceable claims. Etchas v. Orena, 127 Cal. 588, 593, 60 P. 45; 11a Cal.Jur. 785, sec. 558.

[10] In the text found in 3 Bancroft's Probate Practice, page 1397, section 785, it is suggested that a claim which may be allowed or compromised against an estate, must be a valid claim which might have been specifically enforced in the lifetime of the deceased. It is said in that regard: "A very interesting problem arises as to whether an obligation entered into by the decedent in his lifetime, but which remains wholly or in part executory at the time of

his death, is a 'claim' * * * within the meaning of statutes requiring presentment in probate. It is well settled that *if such a contract is not terminated by the fact of death of the decedent,* his estate remains liable. *If of such a nature as to have been specifically enforceable had the decedent continued to live, the contract is so enforceable after his death.*"

The clear inference is that if the executory contract is not legally enforceable it should not be allowed or compromised. If a claim which is based on an executory contract is unenforceable for uncertainty, because it is barred by the statute of limitations, or otherwise, it may not be the subject of compromise in the estate of an incompetent person under section 1530a of the Probate Code. It follows that the court was without authority to approve the compromise of the purported claim in this proceeding by authorizing the transfer of title to the cattle in question or the leasing of the real property in a manner not authorized by statute.

The order is reversed and the court is directed to disallow the purported claim of the respondent.

We concur: PULLEN, P. J.; TUTTLE, J.



43 Cal.App.2d 847

BRADLEY v. RYLAARSDAM.

Civ. 12974.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1941.

Appeal and error ⇐801(1)

An appeal would be dismissed on respondent's motion, where certificate of clerk of Superior Court filed in support of motion set forth facts required by court rule, and all grounds stated in motion were supported by such certificate and the authorities cited. District Court of Appeals Rules, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by Harry E. Bradley, etc., against C. Rylaarsdam. From the judgment the defendant appeals.

Appeal dismissed.

George Cohn, of Los Angeles, for appellant.

H. Sidney Laughlin, of Los Angeles, for respondent.

PER CURIAM.

The respondent having filed his motion to dismiss the appeal in the above entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is ordered that this appeal be, and the same hereby is, dismissed.



43 Cal.App.2d 106

PEOPLE v. SERNA.

Cr. 3394.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1941.

1. Larceny ⇐23

Where one commits a series of successive acts of taking as the result of a single felonious intent, moved by a single, uninterrmittent force, such series constitutes only one continuous act, and is a "single offense" against the state.

See Words and Phrases, Permanent Edition, for all other definitions of "Single Offense".

2. Larceny ⇐23

Whether a series of successive acts of taking constitutes several thefts or a single theft must be determined by the particular circumstances of each case.

3. Embezzlement ⇐22

Where a wrongdoer has lawfully gained possession of property, each of his successive acts in appropriating parcels of the trust fund to his own use is a "separate of-

fense" constituting embezzlement, that is, theft.

4. Larceny ⇐18

Where a wrongdoer has by unlawful means acquired possession of the money or chattels of his neighbor, his guilt of the crime of theft is not dependent on whether he thereafter appropriates the fruits of the theft by a single act or at successive intervals.

5. Larceny ⇐23

If the circumstances do not show that exact time of completion of misappropriation is controlling, court may conclude that several transactions constitute a single offense.

6. Larceny ⇐23

Where the evidence establishes clearly the commission of several offenses by distinct appropriations, all different sums, on separate occasions, then they do not comprise a series of acts that are part of a "single offense", but are "separate offenses".

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Offense".

7. Larceny ⇐23

Though the general intent to deprive another of his possessions may have been framed in accused's mind before he completed his first offense, yet subsequent acts whereby the accused appropriates different sums of money or separate items of goods or chattels are "separate offenses."

8. False pretenses ⇐20½

If a defendant has fraudulent intent to obtain property by false representations, then his obtaining property on the first occasion, under the inducement of his false representation, constitutes a completed crime, and, when other property is thereafter obtained under the influence of the fraudulent representations, a "separate offense" is committed.

9. False pretenses ⇐20½

Where defendant applied to State Relief Administration for unemployment relief, and stated that he was unemployed and that no member of his family had any source of income, though at the time of application and thereafter his wife was employed and receiving income, and defendant received relief amounting to $347.76 in semimonthly installments of $28.98 each, the receipt of each semimonthly installment was a "separate offense", and hence defendant could not be charged with the crime of grand theft but merely with a series of petty thefts. Pen.Code, §§ 484, 995.

10. False pretenses ⇐20½

Though relief applicant's fraudulent statement in his application for relief tainted each transaction whereby he received semimonthly installments, it did not have the effect of amalgamating all of the transactions into a unified deed so as to render applicant guilty of grand theft. Pen.Code, § 484.

11. False pretenses ⇐20½

The fact that there existed a reservoir of unlimited resources from which relief applicant might have secured any sums of money by false representation, even in excess of $200, did not make the taking of any one of semimonthly installments of $28.98, aggregating $347.76, a part of a grand theft, but merely petty theft. Pen.Code, § 995.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Pablo Serna was accused by information of grand theft. From an order setting aside the information, the People appeal.

Order affirmed.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for appellant.

David C. Marcus, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The plaintiff appeals from an order setting aside the information wherein Serna was accused of grand theft. Defendant's motion was made upon the grounds that: (1) Defendant was committed without probable cause; (2) that a public offense had not been charged; and (3) that the transcript of the preliminary trial disclosed at most a series of petty thefts. Pen.Code, sec. 995.

Defendant is an alien residing in Los Angeles county. He applied to the State Relief Administration for unemployment relief. His application was filed October 4, 1937, in which he made the statement that he was unemployed and that no member of his family had any source of income. However, at the time of his application, his wife had been employed since the preceding September by the California Walnut Growers Association, with whom she continued until April, 1938, and through which she earned the sum of $459.89. The relief furnished defendant amounted to $347.76 which was paid to defendant in semi-monthly installments of $28.98 each.

[1-6] The sole question for determination as stated by the attorney-general is "whether the defendant can be charged with the crime of grand theft or whether he is only chargeable with a series of petty thefts". Because of the fact that the total sum received from the state exceeded $200, which is the value necessary to constitute the crime of grand theft, and because defendant made a written application containing a false statement prior to receiving any relief, the argument is made that all sums received by defendant from the State Relief Administration, after having made his application, are parts of one plan, one design, one taking from the state. In support of this contention, appellant cites section 484 of the Penal Code and certain decisions. People v. Mills B. Sing, 42 Cal. App. 385, 183 P. 865; People v. Dillon, 1 Cal.App.2d 224, 36 P.2d 416; People v. Fleming, 220 Cal. 601, 32 P.2d 593. Where a party commits a series of successive acts of taking as the result of a single felonious intent, moved by a single, unintermittent force, such series constitutes only one continuous act, one offense against the state. People v. Dillon, supra; Wharton's Criminal Law, 11th Ed., § 1169. Whether a series of successive acts of taking constitutes several thefts or one single crime must be determined by the particular facts and circumstances of each case. One of the guiding rules for reaching such determination is that where a wrongdoer has lawfully gained possession of property, each of his successive acts in appropriating parcels of the trust fund to his own use is a separate embezzlement, i. e., theft. But where he has by unlawful means acquired possession of the money or chattels of his neighbor, his guilt of the crime of theft is not dependent upon whether he thereafter appropriates the fruits of his theft by a single act or at successive intervals. People v. Stanford, Cal.Sup., 105 P.2d 969. If the circumstances of a case do not show that the exact time of completion of the misappropriation is controlling, the court may conclude that the several transactions constitute one offense. But where the evidence establishes clearly the commission of several offenses by distinct appropriations, all different sums, on separate occasions, then they do not comprise a series of acts of a single crime but they are many distinct crimes.

[7-11] While the general intent to deprive another of his possessions may have been framed in the mind of the accused before he completed his first offense, yet subsequent acts whereby the accused appropriated different sums of money or separate items of goods or chattels are distinct offenses. People v. Rabe, 202 Cal. 409, 261 P. 303. If the defendant had the fraudulent intent to obtain property by false representations then his obtaining property on the first occasion, under the inducement of his false representation, constituted a completed crime. "When at a later date other property was obtained under the influence of the fraudulent representations which had earlier been made a separate offense was committed." People v. Ellison, 26 Cal.App. 2d 496, 79 P.2d 732, 733. In the instant case, the receipt of money from the State Relief Administration was in each instance a separate offense. People v. Miles, 37 Cal. App.2d 373, 99 P.2d 551. His original application furnished defendant an entre or a basis for negotiating for each of the payments subsequently received. While his fraudulent statement in his application for relief tainted all of his transactions, Pen. Code, sec. 484, it did not have the effect of amalgamating all of them into a unified deed. Before he could receive even the first payment, he was required to endorse upon the warrant the following: "The payee in accepting and endorsing this warrant certifies that he or she has correctly reported his or her status to the said State Relief Administration; has complied with its regulations and is eligible for relief." It was therefore essential that the same endorsement be executed by defendant upon each subsequent warrant without which he could not have gained any further sums. He was never in a position at any time to appropriate to his own use any sum belonging to the state in excess of $28.98. In his reply brief, the attorney-general says that "Exhibit A" certified by Mrs. Hamren and approved by A. Parsons was a continuous authorization of the accounting division of the finance department of the State Relief Administration to issue a payroll semi-monthly and that from said payroll the warrant was to be drawn by the state controller continuously semi-monthly thereafter in the sum of $28.98, until this authorization was revised or cancelled by the social worker. But the testimony of Mr. Pettitt, assistant to the deputy chief accounting officer of the State Relief Administration, testified that each two weeks after November 8, 1937, he checked the record and sent to the state controller's office the payroll record for $28.98. The fact that there existed a reservoir of unlimited resources from which he might secure any sum of money, even in excess

of $200, did not make the taking of any one of the sums of $28.98 a part of any crime except the petty theft which was committed by the taking of that particular sum. The State Relief Administration might have been closed on the day following defendant's receipt of his first payment, or the administration might have detected the falsity contained in the application, which would at once have terminated defendant's right to relief, or at any time after filing his application defendant might have experienced a change of heart, any one of which would have closed the state's resources against any further taking by defendant. In view of the foregoing.

The order is affirmed.

We concur: WOOD, J.; McCOMB, J.



43 Cal.App.2d 117

PEOPLE v. EGBERT.

Cr. 1750.

District Court of Appeal, Third District, California.

Feb. 17, 1941.

1. Criminal law ⇐1144

Where defendant appealed from judgment following conviction and from order denying his motion for new trial, and only contention on appeal was with respect to order, District Court of Appeal would assume that lack of merit in appeal from judgment was conceded.

2. Criminal law ⇐911, 1156(1)

A motion for new trial is addressed to sound discretion of trial court and any ruling thereon will not be disturbed on appeal except upon a manifest and unmistakable abuse of discretion.

3. Criminal law ⇐945(1)

On defendant's motion for new trial on ground of alleged newly discovered evidence, the chief consideration before trial court was whether newly discovered evidence was of sufficient probative force to render probable a different result upon retrial.

4. Criminal law ⇐938(1)

Denial of defendant's motion for new trial on ground of alleged "newly discovered evidence" was not an abuse of discretion where facts in record justified conclusion that same result would probably be reached upon a retrial, and trial court could have found that affidavit filed by defendant in support of motion was entitled to little or no credence, and facts proposed to be shown upon new trial merely tended to corroborate defendant's story.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

5. Criminal law ⇐956(3)

Where defendant made a motion for new trial on ground of alleged newly discovered evidence and filed an affidavit in support of motion, that no counter affidavit was filed by the people did not entitle defendant to have motion granted, since whether affidavit called for an answer was for trial court to decide in exercising its discretion.

6. Criminal law ⇐1176

Denial of defendant's motion for new trial on ground of alleged newly discovered evidence did not result in a "miscarriage of justice" where record showed that defendant was fairly tried and convicted, and alleged newly discovered evidence merely tended to corroborate defendant's story and probably would not have produced a different result upon a retrial.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Carson Egbert was convicted of burglary of the first degree, and he appeals.

Affirmed.

James F. Gaffney and Peter Mannino, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

TUTTLE, Justice.

[1] Defendant appeals from the judgment following his conviction of burglary of the first degree, and also from an order denying his motion for new trial. The only contention on appeal is in respect to the latter, and we will therefore assume

that lack of merit in the appeal from the judgment is conceded.

On the evening of September 8, 1940, at about the hour of 9 o'clock, Mrs. Carroll heard a noise at the rear door of her residence. She and her husband had already retired. She arose and went to the service porch and turned on the light. She saw a newly made hole in the screen of the outside door, and a bare arm extending into the house. The hand was reaching for the door knob on the inside. She saw a face pressed closely to the screen, which she testified was that of defendant. The man disappeared. The police were called. They found defendant a short distance from the house. He had parked his car in front of the Carroll home, and was walking toward it when apprehended. There were a number of scratches on his right arm, running parallel with the arm about one-eighth of an inch apart. These scratches were white when first noted, but turned red later.

Upon motion for new trial, defendant contended that it was a case of mistaken identity, and that he was some place other than the scene of the crime at the time of its commission. He based his motion upon newly discovered evidence, and in support thereof filed an affidavit by one Opal Smith, whom he testified he had met at a bar prior to the offense, but whose name he did not ascertain until about a week after the trial. She averred that she had met defendant the night of the crime, and after they had had a few drinks together, they drove in his car toward Land Park, which is a very short distance from the Carroll home; that they parked the car before they arrived at the park; that they remained there a short time; that she told defendant that she wished to go to the home nearby where she was employed; that defendant suggested that they walk in the park, which they proceeded to do; that after an argument, defendant left her and started to walk toward his car. The time was 9:55 p. m.

[2, 3] It is a well-settled rule that a motion for new trial is addressed to the sound discretion of the trial court, and any ruling thereon will not be disturbed on appeal except upon a manifest and unmistakable abuse of discretion. The chief, if not the only, consideration before the trial court is whether or not the newly discovered evidence is of sufficient probative force to render probable a different result upon a retrial of the case. 20 Cal.Jur. p. 92, sec. 61.

[4] The record here does not show an abuse of discretion in the denial of the motion. The positive identification of defendant by Mrs. Carroll, the fresh scratches upon his arm, the manner in which he was dressed, the fact that he was found at the scene of the crime, and that his car was parked near the house which he attempted to enter—these and other facts in the record must have convinced the trial court that another trial would have been a futility. The court may have also reasonably found that the affidavit was worthy of little or no credence, taking into consideration the obvious character and associations of affiant.

[5] Appellant contends that no counter affidavit was filed by the People. None was necessary. The trial court, in the exercise of its discretion, must have taken that fact into consideration in denying the motion. Whether or not the affidavit called for an answer was a matter for the court to decide, in exercising its discretion.

Appellant relies upon the case of People v. Shepherd, 14 Cal.App.2d 513, 58 P.2d 970, where the order denying a motion for new trial was reversed. There, the newly discovered evidence consisted of the testimony of a witness who stated that he had committed the crime of which the defendant had been convicted, and that he, said witness, had pleaded guilty to the precise charge, and judgment had been pronounced against him. Furthermore, the District Attorney there announced that he would not oppose the motion. It could scarcely be denied that the trial of a defendant under such circumstances and without the proposed evidence, would be a manifest injustice, and it is clear that the denial of the motion was an abuse of discretion. Here, the facts which it is proposed to prove have no such probative force. At most, they merely tend to corroborate the story of defendant.

[6] The record shows that defendant was fairly tried and convicted. There are other facts and circumstances not related here which tend to prove his guilt. All the evidence clearly indicates that no miscarriage of justice resulted from the ruling of the court.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

43 Cal.App.2d 70

BROWN et al. v. STATE PERSONNEL BOARD et al.

Civ. 12734.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1941.

Hearing Denied April 17, 1941.

1. Officers ⇐72(1)

Dismissal of probationary employee is not effected unless written reasons for dismissal are filed with the personnel board within the probationary period. St.1913, p. 1041, § 9.

2. Officers ⇐69

A civil service probationer is entitled to have the statutory procedure for dismissal strictly followed. St.1913, p. 1041, § 9.

3. Officers ⇐72(1)

Dismissals of probationary employees were invalid where reports of separation containing reason for dismissals were filed with personnel board more than six months after appointments of such employees, irrespective of custom of board of equalization in filing such reports after expiration of probationary period. St.1913, p. 1041, § 9.

4. Customs and usages ⇐8

Custom cannot overcome unequivocal statutory provisions.

5. Officers ⇐72(1)

The statement "services unsatisfactory" was not a statement of "reason" for dismissal within terms of statute requiring filing of statement of reasons for dismissal of probationary employee. St.1913, p. 1041, § 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Reason".

6. Officers ⇐72(1)

Under statute requiring reasons for dismissal of probationary employees to be filed, probationer's failure with respect to conduct, capacity, integrity, or moral responsibility, as ground for dismissal under rule of personnel board, should be described in language intelligible to a man of ordinary understanding. St. 1913, p. 1041, § 9.

7. Officers ⇐72(1)

In amended rule of personnel board requiring thorough investigation, to determine whether probationary employee is fully qualified for permanent civil service status, the language used, including the word "determine", indicates that appointing power is not clothed with authority to act arbitrarily or capriciously, but that its investigation is akin to that of any fact-finding tribunal, and must be reported to personnel board at the end of second and fourth months of probationary period, so as to circumvent arbitrary removal for reasons other than lack of the qualities prescribed.

See Words and Phrases, Permanent Edition, for all other definitions of "Determine".

8. Officers ⇐72(1)

The mere fact that rule of personnel board, before amendment, required only a want of capacity or conduct to satisfy discretion of appointing power in dismissing probationary employee, did not relieve appointing power of statutory obligation to state reasons for dismissal in report, and statement "unsatisfactory services" was insufficient. St. 1913, p. 1041, § 9.

9. Officers ⇐72(1)

A dismissal of probationary employee did not fail because of discrepancy in name of his position as recited in separation report, in that position was given its former name.

10. Officers ⇐69

Where dismissals of probationary employees were ineffective because of failure to file sufficient statements of reasons for dismissal, alleged fact that employees were dismissed for political purposes was immaterial.

11. Mandamus ⇐143(2), 187(9)

The existence of laches as a bar to action for writ of mandate is a fact, determination of which is left largely to discretion of trial judge by consideration of all circumstances, and his determination will not be disturbed unless manifest injustice has been done or his conclusion is not reasonably supported by evidence.

12. Equity ⇐67

There is no fixed rule as to circumstances that must exist or time that must elapse before doctrine of laches can be appropriately applied, but the matter is in chancellor's sound discretion.

13. Action ⇐63

Definite principles guide the courts in determining whether a litigant has been diligent, as affecting existence of laches, and all of the facts of each case must determine guilt of laches.

14. Mandamus ⇐143(2)

One seeking mandamus to compel reinstatement to a civil service position after a wrongful discharge must act promptly, as affecting his rights under plea of laches.

15. Mandamus ⇐143(2)

A civil service employee was precluded from obtaining mandamus to compel reinstatement if prejudice resulted to his adversary from unexplained delay in seeking remedy, and prejudice rather than lapse of time is determinative, so that plea of laches is unavailable if delay has caused no material change in statu quo and no detriment to party pleading laches.

16. Mandamus ⇐168(4)

Evidence *held* to authorize finding that probationary employees seeking writ of mandate to compel reinstatement after wrongful dismissal were not guilty of "laches", in view of showing that board of equalization had knowledge of employees' insistence upon their rights, and that no prejudice resulted from delay in view of failure to show that other persons were employed to fill their positions.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

17. Mandamus ⇐187(9)

Under rule that all intendments must be invoked in support of trial court's judgment, reviewing court presumed, in support of findings and judgment negativing prejudicial effect of laches in seeking writ of mandate to compel reinstatement of probationary employees, that appointment of persons to fill discharged employees' positions occurred after action for writ of mandamus was commenced.

18. Mandamus ⇐143(2)

The contention that delay in bringing action for writ of mandate to compel reinstatement of discharged probationary employees was prejudicial, because it caused loss of testimony of witnesses who died before trial, was untenable where matters concerning which such witnesses could have testified were not shown, and dismissals of employees were ineffective as a matter of law, making such testimony immaterial in any event.

19. Mandamus ⇐187(9)

In absence of proof that, if discharged probationary employees were reinstated, they would have to be re-educated in changed procedure, reviewing court must presume that employees were familiar with the changed procedure, and hence no prejudice was suffered because of their delay in bringing action for writ of mandate.

20. Mandamus ⇐143(1)

An action for writ of mandate to compel reinstatement of dismissed probationary employees was not barred by statute authorizing employees to be laid off, and requiring such employees to bring action within one year, where dismissals were attempted because employees' services were not "satisfactory" rather than for reasons authorizing "lay-off". St.1933, p. 712, § 14a.

21. Officers ⇐65

The statute authorizing employees to be laid off under specified circumstances, and requiring action brought by employee to be filed within one year, is applicable only to suspensions, which are authorized only when there is lack of work, lack of funds, or in the interests of economy, and not to outright dismissals. St.1933, p. 712, § 14a.

WOOD, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Robert A. Brown and others against the State Personnel Board of the State of California and others, for writ of mandate directing reinstatement of petitioners to civil service positions. From a judgment granting the relief sought, defendants appeal.

Affirmed.

Hearing denied; CURTIS, J., dissenting. TRAYNOR, J., took no part in the consideration or decision of this matter.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellants.

Robert W. Kenny, Morris E. Cohn, and Howland & Prindle, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

It having been adjudged that a writ of mandate should issue to the state board of equalization directing that petitioners be reinstated to their several positions and be paid their accrued salaries from the dates of their wrongful dismissals, appellants take this appeal. In order more successfully to enforce the judgment the state personnel board and certain officers of both boards were joined in the action.

Petitioners are seven in number. Prior to appointment each was certified as eligi-

ble for his position by the personnel board. In the case of each of them, except petitioner Hudelson, a dismissal was attempted after he had served as a probationer for more than four months, and in most instances petitioners actually served the required six months probationary period less from two to ten days. The reason for every dismissal given in the separation report was: "services unsatisfactory", and nothing more. The positions held by petitioners as such probationers were those of supervising liquor control officer, liquor control officer and investigator. Petitioner Hudelson, as probationer, held the position of "supervising liquor control officer" for less than one month, having occupied the same position for five months preceding the commencement of such probationary term under a temporary authorization whereby he was designated "chief liquor control officer".

The principal contention made by appellants is that certain findings are in reality conclusions of law and are contrary to settled legal principles. With respect to petitioners Brown, Torrance, McNamara and Brady, the finding is that the reports of separation in each instance were not filed with the personnel board until after the expiration of the six months probationary period, when a permanent civil service status had been attained by those petitioners in their respective positions. With respect to petitioners Magee and Long, the court found that no written reasons for the attempted dismissals were ever filed with the personnel board and that as a result thereof those two acquired a permanent civil service status. With respect to Hudelson, the court found that no written reason for his attempted dismissal was ever filed with the personnel board; that no report of separation was filed, and that as a result Hudelson attained a permanent civil service status. With respect to all of the petitioners, it was found that the reports of separation failed to comply with the provisions of the Civil Service Act and the rules and regulations of the personnel board, in that they contained no written reasons for the dismissals.

This attack upon the findings presents for our consideration two primary questions: (1) Is it necessary in order to effect a dismissal of a probationary civil service employee that the report of separation be filed with the personnel board prior to the expiration of the employee's probationary period? (2) Is the statement that the employee was dismissed because of "services unsatisfactory" a proper statement of the *reasons* for his dismissal under the provisions of the Civil Service Act and the rules and regulations of the personnel board?

[1-4] Section 9 of the Civil Service Act, St.1913, p. 1041 (Deering's General Laws, 1913, Act 606) governs the case. That portion of the Act material to our consideration provides: "* * * All appointments shall be for a probationary period to be fixed by the commission but not to exceed six months. Unless such appointee shall have been dismissed within such probationary period by the appointing power, for reasons stated in writing and filed with the commission, his appointment shall become permanent." Unless written reasons for the dismissal of the employee were filed with the personnel board within the probationary period no dismissal was effected. Kelly v. State Personnel Board, 31 Cal. App.2d 443, 88 P.2d 264. At page 449 of 31 Cal.App.2d, at page 267 of 88 P.2d the court in that case said: "The statute has an obvious meaning, clear in construction, language and in law, that is that a written statement of reasons must be filed with the commission prior to the expiration of the probationary period, in order to effect the dismissal of a probationer." Such a construction gives effect to all parts of the statute. So construed, a civil service probationer is entitled to have the statutory procedure for dismissal strictly followed. Nilsson v. State Personnel Board, 25 Cal.App.2d 699, at 705, 78 P.2d 467. For like reason the court herein was warranted in concluding that the dismissals of Brown, Torrance, Magee and Brady were abortive, in that the reports of separation containing the reason for the dismissals were filed with the personnel board more than six months after the respective appointments. The custom of the board of equalization in filing reports of separation after the expiration of the probationary period is of no consequence. Custom cannot overcome unequivocal statutory provisions. American National Bank of San Francisco v. Sommerville et al., 191 Cal. 364, 216 P. 376; Davidson v. Burns, 38 Cal.App.2d 188, 192, 100 P.2d 1105, 101 P.2d 568.

[5-7] The reason for the dismissals contained in the several reports of separation was not sufficient to effect a dismissal of petitioners. At the time the reports (except as to Hudelson) were filed with

the personnel board, Rule 9, section 1 of the personnel board provides as follows: "* * * If the *conduct, capacity, moral responsibility or integrity* of the probationer is found to be unsatisfactory, it shall be the duty of the appointing power to dismiss him from the office and to report the dismissal, *together with the reasons therefor,* to the executive officer of the board in writing * * *" (Italics ours.) The statement, "services unsatisfactory", is not a compliance with the above rule requiring that the reasons for dismissal of a probationer be stated in a report of dismissal. Rule 9 directs the appointing power to dismiss a probationer if he be found unsatisfactory with respect to his conduct, his capacity, his moral responsibility or his integrity. But in reporting the dismissal reasons must be given to the executive officer. "Unsatisfactory", applied to services, is not a reason. It is the result of the probationer's misconduct, or of his lack of capacity to do his work, or of his want of integrity or of moral responsibility. It is not a statement that he had failed in respect to one or more of those qualities of head and heart. Had the author of the separation reports taken pains to peruse the printed instructions on the forms prepared for making such reports he might have learned a lesson which he had not imbibed from the responsibilities of his office. For there he would have read: *"A dismissal during probationary period for unsatisfactory conduct or capacity. Report must contain a statement of the reasons for dismissal."* Where a report assigns as the reason for "separation" only the phrase "services unsatisfactory", or "unsatisfactory service", and no statement of fact is included with respect to the employee's lack of any one of the qualities prescribed by the statute, it is clear that there is no statement of "the reasons for the dismissal". In view of the requirement of Rule 9, a probationer's failure as to conduct, capacity, integrity or moral responsibility should be described in language intelligible to a man of ordinary understanding. Kelly v. State Personnel Board, supra. The dismissal of Kelly, attempted in the reported case, was made when Rule 9 allowed a discharge for unsatisfactory "conduct or capacity * * * in the discretion of the appointing power". But when these petitioners (excepting Hudelson) were dismissed Rule 9 had been amended so that it read: *"It shall be the duty of the appointing power during the probationary period * * * to investigate thoroughly his conduct, capacity, moral responsibility and integrity, to determine whether the employee is fully qualified for permanent civil service status."* Not only must the appointing power investigate such moral and mental qualities of a probationer, but he is required to make a *determination* as to "whether the employee is fully qualified for permanent civil service status". This language could mean nothing more than that the appointing power is not clothed with authority to act arbitrarily or capriciously. Its clear implication is that the investigation to be made by the "appointing power" is akin to that of any fact finding tribunal, and must be reported to the personnel board at the end of the second and fourth months of the probationary period. The language of the rule circumvents the arbitrary removal of a probationer for reasons other than for the lack of some of those qualities prescribed by Rule 9.

The case of Neuwald v. Brock, 12 Cal. 2d 662, 86 P.2d 1047, is not in point. Neuwald was discharged prior to the amendment of Rule 9 in October of 1935. Under the rule as it stood prior to that date the appointing power was authorized to dismiss a probationer in his own discretion if "the conduct or capacity of the probationer has not been satisfactory to the appointing power". Under that language not only did the appointing power have a broader discretion, but the reason assigned for the dismissal of Neuwald was in the language of the rule itself. It was because the reason stated for the dismissal of Neuwald followed the precise language of Rule 9 as it then existed that the Supreme Court approved of the dismissal. This is not akin to the language used in reporting the dismissals in the instant case and is therefore not in point.

[8] Hudelson stands in a situation quite different from that of the other petitioners. Nevertheless the foregoing discussion applies with equal force to his case. His attempted dismissal preceded by three months the aforementioned amendment to Rule 9. But the mere fact that the rule at that time required only a want of "capacity" or "conduct" to satisfy the discretion of the appointing power did not relieve the latter of the obligation which obtained then, to-wit, that reasons for a dismissal must be stated in the report of the appointing power. "Unsatisfactory services" was

not a compliance with Rule 9 prior to the amendment.

[9] It is immaterial that the report of separation stated that Hudelson was dismissed from the position of "chief liquor control officer". Since that was the former name of the position which he held as probationer, there is no merit in the point urged by him that the "dismissal" failed because of the discrepancy in the name of his position recited in the separation report. Giving the office either name, the dismissal was abortive because the reasons assigned therefor were an insufficient compliance with Rule 9.

[10] The contention is made that the findings that petitioners were dismissed for political purposes are not supported by the evidence. This becomes immaterial in view of our decision that the dismissals were ineffective.

[11] It is earnestly urged that by reason of the fact that the present proceeding was commenced from two to two and a half years after the attempted dismissals of the several petitioners their action is barred by laches. The existence of laches is a fact the determination of which is left largely to the discretion of the trial judge by a consideration of all the circumstances of the case. His determination will not be disturbed unless a manifest injustice has been done or unless his conclusion is not reasonably supported by the evidence. Wolpert v. Gripton, 213 Cal. 474, 2 P.2d 767; Akers v. Hufford, 128 Cal.App. 146, 16 P.2d 802. The instant action was filed February 14, 1938. The trial court made complete findings on the plea of laches and concluded that the action of petitioners is not barred on that account. The substance of the findings is as follows: The resolutions of dismissal as to each of the seven were adopted on the following dates, to-wit: Hudelson, July 30, 1935; Brown, December 23, 1935; Long, February 5, 1936; the other four, January, 1936; that immediately after the attempted dismissals petitioners notified the appellant boards of their claims of wrongful dismissal and demanded reinstatement; that petitioners were diligent in making repeated demands for reinstatement; that petitioners were informed that their cases would be investigated and that they would be reinstated if their claims were just; that petitioners were told that other employees who had been dismissed at the same time had commenced actions to obtain their reinstatement, and that the board of equalization requested petitioners to refrain from commencing any actions to enforce their rights until after the pending litigation had been decided; that in December of 1937 the pending litigation was settled and those petitioners were reinstated, following which the board of equalization advised petitioners that they also would be reinstated; that the board of equalization was not obligated to employ persons to occupy the positions of petitioners after their attempted dismissals, but that the board did in fact employ such persons; that Ray Edgar and John C. Corbett, members of the board of equalization at the time of the attempted dismissals, had died prior to the time of trial and that two other employees had also deceased, but that appellants made no offer to prove what such deceased persons would have testified to had they been present at the trial, and that accordingly no prejudice resulted to appellants in the presentation of their defense.

[12-15] There is no fixed rule as to the circumstances that must exist or as to the period of time which must elapse before the doctrine of laches can be appropriately applied. 10 Cal.Jur. 526. "The matter is one which reposes in the sound discretion of the chancellor." Ibid. While definite principles guide the courts in determining whether a litigant has been diligent, precedents are of little value, for it is all of the facts of each case which must determine whether a petitioner has been guilty of laches. LaShells v. Hench, 98 Cal.App. 6, 276 P. 377. One of the guiding rules in determining the rights of a petitioner under a plea of laches is that he must be diligent. Where one seeks a writ of *mandamus* to compel his reinstatement to a civil service position after a wrongful discharge he must act promptly. Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 62 P.2d 1047. If because of his delay in seeking his remedy, without offering a satisfactory explanation for the delay, a prejudice results to his adversary, he will be precluded from enforcing his demand. It is not so much a question of the lapse of time as it is to determine whether prejudice has resulted. If the delay has caused no material change in statu quo ante, i. e., no detriment suffered by the party pleading the laches, his plea is in vain. Hayman v. City of Los Angeles, supra, 17 Cal.App.2d page 680, 62 P.2d 1047.

[16] There was no abuse of discretion in holding that petitioners Brown, Brady and Hudelson were not guilty of laches. The evidence is amply sufficient to support the findings of the court as to those petitioners. Immediately following the attempted dismissals they demanded of a number of the board of equalization that they be reinstated. Such demands for reinstatement were repeated prior to the institution of the present action. Both of them were requested by an officer of the board to take no legal action to enforce their reinstatement until after the determination of proceedings then pending on behalf of other dismissed employees to secure their reinstatement. Both Brown and Brady requested hearings before the personnel board. Their motions for reinstatement were continued from time to time until they were finally dismissed. With respect to petitioner Hudelson, the evidence shows that he did not make such frequent demands for reinstatement as did Brown and Brady immediately following their attempted dismissals. Having communicated with the personnel board with reference to his reinstatement, Hudelson employed an attorney to enforce his rights.

It is thus clear that the board of equalization, immediately following the attempted dismissals of the three above named petitioners, had knowledge that all three insisted upon their asserted rights to be reinstated. The finding of the court that the long delay on the part of Brown and Brady in instituting their action to secure reinstatement was excusable is justified by the proof of their continual efforts to enforce their rights and by the evidence of their compliance with the request of the board to await the outcome of the litigation then pending. While the evidence of Hudelson's attempts to gain reinstatement is not sufficient to prove an adequate excuse for his long delay in filing suit, at the same time there is no evidence that appellants were prejudiced by the delay. It was *stipulated that no person was employed to fill the position of supervising liquor control officer, Grade 2,* from which the board had attempted to discharge Hudelson. The only material prejudice which the board could have suffered under the circumstances would have been the payment of a salary to the person taking Hudelson's place, as well as paying the accumulated salary of Hudelson for the same period of time.

With reference to petitioners Torrance, Magee, McNamara and Long, it is clear that the evidence does not support the findings of the court that they were diligent in presenting their claims for reinstatement. (a) Magee gave no testimony whatever at the trial. There is no evidence that the board of equalization ever knew of his demand for reinstatement. It does not appear that he made any effort to regain his position by reinstatement at any time prior to the commencement of this action. (b) Petitioner Torrance testified that prior to his dismissal he conversed with a former member of the board of equalization, and that four months after his attempted dismissal he talked with the chief liquor control officer of the board concerning the possibility of his employment in one of several vacancies. But in neither conversation was the subject of his reinstatement in his former position mentioned. (c) Petitioner McNamara testified that upon receiving notice to the effect that he was dismissed he discussed with his superior officer the reason for the attempted dismissal. Following a consultation with a deputy attorney general upon the subject shortly after receiving his notice on January 22, 1936, he was advised that the dismissal was valid. In the latter part of February, 1936, McNamara conferred with a member of the board of equalization, who advised him that his best course was to apply for another position. Thereafter he was informed by an administrative assistant to the board that there were then numerous vacancies. Then, for the first time, by writing he requested the personnel board to restore his name to the eligible list for the position of collector, and by letter inquired concerning the possibility of being reinstated to his former position of investigator. In reply he was informed that his reinstatement could come only through the board of equalization. There is no evidence that he ever requested the last named board to reinstate him. He had knowledge of the proceedings which had been instituted by other employees to effectuate their reinstatements. Although requested to join in those actions he refused to do so. (d) Following the adoption of the resolution to dismiss petitioner Long, that gentleman stated his grievance to the office of the lieutenant governor and lodged a protest with the board of equalization. Thereafter for a period of six months he made repeated attempts to confer with

two members of the board of equalization. Also, he wrote letters to the board demanding to know the reasons for their action in attempting to dismiss him. All of the petitioners engaged an attorney in December of 1936 to try to effectuate their reinstatement. But there is no proof as to what action, if any at all, was taken by such attorney.

Since the evidence fails to support the findings of diligence on the part of the four last mentioned petitioners in prosecuting their demands to be reinstated, it follows that if their laches resulted in any prejudice to appellants the judgment is not supported as to them. If such prejudice did result, it must have been because of the employment of others, after the attempted dismissals, to perform the duties done by petitioners as probationers; or because material witnesses had deceased prior to the trial; or because such changes had been made in the law and in the rules governing the activities of the board of equalization as would require an unreasonable time for petitioners, after reinstatement to gain a ready knowledge of such changes.

[17] The only evidence relating to the employment of other persons to fill the positions formerly occupied by the four last mentioned petitioners is to the effect that, after the several dismissals, other persons were employed to fill such positions. But there is no evidence that, after the attempted dismissals and prior to the time when this suit was commenced, other persons were employed to fill the positions of those petitioners. Had substantial evidence to that effect been received it would have constituted proof that appellants had been prejudiced by the delay of such petitioners. The only approach to such proof is that certain persons were appointed to fill the positions formerly held by those four petitioners *after* the attempted dismissals. Under such circumstances the familiar rule that all intendments must be invoked in support of the judgment of the trial court applies. Accordingly it must be presumed in support of the findings and judgment that such persons, holding the positions once occupied by the four last mentioned petitioners, were employed after the present action was commenced. Basing our conclusion upon that presumption, we must hold that no prejudice could have resulted to the board from the delay. This is true since the board had notice of the claims for reinstatement at the time the new employees were installed in the positions formerly occupied by the named petitioners.

[18] The contention that the delay was prejudicial because it resulted in the loss of the testimony of witnesses who deceased prior to the trial is untenable. Appellants failed to make any offer of proof of the matters concerning which such witnesses could have testified had they been living at the time of the trial. Consequently we are unable to determine the materiality of such testimony. Since the dismissals were ineffective as a matter of law, such testimony could not have been material in any event. If such testimony had been directed to the reasons for the dismissals it would not be material, for the very good reason that the grounds for such attempted dismissals were of no importance.

[19] The contention that if petitioners are reinstated the board will have to reeducate them in the changed procedure is likewise unavailing. No evidence was offered to prove that petitioners are not familiar with all of the changes in the laws, rules and procedure relating to the business of the board which have occurred since their respective dismissals. In the absence of such proof we must presume that petitioners are familiar with such laws, rules and changes thereof, and that therefore no prejudice has been suffered on that account.

[20, 21] The final contention, that the causes of action of petitioners are barred by section 14a of the Civil Service Act, cannot be sustained. That section provides: "Whenever it is necessary because of lack of work or lack of funds, or whenever it is advisable in the interests of economy, to reduce the staff of any department or agency in the State service, the appointing power may * * * lay off employees according to the procedure set forth in this act and the rules and regulations thereunder. * * *" Stats.1933, Chapter 214, p. 712. The Act further provides that any action brought by a discharged employee against the appointing power must be filed within one year, and if compensation during the layoff is sought it must be commenced within ninety days. From the portion of the section which we have quoted it is obvious that it is not intended to apply to outright dis-

missals but only to suspensions. A suspension is authorized in three situations only: when there is a lack of work, lack of funds or in the interests of economy. In the instant case dismissals of all of the petitioners were attempted because their services were not "satisfactory", and not for any of the reasons which would authorize a "lay-off" or suspension. Moreover, there is no evidence that there was a lack of work or a lack of funds or that petitioners were discharged in the interest of economy. Therefore, the provisions of section 14a regarding the time within which an action under that section must be instituted are not applicable to the instant case.

The judgment is affirmed.

I concur: McCOMB, J.

WOOD, Justice (concurring in part).

I concur in the judgment in so far as it concerns petitioners Brown and Brady. I do not concur in the view that the other petitioners are not barred by laches. If their petitions had been promptly filed the state would not now be compelled to pay to them salaries for a long period of time during which the benefit of their services was not received.



43 Cal.App.2d 100

PEOPLE v. BEST.

Cr. 3372.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1941.

Hearing Denied March 17, 1941.

1. Robbery ⇐24(3)

Evidence identifying accused as party who entered banks and by the use of firearms took away money, sustained conviction for grand larceny.

2. Robbery ⇐26

The question of identity of bank robber was solely for determination of jury where there was substantial evidence to support it.

3. Robbery ⇐23(1)

A witness may describe the firearms used by person accused of robbery, whether the witness saw the firearms during the commission of the crime or whether subsequently the accused identified them as his property.

4. Robbery ⇐23(1)

In prosecution for robbing banks, action of the trial court in allowing police officer to describe dark glasses and revolvers which the officer had seen and which the accused had admitted to the officer were the accused's property was not error.

5. Criminal law ⇐406(1), 409

In prosecution for robbing banks, wherein description of guns which accused had admitted to be his property corresponded with description given by witnesses of guns used in the robberies, such declarations were admissible as against interest, and action of the trial court in admitting the declarations was not abuse of discretion.

6. Criminal law ⇐1104(3)

Where accused assigned as error certain statements by district attorney in course of argument, but in application for transcript accused did not specify argument of counsel as a portion of the phonographic reporter's notes required by accused to be transcribed, the accused's request for a transcript of the entire proceeding from the commencement of trial to and including imposition of judgment did not comply with court rule requiring the court to order the phonographic reporter to transcribe such portion of his notes as in the opinion of the court might be necessary to present fairly and fully the points relied upon by an appellant. Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7.

7. Criminal law ⇐1144(19)

Where accused assigned as error statements by district attorney in course of argument but none of the argument was contained in the record, if the accused's all-inclusive language in his application for transcript could be deemed to require the argument and assignment thereto to be transcribed, although he specified neither, the District Court of Appeal was required to conclude that there was no assignment made to the misconduct of the district attorney, in view of presumption that reporter performed his official duty, by excluding the arguments of district attorney and including in the transcript all matters necessary to comply with the rules of the District Court

of Appeal. Code Civ.Proc. § 1963, subd. 15; Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7.

8. Criminal law ⇐1110(9)

If accused intended to prosecute appeal on misconduct of district attorney, on finding that record was void of argument criticized and of any assignment of error thereto, order for a diminution of the record would have brought to the District Court of Appeal any part of the argument of the district attorney and the assignments of error made thereto. Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7.

9. Criminal law ⇐1119(4), 1129(1)

Where there was in the record neither argument of district attorney nor assignment of error by accused, the District Court of Appeal would not determine that prejudicial error occurred as result of the argument.

10. Criminal law ⇐792(2)

In prosecution for robbing banks, instruction that all persons concerned in commission of a crime, whether directly committing the act or whether abetting its commission, are punished as principals and are equally guilty, did not require reversal on ground that there was no evidence which would bring accused within the definition of an aider or abettor, in view of the fact that distinction between principals and accessories has been abolished.

11. Criminal law ⇐59(5)

All participants in felonies are chargeable as principals.

12. Criminal law ⇐59(5)

To "abet" another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting or aiding the commission of such crime. Pen. Code, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Abet".

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

James Best was convicted of grand larceny, and he appeals.

Affirmed.

James Best, in pro. per.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

From two judgments of conviction of grand larceny, after former convictions of felonies, and from an order denying his motion for a new trial, defendant appeals. As grounds for reversal he contends: (1) That the proof was insufficient to establish his identity as the perpetrator of the crimes; (2) that the court erred in receiving certain testimony descriptive of firearms used by appellant in the commission of the crimes; (3) that the district attorney was guilty of misconduct in his argument to the jury, and (4) that the court erred in giving certain instructions with reference to "aiding and abetting" in the commission of the robberies.

Appellant was indicted for the commission of three felonies. In the first count he was accused of having robbed by means of force certain Japanese men of the sum of $8,000. On this count he was acquitted. The facts forming the basis of count 2 are as follows: On July 21, 1939, two men entered the lobby of the Hill and Atlantic branch of the Security-First National Bank. One of them stood in the customers' lobby while the other entered the enclosure behind the gate and by displaying his revolver forced the employees of the bank to face the rear wall while he took money from the cash drawers. Appellant was identified as the one who took the money by the employees of the bank, including Powell, Nelmes and the manager, DeWalt. At the time of the robbery appellant held a handkerchief over his face but lowered it to make his conversation intelligible to DeWalt, who was at a distance of two feet from him. At that time DeWalt gained a profile view of appellant's face. As to his general appearance and size, he was identified by Powell, and with particular reference to his size and dress by Mr. Nelmes. At the time appellant wore dark, white-rimmed glasses and held an automatic revolver. He removed from the bank $6,603.12.

The facts supporting count 3 of the indictment are as follows: On December 11, 1939, two men entered the front door of the Whittier and Euclid branch of the California Bank. One stood at the front door covering the employees and customers with a revolver while his partner, menacing those present with an automatic pistol, took currency from the tellers' cages in the amount of $2,124 and removed it from the bank.

Appellant was identified as taker of the money by the manager, Mr. Connell, the assistant manager, Mr. Higgens, three tellers, Messrs. Thomas, O'Malley and Schlundt, and the stenographer, Miss Gracy. All of the witnesses were positive of their identification. At the time appellant carried a .45 automatic, blue steel pistol that was worn and faded. While robbing this bank appellant wore nothing to conceal his features. He was subsequently arrested in Portland, Oregon. While waiting to be transported to Los Angeles, appellant conferred with Officer Stromwell of the Los Angeles police. He admitted to the officer that the two revolvers which he carried were his property. One was the .45 automatic and the other was a .38 Colt used by appellant in committing the robberies. He was shown a pair of white-rimmed dark glasses and admitted their ownership also. The glasses were introduced in evidence and were identified by the bank employees as the glasses worn by appellant at the time of the robbery. The only witness offered by appellant to rebut the testimony of the People's witnesses, one Jack Coady, a customer of the Security-First National Bank, was unable to contribute any testimony of value with reference to the lack of identity of appellant as the robber.

[1, 2] The evidence is ample to support the finding of the jury that appellant was the person who entered the two banks and by the use of firearms took away the money of the bank. People v. Pianezzi, 42 Cal.App.2d 265, 108 P.2d 732. The question of the identity of the robber was solely for the determination of the jury where there was substantial evidence to support it. People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814; People v. Connelly, 195 Cal. 584, 593, 234 P. 374; People v. Deal, 42 Cal.App.2d 33, 108 P.2d 103. That finding is fortified when the trial court in reviewing the evidence on the motion for a new trial denies the motion.

[3, 4] Appellant assigns as error the action of the court in allowing the police officer to describe the dark glasses subsequently received in evidence as an exhibit and the two revolvers which had been taken by the Portland police and held by them. There is no vice in allowing a witness to describe the firearms of a person accused of robbery, whether the witness saw the guns during the commission of the crime or whether subsequently the robber identified the guns as his property. People v. Powell, 71 Cal.App. 500, 513, 236 P. 311. Not only had the officer seen the revolvers, but to him appellant admitted that they were his property.

[5] The witnesses to both robberies described in detail the guns used by appellant. They described and identified the dark glasses worn by appellant in the commission of the robbery of the Security-First National Bank. The description of the guns, admitted by appellant, while in Portland to be his property, corresponded with the description by the witnesses of the guns used in the robberies. Such declarations were admissible as against interest and were competent evidence which, taken in connection with other proof, tended to establish the guilt of appellant. People v. Ammerman, 118 Cal. 23, 32, 50 P. 15. Admitting such declarations under the circumstances was addressed to the trial court's discretion, which is not shown to have been abused. People v. Connelly, 195 Cal. 584, 234 P. 374.

[6-9] Appellant assigns as error certain statements by the district attorney in the course of his argument. None of the argument of the district attorney is contained in the record. In his application for a transcript appellant did not specify argument of counsel as a portion of the phonographic reporter's notes required by him to be transcribed. It is true that appellant requested a "transcript of the entire proceeding from the commencement of the trial to and including the imposition of judgment". But this cannot be said to be a compliance with section 7, Rule II of the Rules of the Supreme Court and District Courts of Appeal. That rule requires the court to order the phonographic reporter to transcribe such portions of his notes as in the opinion of the court may be necessary to fairly and fully present the points relied upon by appellant. Misconduct of the district attorney is not mentioned in the "Application for Transcript". The judge's order was to prepare the transcript "as applied for". If appellant's all-inclusive language in his application for a transcript may be deemed to require the argument and his assignment thereto, although he specified neither, we must conclude that there were no assignments made to the misconduct of the district attorney, in view of the presumption that the reporter has performed his official duty, Code Civ. Proc., Sec. 1963, subd. 15, by excluding the

arguments of the district attorney and by including in the transcript all matters necessary to comply with the rules of this court. If appellant had any intention of prosecuting his appeal upon the misconduct of the district attorney, on finding that the record was void of the argument criticized and the assignments made, the order for a diminution of the record would have brought to this court any part of the argument of the district attorney and the assignments of error made thereto. Since there is in the record neither argument of the district attorney nor assignment of error by appellant, we are in no position to determine that any prejudicial error occurred. People v. Green, 13 Cal.2d 37, 45, 87 P.2d 821; People v. Collins, 195 Cal. 325, 352, 233 P. 97.

[10-12] The final assignment of error made by appellant is that the court by instructing the jury that all persons concerned in the commission of a crime, whether directly committing the act or whether they abetted its commission shall be prosecuted, tried and punished as principals and are equally guilty. Appellant contends that there is no evidence presenting such issue in his case, for the reason that the employees of the bank described him as the number one man of the robberies and that there is no testimony to the effect that defendant was any other member of the two robberies, and that there is no evidence which would bring him within the definition of an aider or abettor. But the distinction between principals and accessories was long ago abolished. Under the law all participants in felonies are chargeable as principals. Appellant would be equally as guilty whether he pressed his gun against the heads of the bank employees and required the delivery of the money or stood at the doorway and merely shouted terror to the employees if they did not comply with the demands by his partner for the bank's money. To "abet" another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting or aiding the commission of such criminal offense. Penal Code, § 31; People v. Steelik, 187 Cal. 361, 367, 368, 203 P. 78; Lassen v. Board of Dental Examiners, 24 Cal.App. 767, 772, 142 P. 505.

Judgment and order are affirmed.

We concur: WOOD, J.; McComb, J.

JOHNSTON v. OTA et al.

Civ. 12881.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1941.

1. Evidence ⇐43(3, 4)

Generally, a court will not take judicial notice of other actions, including those pending or concluded in the same court.

2. Evidence ⇐43(2, 3)

The authority of a court to take judicial notice of its own records is limited to proceedings in the same case.

3. Evidence ⇐43(3)

The court may take judicial notice of proceedings in another cause tried in the same court only where an unreasonable hardship will result from failure of the court to do so.

4. Judgment ⇐951(1)

Although judgment pleaded as a bar to an action was an adjudication of matter at bar and might have been rendered by the same court upon the same cause of action, and although such judgment and its supporting papers might be on file in the same court, the party pleading the prior adjudication carried the burden of establishing the plea and the burden could be met only by actual proof of the records of the prior case.

5. Judgment ⇐715(1)

In order to establish plea of "res judicata", it must appear either on the face of record or be shown by extrinsic evidence that precise issue raised was determined in prior suit.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

6. Evidence ⇐43(3)
Judgment ⇐951(4)

In action for breach of rental contract wherein plea of res judicata was filed, the trial court erred in taking judicial notice of judgment roll in prior action between the same parties before the same court, which was dismissed, and in sustaining plea of res judicata and dismissing the action without receiving formal proof.

7. Judgment ⇐572(2)

If demurrer filed by defendants in first action was sustained for lack of jurisdic-

tion or because of uncertainties or ambiguities, judgment in the first action would not under the "res judicata" doctrine bar subsequent action based upon the same facts.

8. Judgment ⇐570(5)

If judgment in first action did not determine the merits of the existing controversy, upon a complaint that contained a valid declaration of all the ultimate facts, the judgment of dismissal based upon order sustaining general demurrer would not be a bar under the "res judicata" doctrine to a subsequent action based upon the same facts.

9. Judgment ⇐954

In action for breach of rental contract, wherein defendants who filed plea of res judicata rested their case upon the judgment attached to their answer as an exhibit, which showed that the parties to the action were the same as those to prior action, action of the trial court in denying plaintiff's offer to prove by the judgment roll that the claims asserted by the plaintiff were not the same as those asserted in prior action was error.

10. Judgment ⇐951(4)

Fact that judgment which was relied on to sustain plea of res judicata was attached as an exhibit to the answer merely established its genuineness and due execution and did not prove the matters adjudicated by the judgment. Code Civ.Proc. § 448.

11. Judgment ⇐570(5)

Generally, judgments merely of dismissal, whether voluntary or involuntary, are not on the merits and do not operate as a bar or "estoppel" in subsequent proceedings involving the same matters unless it appears that the judgment necessarily involves those matters.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

12. Judgment ⇐725(1)

Every "estoppel" must be certain to every intent and not to be taken by argument or inference, and if upon the face of the record anything is left to conjecture concerning what was necessarily involved and decided, there is no "estoppel" in it when pleaded and nothing conclusive in it when offered in evidence.

13. Judgment ⇐715(1)

In order to justify judgment of "res judicata", it must be shown that the rights of the plaintiff alleged in second action are the same rights that had been adjudicated in first action. Code Civ.Proc. § 1911.

14. Judgment ⇐951(4)

The plea of former adjudication can be proved only by the judgment roll or other competent evidence.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by John Johnston against Y. Ota and others on a rental contract. From an adverse judgment, the plaintiff appeals.

Reversed.

Mitchell & Gold, of Los Angeles, for appellant.

Joseph S. Dubin, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment after trial of a plea of res judicata to counts 3 and 4 of the amended complaint after a dismissal of counts 1 and 2 on plaintiff's motion.

In the present action plaintiff demands damages for a breach of contract to pay rentals in the sum of $1,800 on lands of plaintiff and for $500 which plaintiff "was compelled to expend for the cultivation and irrigation of said lands (the alleged obligation of the lessee) an itemization of said expenses being attached" as an exhibit.

Defendant interposed a number of defenses including the plea in bar by reason of a former judgment of dismissal of an action brought by the same plaintiff against the same defendants. From such judgment of dismissal, it appears that an action involving the same parties had been dismissed by the same court on November 11, 1938, after "plaintiff has failed to file a third amended complaint".

When the case was called for trial, the court upon the motion of defendants proceeded with the trial of the plea of res judicata. Code Civ.Proc. § 597. At the trial no evidence was introduced. A copy of the judgment in the first case was attached as an exhibit to the answer. Without receiving any formal proof the court took judicial notice of the contents of the judgment roll and made findings substantially as follows: That counts 3 and 4 are upon the same claim and involve the same facts and parties as in the first action; that the evidence necessary to establish

the allegations in the first action was and is the same evidence that would be necessary to establish plaintiff's claim in the third and fourth counts in the present action; and that all matters and things contained in the third and fourth counts of the second amended complaint in the present action "have been concluded and adjudicated in favor of said defendants and against plaintiff by reason of said judgment of dismissal".

The questions for our determination are: (1) Can the superior court take judicial notice of the contents of the judgment roll in a former adjudication between the same parties in another action, and (2) Was it error to refuse an offer of the judgment roll in the first action?

[1, 2] (1) The general rule is that the court will not take judicial notice of other actions, not even those pending or concluded in the same court. Bank of America v. Button, 23 Cal.App.2d 651, 74 P.2d 81; People v. Newell, 192 Cal. 659, 221 P. 622; Stanley v. McElrath, 86 Cal. 449, 25 P. 16, 26 P. 800, 10 L.R.A. 545; Paridy v. Caterpillar Tractor Co., 7 Cir., 48 F.2d 166; Glaze v. Bogle, 105 Ga. 295, 31 S.E. 169. The authority of a court to take judicial notice of its own records is limited to proceedings in the same case. Sewell v. Price, 164 Cal. 265, 128 P. 407.

[3, 4] In reversing the trial court which found, by judicial notice, that the action was barred by a judgment in a former action in the same court, the circuit court of appeals of the 7th circuit held that only under exceptional circumstances will a court notice proceedings in another cause, although tried in that court between the same parties. Paridy v. Caterpillar Tractor Co., supra. The only exception to the rule is where unreasonable hardship would result. Bank of America v. Button, supra. Although the judgment pleaded was an adjudication of the matter at bar and may have been rendered by the same court upon the same cause of action, and although such judgment and its supporting papers may be on file in the same court, still the party pleading such prior adjudication carried the burden of establishing his plea which can be done only by actual proof of its records. Glaze v. Bogle, supra.

[5] It must appear either upon the face of the record or be shown by extrinsic evidence that the precise issue raised in the second action was determined in the former suit. Russell v. Place, 94 U.S. 606, 24 L.Ed. 214. In a second action between the same parties where it was alleged that the land involved in the complaint was the same land that was involved in the first action, it was proper for the court to receive in evidence the transcript containing the judgment roll for the purpose of establishing the allegations of the complaint. Graves v. Hebbron, 125 Cal. 400, 58 P. 12.

[6-8] There was no circumstance in the instant case that would have justified the court's taking judicial notice of the judgment pleaded or of the pleadings which preceded it. The parties were represented by counsel and the record of the first case lay upon the counsel table within the view of the court. By use of it plaintiff offered to prove that the demurrer in the first case stated 15 grounds; that three were directed to the lack of substance to constitute a cause of action; one to the jurisdiction of the court and 11 items were special demurrers on the grounds of uncertainty and ambiguity. The transcript may have shown that the demurrer might have been sustained on the question of jurisdiction; or on one or more of the numerous grounds of special demurrer; or that it may have been sustained because of an omission of technical allegations that are indispensable to the statement of a valid cause of action. If it had been sustained for lack of jurisdiction, the judgment would not be a bar to the filing of a new action. Kirsch v. Kirsch, 113 Cal. 56, 45 P. 164. If it had been sustained because of uncertainties or ambiguities, the judgment would not be a bar to the filing of a new action. Goddard v. Security Title, etc., Co., 14 Cal.2d 47, 92 P.2d 804. Even though the judgment of dismissal is based upon the order of the court sustaining a general demurrer, such judgment might not have adjudicated the substantial rights of the parties. If the judgment did not determine the merits of the existing controversy, upon a complaint that contained a valid declaration of all the ultimate facts, then the prior judgment on demurrer is not a bar to the present action. Goddard v. Security Title, etc., Co., supra; Erganian v. Brightman, 13 Cal.App.2d 696, 57 P.2d 971.

[9] (2) After the defendants had rested their case upon the judgment attached to their answer as an exhibit, the court erred in denying plaintiff's offer to prove by the judgment roll the claims asserted by plaintiff, to-wit, that the claims set forth in the

present action are not identic with those alleged in the prior action. While it is true that the exhibit showed beyond a peradventure that the parties to the action were the same, still it was necessary, in order to establish the plea in bar, that the defendants prove that the present action involved the identical matters and things that were adjudicated by the dismissal of the first action. And, when they declined to offer any proof of their plea, and the court was disposed favorably thereto, plaintiff's offer of legal evidence to defeat the plea should have been received.

[10-12] If we may assume the accuracy of respondent's representations in their brief, the court would have found the identicity of the issues in the two cases. But the record before us shows only findings of fact without evidence to support them. The fact that the judgment was attached as an exhibit to the answer, merely establishes its genuineness and due execution. Code Civ.Proc. § 448. It does not prove the matters adjudicated by the judgment of dismissal. There were no means by which the court could have determined whether the demurrer in the former case was sustained for want of jurisdiction or upon one or more of the special demurrers or whether it was for lack of substance in the complaint to constitute a cause or causes of action. "Generally, judgments merely of dismissal, whether voluntary or involuntary, are not on the merits, and do not operate as a bar or estoppel in subsequent proceedings involving the same matters, unless it appears that the judgment necessarily involves those matters." Campanella v. Campanella, 204 Cal. 515, 520, 269 P. 433, 435. Because of an utter want of proof, there was no judicial determination by the court of the matters pleaded in bar. Id. "Every estoppel must be certain to every intent and not to be taken by argument or inference. If upon the face of the record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered in evidence". Coke on Littleton, par. 362b.

[13, 14] In order to justify the judgment of res judicata, it must be shown that the rights of the plaintiff alleged in the present action against the same defendants are the identic rights that had been adjudicated in the former action. Finally, as if endeavoring to make certain that the dominion of a judgment might not be extended beyond the limitations indicated by the authorities, both ancient and modern, the legislature in the early years of our statehood enacted section 1911 of the Code of Civil Procedure, to-wit: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." The plea of former adjudication can be proved only by the judgment roll or other competent evidence. Graves v. Hebbron, supra; City of Los Angeles v. Moore, 31 Cal.App. 39, 159 P. 872; Stanley v. McElrath, supra; Divide Creek Irrigation Dist. v. Hollingsworth, 10 Cir., 72 F.2d 859, 96 A.L.R. 944.

For the foregoing reasons the judgment is reversed.

We concur: WOOD, J.; McCOMB, J.



43 Cal.App.2d 233

STATE COMPENSATION INS. FUND v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 2591.

District Court of Appeal, Fourth District, California.

Feb. 26, 1941.

1. Workmen's compensation ⇐836

Under the Workmen's Compensation Law, the risk of accidental injuries is shared by employer and employee.

2. Workmen's compensation ⇐810

Under the Workmen's Compensation Law, an injured employee should not receive, in an ordinary case, greater compensation than his wages would have been had he not been injured. St.1937, p. 280, § 4459.

3. Workmen's compensation ⇐803

Where employee was found to have been totally but temporarily disabled by a back injury on August 15, 1937, and was given total, temporary disability up to December 8, 1937, the date of his recovery from the back in-

jury, he had no "earning capacity" at time of carbon monoxide gas injury on August 16, 1937, on which to base a second award until he recovered from his first injury. St.1937, p. 280, § 4459.

See Words and Phrases, Permanent Edition, for all other definitions of "Earning Capacity".

4. Workmen's compensation ⇐872

An injured employee is entitled to receive but one total temporary disability award over the same period even though he receives two separate injuries. St.1937, p. 280, § 4459.

Proceeding by the State Compensation Insurance Fund against the Industrial Accident Commission of the State of California and others to annul awards of the commission against the State Compensation Insurance Fund for injuries suffered by E. J. Hunter, an employee of the Kettleman North Dome Association.

Award affirmed.

Donald Gallagher and A. V. Prothero, both of San Franciso, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

MARKS, Justice.

Petitioner has filed two separate proceedings to annul two separate awards of the Industrial Accident Commission against petitioner, the insurance carrier, for injuries suffered by E. J. Hunter, an employee of the Kettleman North Dome Association. The facts of the two cases and the law involved are so closely related that they should be considered in one opinion to obviate needless repetition.

On December 14, 1937, Hunter filed an application with the Industrial Accident Commission seeking compensation for injuries to his lower back suffered on August 15, 1937. This application bore the I. A. C. number 58176 and will be referred to as the back injury case. After various hearings and rehearings the commission found that Hunter had suffered total temporary disability on August 15, 1937, and awarded him weekly indemnity payments of $21.27 for the period of August 15, 1937, to December 8, 1937, the admitted date of his recovery from the back injury, less the waiting period of seven days. Hunter's weekly earnings were $34.43.

Hunter filed a second application for total temporary disability caused by inhaling carbon monoxide fumes on August 13, 14, and 16, 1937. The application bore the I. A. C. number 58754, and will be referred to as the carbon monoxide case. The Industrial Accident Commission, after numerous hearings and rehearings, found that Hunter had suffered total temporary disability from the carbon monoxide fumes on August 16, 1937, and awarded him weekly indemnity payments of $21.26 from August 16 to December 8, 1937, and thereafter, less the waiting period of seven days. This award was also based on a weekly wage of $34.43.

While Hunter's wages, had he not been injured, would have been $34.43 per week, under the two awards he will receive $42.53 per week from August 16 to December 8, 1937, less the waiting periods.

The facts in the case are all admitted. The parties only disagree on the law applicable to those facts.

Petitioner admits that Hunter was entitled to total temporary disability but argues that he was not entitled to double total disability allowances up to December 8, 1937. As the allowance for the back injury had been paid in full, petitioner contends that it is entitled to credit that amount on the award for the carbon monoxide injury. We are cited to no cases deciding these questions.

[1] In discussing the theory underlying Workmen's Compensation Laws, the Supreme Court said in Western Indemnity Co. v. Pillsbury, 170 Cal. 686, at page 693, 151 P. 398, at page 401: "It may be noted that, under the particular scheme embodied in this act, the loss resulting from accidental injuries is not imposed upon the employer alone. The scale of compensation fixed by section 15 allows to the employé, in addition to medical and surgical expenses, an indemnity based upon his loss of earnings; but this indemnity covers not the whole, but only a part or a percentage of such loss. The risk of accidental injuries is thus shared by employer and employé."

The text writers have adopted this view and have pointed out the danger in awarding an injured employee compensation in an amount in excess of his ordinary earnings. See Campbell, Workmen's Compensation, sec. 30; Hobbs, Workmen's Compensation Insurance, p. 64.

In considering a related question, this court said in Gardner v. Industrial Acci-

dent Commission, 28 Cal.App.2d 682, 684, 685, 83 P.2d 295, 297: "The facts and findings in the instant case are sufficiently parallel to the facts and findings in the case of Edson v. Industrial Acc. Comm., supra [206 Cal. 134, 273 P. 572], to cause the holding in that case to control the decision of the case before us, i. e., that the Industrial Accident Commission is not authorized, in computing the percentage of permanent disability of an employee caused by an industrial injury, to include any percentage of such disability attributable to a prior industrial or non-industrial disease or injury; nor is it justified in including in an award any amount as compensation for the disability attributable solely to the prior injury or disease and for which the employment was in no wise responsible. Hercules P. Co. v. Industrial Acc. Comm., 131 Cal.App. 587, 593, 21 P.2d 1014; County of Los Angeles v. Industrial Acc. Comm., 14 Cal.App.2d 134, 136, 57 P.2d 1341; Tanenbaum v. Industrial Acc. Comm., 4 Cal.2d 615, 52 P.2d 215."

[2] The foregoing authorities clearly indicate that under the Workmen's Compensation Laws an injured employee should not receive, in an ordinary case, greater compensation than his wages would have been had he not been injured.

We believe the answer to the question first presented is found in section 4459 of the Labor Code, St.1937, p. 280, which provides as follows: "The fact that an employee has suffered a previous disability, or received compensation therefor, does not preclude him from compensation for a later injury, or his dependents from compensation for death resulting therefrom, but in determining compensation for the later injury, or death resulting therefrom, his average weekly earnings shall be fixed at the sum which reasonably represents his earning capacity at the time of the later injury."

[3, 4] In the back injury case Hunter was found to have been totally, but temporarily disabled on August 15, 1937, and was given total temporary disability up to December 8, 1937, the date of his recovery from that injury. Three hundred and twenty-eight dollars and sixteen cents, the total amount of this award, was paid him by petitioner.

The Industrial Accident Commission found that the carbon monoxide injury was suffered on August 16, 1937. As Hunter was totally disabled on the date of the second injury and not able to work, it should follow that he had no "earning capacity" at the time of his second injury upon which to base the second award, as required by section 4459 of the Labor Code. This would be true until December 8, 1937, when he recovered from his first injury and could have resumed his employment had he not suffered the second injury.

There seems to be no good reason why the award in the back injury case should be disturbed. Hunter suffered a compensable injury on August 15, 1937, for which he is entitled to compensation until his recovery from that injury on December 8, 1937. No question is raised as to the amount of the award.

The award in the back injury case bearing the Industrial Accident Commission's number 58176 is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.



43 Cal.App.2d 236

STATE COMPENSATION INS. FUND v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 2592.

District Court of Appeal, Fourth District, California.

Feb. 26, 1941.

1. Workmen's compensation ⇐872

An injured employee is entitled to receive but one total temporary disability award over the same period even though he receives two separate injuries.

2. Workmen's compensation ⇐872, 904

Where injured employee was paid full compensation for back injury up to his recovery from that injury on December 8, 1937, compensation for carbon monoxide gas injury sustained on day following back injury should only have been awarded to commence

at time of recovery from back injury, but award for the gas injury could be sustained by crediting the total temporary disability compensation paid for the back injury on the award made for the gas injury.

Proceeding by the State Compensation Insurance Fund against the Industrial Accident Commission of the State of California to annul an award of the commission against the State Compensation Insurance Fund for injuries suffered by E. J. Hunter, an employee of the Kettleman North Dome Association.

Award annulled and cause remanded with instructions.

Donald Gallagher and A. V. Prothero, both of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

MARKS, Justice.

The facts of this case and the law bearing upon them are sufficiently set forth in State Compensation Ins. Fund v. Industrial Acc. Comm., Cal.App., 110 P.2d 510, the opinion being filed herewith.

[1] We there held that E. J. Hunter, the injured employee, was entitled to receive but one total temporary disability award over the same period even though he received two separate injuries.

[2] He has been paid full compensation in the back injury case up to his recovery from that injury on December 8, 1937. No question is raised as to his being entitled to his compensation in this case (carbon monoxide case) for the disability he suffered after that date. While the Industrial Accident Commission should only have awarded compensation in this case to commence at the time of the recovery in the back injury case, its award in this case may be sustained by crediting the total temporary disability compensation paid Hunter in the back injury case on the award made in this case.

The award in the Industrial Accident Commission case number 58754 (carbon monoxide case) is annulled and the cause remanded to the Industrial Accident Commission with instructions to reenter the award in favor of E. J. Hunter as finally made and to credit thereon the amount paid him by petitioner for total temporary disability to December 8, 1937, in Industrial Accident Commission case number 58176, the back injury case.

We concur: BARNARD, P. J.; GRIFFIN, J.



43 Cal.App.2d 53

DIERSSEN v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11364.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1941.

Hearing Denied April 17, 1941.

1. Municipal corporations ⇐217(3)

The San Francisco charter provision that any citizen having qualifications prescribed by provision that all employees of such city and county shall have been residents thereof for at least one year before their appointments may submit himself for any examination under conditions established by Civil Service Commission imposes, as "conditions precedent" to taking examination, citizenship and residence in such city and county for one year before closing date for filing applications to take examination, not merely year's residence before appointment to position. St.1931, p. 3062, § 144; St.1933, p. 2805, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Conditions Precedent".

2. Mandamus ⇐15

The "clean hands" doctrine applies to mandamus proceeding, which is essentially equitable in nature.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

3. Mandamus ⇐164(2)

A judgment dismissing petition for writ of mandate to compel San Francisco City and County Civil Service Commission to place petitioner's name first on list of eligibles for appointment as superintendent of agriculture after Commission's removal of

his name from tentative list on ground that he had not been resident of such city and county for one year before closing date for filing applications to take examination for such position cannot be sustained by appellate court on theory that exhibits attached to Commission's return demonstrated that petitioner, who filed no affidavit denying their genuineness and due execution, did not come into court with "clean hands" because exhibits showed that he was resident of another county during such time and filed conflicting sworn statements as to his residence. Code Civ.Proc. § 448; St.1931, p. 3062, § 144; St. 1933, p. 2805, § 7.

4. Municipal corporations ⇐62, 63(1)

A chartered city or city and county may confer quasi judicial power, such as power to determine facts, on boards or commissions dealing strictly with municipal affairs, including Civil Service Commission, and fact findings thereof may be interfered with by courts only where board or commission acts arbitrarily, capriciously or fraudulently or clear abuse of its discretion is alleged and proved. Const. art. 11, §§ 6, 8½, subd. 4.

5. Municipal corporations ⇐63(1)

The courts are powerless to interfere with fact findings of board or commission, such as Civil Service Commission, empowered by city or city and county charter to determine facts, if there is any substantial evidence supporting such findings. Const. art. 11, §§ 6, 8½, subd. 4.

6. Constitutional law ⇐30
Municipal corporations ⇐62

The constitutional provisions, authorizing chartered city or city and county to confer quasi judicial power, such as power to determine facts, on boards or commissions dealing strictly with municipal affairs, do not automatically confer such power on local boards, nor require city or city and county to do so in its charter, and such power does not exist, if not expressly or impliedly conferred by charter. Const. art. 11, §§ 6, 8½, subd. 4.

7. Municipal corporations ⇐217(3)

The San Francisco charter confers on City and County Civil Service Commission power to pass on qualifications of persons taking civil service examinations, including qualifications such as age, residence, experience, etc., as well as those disclosed by examinations. St.1931, pp. 2990, 3059, 3060, 3062, 3064, §§ 21, 140, 141, 144, 145, 147; St. 1938, Ex.Sess., p. 132, § 147.1.

8. Municipal corporations ⇐63(1)

The administration of plan, set up by San Francisco charter, for making of civil service appointments, by City and County Civil Service Commission should not be interfered with by courts, unless it be shown that Commission acted fraudulently, capriciously, arbitrarily, or in violation of charter provisions, as Commission acts in quasi judicial capacity in passing on qualifications of persons taking civil service examinations, including question of their residence. St. 1931, pp. 2990, 3059, 3060, 3062, 3064, §§ 21, 140, 141, 144, 145, 147; St.1938, Ex.Sess., p. 132, § 147.1.

9. Mandamus ⇐154(5)

In proceeding for writ of mandate to compel San Francisco City and County Civil Service Commission to place petitioner's name first on list of eligibles for appointment as superintendent of agriculture, petition alleging that petitioner took examination for such position and was placed first on tentative list of eligibles and that Commission, after filing of protest, determined, without right and in utter disregard of proofs adduced by petitioner, that he lacked residence qualification, was insufficient to state cause of action, in absence of allegation that Commission acted arbitrarily, fraudulently, capriciously or in abuse of discretion. St. 1931, pp. 2990, 3059, 3060, 3062, 3064, §§ 21, 140, 141, 144, 145, 147; St.1938, Ex.Sess., p. 132, § 147.1.

10. Mandamus ⇐154(5)

As San Francisco charter confers discretionary or quasi judicial power on City and County Civil Service Commission to pass on question of residence of persons taking examinations for civil service positions, petition for writ of mandate to compel Commission to place petitioner's name first on list of eligibles for appointment to such a position after Commission's removal of his name from tentative list on ground that he was not resident of city and county for required time must allege that Commission acted arbitrarily, fraudulently, capriciously or in abuse of discretion, and averment that petitioner's evidence would support conclusion contrary to that of Commission does not allege abuse of discretion, in absence of denial of existence of other evidence supporting Commission's action. St.1931, pp. 2990, 3059, 3060, 3062, 3064, §§ 21, 140, 141, 144, 145, 147; St.1938, Ex.Sess., p. 132, § 147.1.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Proceeding by Norman E. Dierssen for a writ of mandate to compel the Civil Service Commission of the City and County of San Francisco to place petitioner's name first on the list of eligibles for appointment to the position of superintendent of agriculture. From a judgment denying and dismissing the petition, petitioner appeals.

Affirmed.

Cross & Brandt, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco (Grover O'Connor, of San Francisco, of counsel), for respondent.

PETERS, Presiding Justice.

Petitioner appeals from a judgment of the superior court of San Francisco denying and dismissing with prejudices his petition for a writ of mandate. By the writ, petitioner seeks to compel the Civil Service Commission to place his name as number one on the list of eligibles for appointment to the position of superintendent of agriculture. It appears that petitioner received the highest grade in the examination held for the position, and was placed at the top of the tentative eligibility list, but, upon objections being filed by the applicant second in rank on the ground that petitioner did not have the necessary residence qualification, the Commission, after several hearings, removed petitioner's name from the list. Objection was also filed to petitioner on the ground that he did not have the required experience qualification, but the commission did not determine this question in view of its ruling that he lacked the residence requirement. As announced in the examination scope circular, the required residence was residence in San Francisco for one year immediately preceding January 27, 1939, the closing date for filing applications to take the examination.

The Commission filed a return to the alternative writ of mandate, alleging its determination, after hearing, against petitioner's claim of residence. To this return were attached photostatic copies of various documents showing that at various times between 1933 and 1938 petitioner had stated, sometimes under oath, that his residence was Sacramento county. Among these exhibits was a copy of petitioner's affidavit of registration, under the permanent registration law, showing that petitioner had registered on February 5, 1936, and, at that time, under oath, gave Elk Grove, Sacramento county, as his residence. Also attached were photostatic copies of pages from the roster of voters which sets forth the names of those who voted in the primary election of August 30, 1938, and the general election of November 8, 1938. From this roster it appears that petitioner voted in these elections and signed the roster, giving his address as Elk Grove. In his application to take the examination he gave January 4, 1934, as the date he became a resident of San Francisco, claiming to have been a resident of that city since that date.

Upon motion of respondent, the trial court, without the taking of evidence, dismissed the petition for the writ. The respondent had moved for dismissal on the grounds that petitioner had not come into court with clean hands; that the court was without jurisdiction to interfere with the determination of the Commission, and that the petition did not state a cause of action. The judgment of the trial court, as shown by the recitals therein, is predicated on all three grounds.

[1] Petitioner urges that the Commission had no authority to require that an examinee must have one year's residence prior to the closing date for filing applications to take the examination; that under the Charter all that is required is one year's residence prior to appointment. Aside from the fact that the petition for the writ was not based on that theory, and, in fact, alleged residence in San Francisco since January 4, 1934, petitioner's interpretation of the charter provisions is not justified.

The Charter of San Francisco became effective January 8, 1932, St.1931, p. 2973. Section 144 provides in part: "Any citizen having the qualifications prescribed by section 7 of this charter may submit himself for any examination under conditions established by the civil service commission. * * *" Section 7 of the charter was amended in 1933 (Stats. of 1933, p. 2805) and reads in part as follows: "All employees of the City and County shall be citizens and shall have been residents thereof, for at least one year prior to the appointment, unless otherwise specifically provided in this Charter * * *." Petitioner contends that under section 7 of the

charter, supra, the only requirement is that he be a resident one year prior to his appointment, not one year's residence prior to taking the examination. Eligible lists continue in effect for two years, and may be continued in effect for four years. Thus, under petitioner's interpretation, a person who is a nonresident when he takes the examination may qualify for appointment within the two or four-year period. This is not a reasonable nor proper interpretation of the two sections. Section 7 refers to appointees, not to examinees. Moreover, section 7 refers to all appointments—both civil and noncivil service appointments. Section 144, supra, however, refers specifically to examinees. Petitioner's interpretation would mean that every citizen of United States would be eligible to take every examination, but only those who had been residents of San Francisco for one year prior to their appointment could be appointed to a position. The interpretation of petitioner completely disregards the words, "having the qualifications prescribed by section 7 of this charter". Those words would be meaningless if petitioner's construction is correct.

For these reasons, we think the only proper interpretation of the two sections is that section 144 imposes as conditions precedent to taking an examination the requirements of section 7—citizenship and one year's residence in San Francisco. Section 7, applying to noncivil service, as well as civil service employees, requires citizenship and one year's residence prior to appointment. This interpretation gives effect to both sections of the charter, is reasonable, and provides a workable system.

[2, 3] Using this interpretation as its basic premise, in support of the judgment, the respondent urges that, since petitioner did not file an affidavit denying the genuineness and due execution of the written exhibits attached to the return, under section 448 of the Code of Civil Procedure, their genuineness and due execution were admitted; that they demonstrate that petitioner was a resident of Sacramento county during the time in question; that at any rate petitioner has filed under oath, conflicting statements as to his residence; that this demonstrates that he did not come into court with clean hands; that the clean hands doctrine applies to *mandamus* proceedings.

There can be no doubt that a *mandamus* preceeding is essentially equitable in nature, and that the clean hands doctrine is applicable to such a proceeding. Hutchison v. Reclamation Dist. No. 1619, 81 Cal. App. 427, 254 P. 606. If the evidence should show that petitioner with full knowledge of the nature of his acts, under oath, had stated his residence for voting purposes to be Sacramento, and later proved that he was a resident of San Francisco for the same period, he very likely would be guilty of a criminal offense. Sec. 139 of Elections Code, St.1939, p. 58. Under such circumstances, the clean hands doctrine might well be applicable. The difficulty with this argument as applied to the facts of the instant case, however, is that the trial court did not apply the doctrine after the facts had been shown by evidence, but upon the pleadings. Apparently, this was done on the theory that, because the petitioner had failed to file an affidavit denying the genuineness and due execution of the exhibits to the return, under section 448 of the Code of Civil Procedure, he must be deemed to have admitted those facts. We have serious doubts as to whether section 448 of the Code of Civil Procedure applies to documents of the type here involved. The documents are merely evidentiary matter to support the allegation in the return that petitioner did not possess the residential qualifications. The defense to the petition was that the Commission had found, on competent evidence, that petitioner was not a resident of San Francisco for the required period. To support that defense the exhibits were attached. We do not believe that section 448 of the Code of Civil Procedure was intended to apply to written instruments of that type. Moreover, even if the section were applicable, all that would be admitted by failing to file the affidavit would be that the documents were genuine and had been executed by petitioner. The petitioner could lawfully attack the instruments for any cause not going to their genuineness or due execution. He could, without further pleading, introduce competent evidence to sustain any other defense, such as fraud, mistake, undue influence and the like. See cases collected 21 Cal.Jur., p. 168, in section 114. We are, therefore, of the opinion that the judgment appealed from cannot be sustained on the theory that the record demonstrates, as a matter of law, that petitioner did not come into court with clean hands.

The judgment, however, was not based solely on that ground. The trial court also held that it had no jurisdiction to interfere with the action of the Commission, and that the petition did not state a cause of action. The two points are integrally connected. They are based on the following premises: (1) That local boards, such as the Civil Service Commission, may lawfully be invested with judicial or quasi judicial power; (2) that the Charter of San Francisco vests such power, so far as the question of residence is concerned, in the Commission; and (3) that where such power is vested a petition is defective that does not allege facts to show that the Commission acted arbitrarily, capriciously or fraudulently. These points will be considered in order.

[4, 5] The question as to whether by charter provision local boards, such as a Civil Service Commission, may be invested with judicial fact finding powers seems never to have been seriously questioned in this state. The books are full of cases expressly or impliedly holding that where fact-finding powers have been conferred on local boards their determination will not be set aside unless an abuse of discretion is pleaded and proved, that is, unless it be alleged and proved that the board acted arbitrarily, capriciously or fraudulently. Croly v. Board of Trustees of City of Sacramento, 119 Cal. 229, 51 P. 323; Stanley-Taylor Co. v. Supervisors, 135 Cal. 486, 67 P. 783; Barto v. Supervisors, 135 Cal. 494, 67 P. 758; County of Yolo v. Joyce, 156 Cal. 429, 105 P. 125; Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 P. 780; Maxwell v. Civil Service Commission, 169 Cal. 336, 146 P. 869; Pratt v. Rosenthal, 181 Cal. 158, 183 P. 542; Mann v. Tracy, 185 Cal. 272, 196 P. 484; Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Klevesahl v. Byington, 1 Cal.App.2d 671, 37 P.2d 179; Ludolph v. Board of Police Com'rs, 30 Cal.App.2d 211, 86 P.2d 118. It is true that in Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P. 2d 119, and Drummey v. State Bd. of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, and other recent cases, it has been held that state-wide administrative boards constitutionally cannot be vested with judicial or quasi judicial power. Those cases are predicated on the theory that Art. VI, section 1, of the State Constitution vests the entire judicial power *of the state* in the courts. All of those cases, including the earlier cases of Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874, and Dept. of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076, upon which the later cases are predicated, expressly recognized that the holdings therein were applicable only to state-wide boards and did not apply to local boards. Thus, in the Drummey case, supra, 13 Cal.2d at page 81, 87 P.2d at page 852, it is stated: "The theory of the Tulare and Standard Oil cases is that, if the legislature attempted to confer judicial or quasi-judicial power on state-wide administrative boards, the statutes would be unconstitutional as in violation of section 1 of article 6 of the state Constitution, which vests the entire judicial power of the state in the courts, *except as to local boards,* and the railroad and industrial accident commissions, *which are governed by special constitutional provisions.*" (Italics added.) Quite obviously, what the Supreme Court had in mind when it stated in the Drummey case, supra, that, "local boards * * * are governed by special constitutional provisions," were the broad provisions of Art. XI, section 6, of the Constitution dealing with the powers of chartered cities. That section, so far as pertinent herein, provides that, "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered * * * to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters * * *". Moreover, Art. XI, section 8½, Sub. 4, provides that, "It shall be competent in any charter framed in accordance with the provisions of this section * * * for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and *employees* whose compensation is paid by such city or city and county * * * shall be elected or *appointed* * * *". Obviously, a civil service system is strictly a municipal affair. Under these provisions a chartered city or city and county may lawfully confer quasi judicial power on boards or commissions dealing strictly with municipal affairs, such as the power to determine facts, and, if such finding is made, the courts may interfere only where the board acts arbitrarily, capriciously, or fraudulently.

Stated another way, the courts are empowered to interfere with the findings of such boards only where a clear abuse of discretion is alleged and proved. If there is any substantial evidence to support the board's findings, the courts are powerless to interfere. This is apparently the law even as to state-wide boards where the board has fact-finding powers and is not attempting to take away an existing right. McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205. We, therefore, conclude that by charter provision a city or city and county may lawfully confer on local boards dealing with strictly municipal affairs judicial or quasi judicial power.

[6-8] The sections of the Constitution above referred to, however, do not automatically confer such power on local boards, nor do they require a city or city and county to so provide in their charter —they merely empower such city or city and county to so provide in their charter. If the charter does not expressly or impliedly confer such power, the power does not exist. French v. Cook, 173 Cal. 126, 160 P. 411; Sheehan v. Board of Police Com'rs., 197 Cal. 70, 239 P. 844; Sheehan v. Board of Police Com'rs., 47 Cal.App. 29, 190 P. 51. This, then, presents the second question mentioned above—Does the charter of San Francisco expressly or impliedly confer judicial or quasi judicial power on the Civil Service Commission to pass on the question of the residence of applicants to take a civil service examination? Clearly, the charter confers on the Commission the power to prepare examinations, to grade them, to prepare tentative and final eligible lists from which appointments shall be made, and to generally supervise and control the civil service system. Section 21 of the Charter confers on boards operating under the charter the general power to hold hearings, subpoena witnesses, etc., relative to the affairs under their control. Section 140 of the Charter creates the Commission "which is charged with the duty of providing qualified persons for appointment to the service of the city and county". Section 141 provides that the Commission "shall be the employment and personnel department of the city and county and shall determine appointments on the basis of merit and fitness * * *". Section 144 above referred to, and, as interpreted in this opinion, requires one year's residence in San Francisco as a condition precedent to taking any examination. Section 145 provides for the giving of examinations by the Commission and for the creation by it of eligible lists. Section 147 expressly commands the Commission to remove the name of any person on an eligible list who has secured his place on the list "by fraud, concealment of fact or violation of commission rules". Section 147.1 added in 1938 (Stats. of 1938, Extra Session, p. 132), provides for the posting of grades after an examination and for the inspection of examination papers, and then provides: "The Civil Service Commission shall have power to correct any error which in its judgment may have occurred in the rating of any participant in said examination, and to alter said published or posted list of eligibles and to make changes accordingly therein which in the opinion of said commission may be justified by any re-examination of said papers, questions, answers, marks or grades given in said examination * * *".

Respondent argues that section 147.1, supra, expressly confers discretionary power on the Commission to correct errors not only in examination papers but also in the sworn application of an examinee, and that this includes the power to pass on the question of residence as set forth in the application. Great emphasis is placed upon the language conferring upon the Commission "power to correct any error which in its judgment may have occurred in the rating" of an examinee. It is argued that, if, because of a false statement as to residence, an examinee has been placed on the tentative list, an error in rating has occurred. Petitioner argues that section 147.1 applies only to errors in connection with the marking of examination papers. While there can be little doubt that section 147.1 was intended primarily to confer discretionary power on the Commission to correct errors in the marking of papers, there is much merit in the argument that the grant of power is broad enough to include the power to correct any error that results in a false rating, including power to pass on the correctness of statements made in the application, which includes the power to pass on the question of residence. However, it is not necessary to base this portion of the opinion solely on section 147.1, supra. A reading of the various sections of the Charter above referred to demonstrates that San Francisco, exercising its plenary power with regard to the method and manner of appointments, has set up a complete scheme for the making of such appoint-

ments. It is further apparent that the complete administration of this plan has been conferred upon the Commission. The obvious intent of the sections as a whole is that power has been conferred on the Commission to pass on the qualifications of examinees, including not only such qualifications as are disclosed by the examination, but also such other qualifications such as age, residence, experience, etc. It is also quite clear that it is the intent of the charter that the administration of this plan should not be interfered with by the courts unless it be shown that the Commission acted fraudulently, capriciously or arbitrarily, or in violation of the provisions of the charter. That is but another way of stating that in passing on such questions, including the question of residence, the Commission acts in a quasi judicial capacity.

[9, 10] The only question left for determination is whether the petition states a cause of action. So far as pertinent here, the petition alleges that petitioner took the examination; was placed first on the tentative list; that a protest was filed on the ground that petitioner lacked both the experience and residence qualifications; that the Commission determined that he did not possess the residence requirement; that the action of the Commission is without right "and in utter disregard of the proofs, oral and documentary, adduced by petitioner before respondent as aforesaid, which proofs demonstrate that petitioner is, and ever since on or about the 4th day of January, 1934, has been, a bona fide legal resident of said City and County and State".

This petition, as a matter of law, is insufficient to state a cause of action for a writ of mandate. If the charter did not confer discretionary or quasi judicial power on the Commission to pass on the question of residence, the petition here involved would be sufficient. It was obviously framed on that theory. But, as already held, the charter does confer discretionary or quasi judicial power on the Commission to pass on that question. Since that is so, it must be alleged in a *mandamus* proceeding attacking its action that it has acted arbitrarily, fraudulently, capriciously, or in abuse of discretion. An averment that petitioner's evidence would support a conclusion contrary to that of the Commission does not properly or at all allege an abuse of discretion, in the absence of a denial of the existence of other evidence supporting the action of the board exercising judicial power. These principles are well-settled. In Bennett v. Brady, 17 Cal.App.2d 114, 116, 61 P.2d 530, 531, the rule is stated as follows: "In passing upon the sufficiency of the petition to state a cause of action, the attached transcript of evidence cannot be considered for the purpose of supplying any deficiency in its allegations. People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435. A petition in substantially the same form was held in Hogan v. Retirement Board [13 Cal.App. (2d) 676], 57 P.2d 520, not to state a cause of action because it failed to show respondents had acted arbitrarily, capriciously, fraudulently, or without due regard for the applicant's rights. To state a cause of action, the petition must set forth facts showing that a pension ought to have been allowed, and that respondents' refusal to do so was an abuse of their discretion. 16 Cal.Jur. 861. If all the evidence produced at the hearings was susceptible of the sole construction that petitioner was entitled to a pension, respondents abused their discretion in refusing to award it and can be compelled by mandate to do so. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784. However, the petition fails to bring itself within this rule, for it merely alleges that petitioner's evidence, not all the evidence, established and proved the allegations of her application. For aught that appears, her evidence may have conflicted with other evidence or supported different inferences. The general demurrer was properly sustained." See, also, County of San Luis Obispo v. Gage, 139 Cal. 398, 409, 73 P. 174, where it was held that an allegation that a board rejected certain claims "without right and against the facts" was insufficient where the board is vested with discretionary power.

The allegation in the petition here involved, above quoted, amounts to no more than a charge that petitioner's evidence produced before the Commission was sufficient to support a finding of residence, or that such evidence, standing alone, would compel such finding. The allegation is, in effect, that the action of the Commission was in disregard of the evidence produced by petitioner, without reference to what other evidence may have shown. There is a complete failure to deny the existence of other evidence. The allegation fails to comply with the test laid down in the cases

referred to above. For that reason, the petition fails to state a cause of action.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.



43 Cal.App.2d 189

FAGAN v. FAGAN.

Civ. 2902.

District Court of Appeal, Fourth District, California.

Feb. 21, 1941.

1. Parent and child ⇐3(1)

The parent of a minor child is primarily liable for the child's support and should be compelled to support the child unless legally excused from that burden. Civ.Code, §§ 138, 196, 203; Probate Code, § 1504.

2. Parent and child ⇐3(3)

An impoverished and indigent minor child may maintain an action to declare herself free from dominion of parent for abuse of parental authority, and to obtain support and education, though her custody has been previously awarded to a guardian of her person. Civ.Code, §§ 138, 196, 203; Probate Code, § 1504.

3. Parent and child ⇐3(1)

The mere nomination of a guardian by a 16-year-old child is not a "waiver" of her claim to future support by father who has abandoned her. Civ.Code, §§ 138, 196, 203; Probate Code, § 1504.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Shirley Dorothy Fagan, by her guardian Dorothea Gebhardt, against James J. Fagan, Jr., for support and maintenance. Judgment for defendant, and plaintiff appeals.

Reversed with instructions.

Henry F. Boyen and Frank Fontes, both of San Francisco, and Roland Thompson, of Santa Ana, for appellant.

Rutan, Mize & Kroese, of Santa Ana, and Mason & Windham, of Long Beach, for respondent.

GRIFFIN, Justice.

This is an appeal by the plaintiff and appellant Shirley Dorothy Fagan, a minor, from a judgment in favor of the defendant and respondent James J. Fagan, Jr., after an order sustaining a general demurrer without leave to amend.

The sole question involved on this appeal is whether or not the first amended complaint contained facts sufficient to constitute a cause of action against the defendant and whether or not the lower court erred in refusing permission to file a second amended complaint.

The first amended complaint shows that respondent and his wife were divorced prior to 1933; that there had been born to them the appellant a daughter; that the divorce was obtained by the mother in the state of Nevada; and that by the divorce decree the mother was given custody of appellant and respondent required to pay $50 per month for her support. By implication it appears that respondent complied with this order for several years. The mother died in the year 1933, and the child went to live with her grandparents, one of whom is now her general guardian.

In 1938, a petition for appointment of appellant's grandmother as her general guardian was filed and in that proceeding appellant nominated her grandmother as such guardian and the respondent contested the proceeding. It resulted in the appointment and qualification of the grandmother as the general guardian in accordance with the petition and nomination by appellant. This status and relationship existed at the time of the commencement of this action.

The second amended complaint, proffered for filing and refused, contained similar allegations to the amended complaint and the additional allegations: "That at the time of the appointment of plaintiff as guardian of the person of said minor, and for a long time prior thereto, defendant had been guilty of parental abuse of authority in failing, neglecting and refusing to pay for the support and maintenance of his said minor child and had been and was guilty of abandoning his

child without cause or justification (which fact it is alleged the court found to be true). * * * Defendant is not a fit or proper person to have the care, custody or control of said minor child; said minor child was justified in refusing to live at defendant's home and in nominating said Dorothea Gebhardt as the guardian of her person; and that by reason of said conduct said minor child has, at the time of said nomination and appointment of Dorothea Gebhardt the guardian of her person and for a long time prior thereto had been, and was, entitled to be free from the domination of said defendant; * * * that said minor does not have any estate or any property * * * and is wholly dependent upon said grandparents for her support * * * that the defendant, the father of said minor, has real and personal property of the value of $15,000 and upwards and has income in excess of $5,000 per year and is financially able to support, care for and maintain said minor".

Respondent concedes that should this court reverse the trial court on the appellant's first point then the second amended complaint should be allowed filed as against objections made in the trial court, but reserving to the respondent his right to demur specially and to move to strike out any objectionable or redundant matter contained therein.

The question presented is this: May an impoverished and dependent minor over 14 years of age, having nominated one, other than its parent, as general guardian, and while still the ward of such a general guardian, maintain an action against its parent (who is admittedly financially responsible) under section 203 of the Civil Code of the state of California, or any other section, for freedom from parental authority and for support? It was the respondent's contention, and the lower court ruled, that a parent deprived of the custody of a child by the appointment and qualification of another as its general guardian, is relieved of the duty of supporting such child, and that a father who has lost the custody of a child is not liable nor responsible for its support.

Appellant admits that this contention is supported in part by some of the earlier decisions of our higher courts such as the cases of Selfridge v. Paxton, 145 Cal. 713, 715, 79 P. 425, and Calegaris v. Calegaris, 4 Cal.App. 264, 87 P. 561, but contends that most of the earlier cases mentioned have been overruled or modified, and that it is well settled in this state that a father who has lost custody of his minor child, either by divorce or guardianship proceedings, is still responsible for its support, maintaining that the duty of a parent to support a minor child is contained in the following sections: sections 138 and 203 of the Civil Code; section 270 of the Penal Code; and section 3501 of the Labor Code, St. 1937, p. 268. In support thereof appellant cites Dixon v. Dixon, 216 Cal. 440, at page 442, 14 P.2d 497; County of Los Angeles v. Superior Court of Alameda County, 128 Cal.App. 522, 18 P.2d 112; Matter of Guardianship of Michels, 170 Cal. 339, 343, 149 P. 587; Federal Liability Insurance Co. v. Industrial Accident Commission, 195 Cal. 283, 288, 233 P. 335; Svoboda v. Superior Court, 190 Cal. 727, 214 P. 440; §§ 1501 and 1504 Probate Code; 20 Cal.Jur. page 436, § 34; Southern California Edison Co. v. Industrial Accident Commission, 92 Cal.App. 355, 268 P. 415; Llewellyn Iron Works v. Industrial Accident Commission, 191 Cal. 28, 214 P. 846; Boens v. Bennett, 20 Cal.App.2d 477, 67 P.2d 715; People v. Schlott, 162 Cal. 347, 349, 122 P. 846; and Ex parte Miller, 109 Cal. 643, 42 P. 428. Respondent contends that reading sections 196 and 203 of the Civil Code together and construing them together, that the defendant, the father of the child, is relieved of support of the minor, plaintiff in this action; that the only right that can be enforced under section 203 of the Civil Code is the duty of support and education, and for the definition of such duty one must look to section 196 of the Civil Code, citing Ex Parte Miller, supra, and In re Ross' Guardianship, 6 Cal.App. 597, 92 P. 671.

Appellant concedes that under section 1504 of the Probate Code if a minor having a father living has property, the income of which is sufficient for her support, maintenance and education in a manner more expensive than her father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the support, maintenance and education of such minor may be defrayed out of the income of her own property, in whole or in part, as judged reasonable, but argues that in the case at bar there is no such situation; that the father is able to take care of his minor child but for some reason known only to himself he refuses to do

so and leaves her education to the support and charity of others; that the duty of a father to support and maintain his minor child has been recognized by the courts even in the absence of any statute declaring it.

Respondent contends that the duty of a parent to support a minor child is not found in section 203 of the Civil Code; that that section creates the right in a minor child, under proper circumstances, to free itself from an abusive parent and, in connection therewith, enforce the duty of support and education; that the duty of a parent to support a minor child is stated and limited in section 196 of the Civil Code; and that the loss of custody and parental authority upon which the duty to support rests, is defined in section 204 of the Civil Code. The contention that a husband deprived of the custody of a child is not liable for its maintenance and support receives support in language used in some of the earlier cases. This is particularly true in an action by a third person against a husband who is not entitled to the custody of his child.

Selfridge v. Paxton, supra, was an action for surgical services performed on a minor child, brought by a third person against a husband and wife who had been divorced and where the custody of the minor child had been awarded to the mother. It was there held that the husband was not liable to the third party under sections 196 and 207 of the Civil Code.

Calegaris v. Calegaris, supra, involved an order modifying a decree of divorce, directing the defendant to pay $60 per month for the maintenance and support of minor children, where the custody of the children had been previously awarded to the mother. In reversing the judgment the court there held, under the facts related, that the husband was not liable under section 196 of the Civil Code because he had been deprived of the custody of the children, but said [4 Cal.App. 264, 87 P. 562]:

"If the conditions of the parties had changed materially after the decree, or if the means allowed to plaintiff had been exhausted, or if the circumstances had been such as to call for aid from defendant to assist in the education of the minors, the question would have been different."

In Lewis v. Lewis, 174 Cal. 336, 163 P. 42, it was held that under the express provisions of section 138 of the Civil Code a court which has granted a divorce has power to modify its judgment at any time during the minority of the children of the marriage by providing for the custody, education and support of such children, even though the judgment may have contained no provision on that subject, and that no reservation in the decree itself is necessary to the exercise of this power. In the syllabus it was stated:

"The obligation of the father so deprived of the custody of the child, under a divorce decree which made no provision for its support, is one to be enforced by the court which granted the divorce, and in the divorce action itself. A separate action by the child against the father to compel him to furnish support and education will not lie."

In Blair v. Williams, 86 Cal.App. 676, 261 P. 539, which was an action for nursing care to a child by a third party against the husband, who was separated from his wife and by a divorce decree was ordered to pay her for the care of herself and child, it was held that under sections 196 and 207 of the Civil Code, the father was not responsible for the support of his children after entry of an order granting custody of the children to the mother, either with or without a provision for their maintenance.

In Ex Parte Miller, 109 Cal. 643, 42 P. 428, 429, in a concurring opinion by Mr. Justice Temple, it was said: "When a parent is deprived of the custody of his child, and therefore of the right to its services and earnings, by the summary proceeding, he is no longer liable for its support and education. This is true as a general proposition of law, and it is recognized by our Code. Section 196 [of the Civil Code], provides that a parent entitled to the custody of a child must give him support and education suitable to his circumstances; plainly implying that the parent does not owe that duty to a child when he is not entitled to its custody." And that "In no other case, except as provided in section 203, has the court the power to deprive the parent of his authority, and yet hold him liable for the maintenance of his child * * *." See, also, In re Ross' Guardianship, supra.

It appears from the later decisions that a distinction has been drawn between a right of action by a minor against a parent brought directly for the support of the minor, and an action by a third party to

recover for services performed on behalf of the minor.

In Pacific Gold Dredging Co. v. Industrial Accident Commission, 184 Cal. 462, at pages 465 and 466, 194 P. 1, at page 3, 13 A.L.R. 725, the court said: "It is true that it has been held that a father, deprived of the custody of his child in divorce proceedings, without requirement that he contribute to its support, is not liable to a third party furnishing such child with the necessaries of life * * * but, under section 207, Civil Code, third persons seeking such recovery are limited in their right of action to the parent in charge of the minor. It is also held, in People v. Hartman [23 Cal.App. 72, 137 P. 611], that the defendant was not liable to prosecution, under section 270 of the Penal Code, upon a charge of willfully, unlawfully, and feloniously failing to furnish necessary food, clothing, shelter, or medical attendance for his infant child. * * * We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support to his minor child, who has no other source of maintenance, because, on account of his own fault, he has been deprived of the custody of such child. Both a legal and moral obligation rests upon a father to support his minor children. And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, and he may by misconduct forfeit his right to the custody of his child, it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to turn to his father for maintenance, if the substituted source of supply fails. It has been held that such right to look to a father for maintenance cannot be taken from the infant by contract between the parents * * * and it certainly would be a reproach upon the law if a father, by his own misconduct making him an unfit custodian of the child, could absolve himself from legal responsibility for its support."

This holding was affirmed in Federal Mutual Liability Insurance Co. v. Industrial Accident Commission, supra [195 Cal. 283, 233 P. 337], and the cited case of Lewis v. Lewis, supra, was discussed. It was there stated that "the better rule was that announced in the case of Pacific Gold Dredging Co. v. Industrial Accident Commission, supra", and in holding that the father was obligated to support his minor child, said:

"Whether such conclusion is based upon the proofs of the voluntary resumption on the part of the father of his parental relations and obligations to his child, or upon the legal liability for the support of his child imposed by the terms of the divorce decree, or upon the broader ground of the basic legal obligation imposed by law upon a father to support his dependent child to the end that it shall not become a public charge, the award of the Commission upon either and all of these grounds can be sustained. The fact that the mother of the child, who had committed its custody to other relations, and had remarried and was living in a foreign land and beyond the jurisdiction of our local court, was also contributing somewhat to the child's support is, we think, an entirely immaterial feature of the case."

In Svoboda v. Superior Court, supra, the holding in Pacific Gold Dredging Co. v. Industrial Accident Commission, supra, is preferred to that stated in Lewis v. Lewis, supra.

In Watkins v. Clemmer, 129 Cal.App. 567, 19 P.2d 303, 308, which was an action to recover upon an alleged account stated for medical and surgical services furnished by the plaintiff to the minor son of the defendant, the services having been performed at the instance of and the bill sent to the mother, who had custody of said minor by a decree of divorce from defendant, the court, after citing Pacific Gold Dredging Co. v. Industrial Accident Commission, supra, said:

"The later cases follow the Pacific Gold Dredging Case, wherein it is said: 'We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support. * * * And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, * * * it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to turn to his father for maintenance, if the substituted source of supply fails.' * * * It will be readily observed that all these cases deal with the duty of support as between the minor and his parent, and not with the duty of support as between a third party and the parent."

One of the most recent cases on the general subject is Dixon v. Dixon, 216 Cal. 440, 14 P.2d 497, where the father's obligation to support his daughter had ended in Oklahoma (where a girl attains majority at 18 years of age). She thereafter came to California, where her mother sued the father in the daughter's behalf for the daughter's support. The father was held liable for the danghter's support here until she reached 21. The court said: "Neither the age of majority in Oklahoma nor the provisions of a decree of divorce in that jurisdiction have any bearing whatsoever on this issue."

The Supreme Court, upholding an order for the child's support, briefly disposed of the case as follows: "Since the recasting of section 270 of the Penal Code by the act of 1923 (St.1923, p. 592), the failure of a father to provide necessary support and maintenance for his minor child has been a criminal offense. This is true, regardless of agreements, property settlements, decree of divorce, or decrees respecting custody or maintenance of the minor, affecting the husband and wife. All doubt or confusion on this subject has also been settled by recent decisions of this court." (Citing cases.)

Foy v. Foy, 23 Cal.App.2d 543, 73 P.2d 618, 620, refers to Dixon v. Dixon, supra, for authority for the statement that: "Although a decree of divorce had been previously granted, still the court under said section [137 Civ. Code] could order the husband to support his child." It was also held that "A court of equity in the exercise of its general chancery powers had inherent jurisdiction, independent of statute, to award and control the custody of children * * * [and] may provide for the maintenance of a child pending a determination of its custody". And "The husband's choice of attack by an independent equitable proceeding rather than by a motion in the divorce action is immaterial * * *."

In Southern California Edison Co. v. Industrial Accident Commission, 92 Cal. App. 355, 268 P. 415, 416, although involving the provisions of the Workmen's Compensation Act, the facts resemble those in the instant case. The court said:

"Whatever may be said of earlier decisions, it now seems to be the settled rule of law in this state that by no act, conduct, or arrangement of whatever sort may a parent shift from his shoulders the legal responsibility and moral duty to support his minor child. It is an absolute, inalienable right enjoyed by the child, which no form of contract between the parents, nor alteration of the domestic status of either of them, may affect. Were the rule to the contrary, it is readily conceivable how a minor child of a rich father (by reason of the divorce of its parents and the subsequent marriage of the mother to a possibly shiftless and impecunious man, who under the law, on taking the child into his household, might become legally liable for the maintenance of the child) might be deprived of an education and the bare necessities of life, or even reach such a state of destitution as to become a public charge." (Citing cases.)

In Ex parte Gordan, 95 Cal. 374, 30 P. 561, the court held that the power of the court in an action for divorce to compel the father to support his minor child does not depend solely upon section 139 of the Civil Code, and whether he is with or without fault in the matters involved in the action, it is his duty to support such child, and the court may compel him to do so, although the child is given to the custody of a stranger to the action.

Boens v. Bennett, supra, was an action brought under section 203 of the Civil Code by a minor son against his father for support. The father obtained a final decree of divorce in the courts of this state, which decree erroneously attempted to award the custody of the minor children residing out of the state, including the plaintiff's son, to the father. It was appellant's contention that respondent should assert and establish his claim in the divorce case and not by a separate action. The court there said, at page 484 of 20 Cal. App.2d, at page 719 of 67 P.2d:

"The obligation, both moral and legal, rested upon this defendant father, who brought his minor son from New York to California, to give the latter support suitable to the former's circumstances, and if the court believed, as it had a right to believe, from the evidence, that the father repudiated this obligation and by his conduct cast his son and the responsibility for the latter's maintenance upon others, then it was proper for the court to make an award to a guardian of such sum as was necessary to support the minor child according to the circumstances of the father."

It was further held that section 203 and kindred sections of the Civil Code are part of the substantive law of the state establishing and declaring a legal duty of the parent to maintain and support his children who are within such provisions, and establishing the right in such children to have such maintenance and support and to enforce against the parent such obligation and duty upon the latter's part; that as the duty runs to the children, the latter are the persons to whom the right imposed by the duty accrues; and that they are the proper parties to an action to enforce such right and compel the performance of such duty; that the court having jurisdiction to enforce the provisions of section 203 of the Civil Code, it had the power to make all orders necessary for that purpose, including the order for counsel fees.

[1] Our attention has not been called to any statute that makes the guardian of the person personally liable for the support and maintenance of a ward or any provision of the law whereby a minor can legally compel a guardian to support her from the guardian's own funds. A parent of a minor child is primarily liable for the support of the child. It is only reasonable that a parent should be compelled to support his minor children, unless legally excused from that burden. Otherwise they may become public charges. If it were otherwise, designing parents might wittingly induce some third person to be appointed guardian of their children and free themselves from the moral and legal liability to support their own children.

[2, 3] In view of the trend of the more recent decisions, we are impelled to hold that an impoverished and indigent minor child may maintain an action to declare herself free from the dominion of the parent for abuse of parental authority, and for support and education, even though her custody has been previously awarded to a guardian of her person. We are unable to conclude that the mere nomination of a guardian, by a child sixteen years old, which nomination is subject to the approval of the court, constitutes a waiver of her claim to future support from her father who has abandoned her.

For the reasons expressed the judgment is reversed with instructions to the trial court to overrule the demurrer and allow the filing of the second amended complaint as proposed, with the right, within a reasonable time, to move to strike and to plead.

We concur: BARNARD, P. J.; MARKS, J.



43 Cal.App.2d 120

BELMONT v. MILTON.

Civ. 2536.

District Court of Appeal, Fourth District, California.

Feb. 17, 1941.

1. Factors ⇐45

Evidence supported judgment for consignee under an agreement for marketing of crops against owner for the difference between advances made by consignee to owner and expenses incurred, and the returns from sale of crops.

2. Factors ⇐11

Where agreement for marketing of crops provided that consignee agreed to pick and market all or part of crop or crops in such manner and at such time or place as would in his judgment yield maximum return therefor, consignee's failure to pick and market 400 boxes of oranges before frozen did not constitute a breach of contract entitling owner to recover damages therefor, since, by terms of agreement, consignee was not required to pick and sell all of the crop.

3. Contracts ⇐143

The court cannot make a new and different contract for the parties. Code Civ. Proc. § 1858.

4. Factors ⇐6

Where agreement for marketing of crops covered year from August 17, 1936, to August 17, 1937, provision in agreement that it would be "binding" upon both parties until advances and payments made by consignee to owner had been fully paid would not be construed to extend contract to include crops of following year upon advances

not being fully paid, so as to entitle consignee to recover damages for owner's alleged breach regarding the 1937–1938 crop. Code Civ.Proc. § 1858.

See Words and Phrases, Permanent Edition, for all other definitions of "Binding".

5. Factors ⇐45

Under agreement for marketing of crops by terms of which consignee made advances to owner before crops were picked and marketed, where it appeared that agreement was one of consignment and not of sale, advances would be construed as "loans" for which consignee would be entitled to interest. Civ.Code, § 1914.

See Words and Phrases, Permanent Edition, for all other definitions of "Loan".

6. Factors ⇐45

A factor, who is not a del credere factor, is entitled to interest on advances made.

7. Appeal and error ⇐1172(5)

In action by consignee against owner for advances made under a crop marketing agreement, error in refusing to permit consignee interest on advances did not require a reversal of entire judgment for consignee, but judgment would be affirmed except as to that part disallowing interest on advances, and such portion would be reversed and new trial ordered, with instructions to ascertain amount of interest due consignee.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Frank Belmont against E. F. Milton, for advances made and for damages under a contract labeled "Citrus Marketing Agreement", wherein defendant filed a cross-complaint. From an insufficient judgment, the plaintiff appeals.

Modified and affirmed in part, and reversed in part with directions.

Henry O. Wackerbarth, of Los Angeles, for appellant.

LeRoy G. Smith, of Dinuba, for respondent.

KLETTE, Justice pro tem.

This is an action by Frank Belmont, plaintiff and appellant, against E. F. Milton, defendant and respondent, for advances made, and for damages, under a contract, labeled "Citrus Marketing Agreement". The following are the essential parts of said contract, necessary for our consideration here:

"This agreement, made this 17 day of August, 1936, and ending the 17 day of August, 1937, between Frank Belmont hereinafter called the consignee, and E. F. Milton of Dinuba, Calif. hereinafter called the owner.

"Witnesseth: That the Owner, in consideration of one dollar and the promises herein on the part of the Consignee, employs said Consignee to pick, haul, pack, ship and market *Oranges* now growing on his land and that during the term of this agreement may be grown upon his land and premises consisting of 55 acres * * * The undersigned represents and guarantees to the Consignee * * * that there is no encumbrance, lien or adverse claim of any kind upon or against said crops or any part thereof except whatever Frank Belmont *advance*.

"The Consignee accepts said employment and agrees to pick, haul, pack, ship and market *all or part* of said crop or crops in such manner, at such time or place as will in his judgment yield the maximum returns therefor, * * *

"The Consignee is given full power and authority to enter the said acreage at any time to pick the said fruit and to sell, or offer for sale, or contract for the sale of *any or all* of the said fruit belonging to the Owner, and either before or after delivery to make collection therefor, in his own name or otherwise; * * * provided, however, that the said Consignee will make a full and complete accounting to the Owner of all financial transactions with regard to the respective fruit.

"Before payment of his net proceeds is made to the owner the Consignee may first deduct therefrom the actual cost of picking and hauling the said fruit.

"A flat charge of $.65 per packed box will be made for packing oranges, *$.65 per packed box for grapefruit;* * * *

"That the Consignee will pack, load, ship and market said fruit in such manner, at such time and place, and upon such terms and conditions, subject to the provisions hereof, * * * as will in his judgment yield the maximum return therefor, and will pay to the undersigned the total amount received from sale of said fruit, after deducting therefrom an amount equal

to the total sum paid or advanced hereunder, * * *

"In consideration of the promises contained herein the Owner agrees that if he should at any time dispose of any merchantable fruit above agreed to be shipped through the Consignee during the life of this contract, he shall and will pay to the Consignee, as liquidated damages for such breach, the sum of fifteen cents (15 cts) for each and every commercial package or box, known in the trade as 'field box', or the equivalent thereof, which may be so disposed of, sold, marketed or consigned by said Owner, it being specifically agreed that it is impracticable and extremely difficult to fix the actual damage which would thereby be suffered by the Consignee.

"Should the net return from sales of fruit during the life of this agreement fail to equal the total amounts advanced by the Consignee hereunder including all payments on owner's account other than guarantees, then this contract shall be *binding* upon both parties until such advances and payments have been fully paid * * *

"The said Consignee hereby guarantees a minimum net return of $ cost per * * * box to the said Owner." (Italics ours.)

The complaint is in three counts, the first seeking recovery of the difference between the advances made, expenses incurred, with interest, and the returns from the sale of the crops, including certain grapefruit, which was shipped and sold. The second count seeks recovery of 15 cents per box, under the liquidated damage clause of the contract, for 4000 boxes of oranges sold by respondent, from the crop of 1937–1938, under the theory that the contract remained in force, and covered the future crops, until all advances and expenses had been fully paid. The third count is for damages, in the amount of the profit, which it is alleged appellant would have made, on the 4000 boxes of oranges of the 1937–1938 crop, had they been delivered to him.

An amended answer and cross-complaint, was filed by respondent, which admitted appellant had made advances to respondent in the sum of $2,412.80, and alleged that the contract was void for want of consideration and mutuality, and that the contract was breached by appellant, because of his failing to pick 4000 boxes of oranges growing in said orchard, which on January 7, 1937, were frozen, asking damages therefor.

The court found for appellant in the sum of $1,038.44, under the first count in the complaint, denied him interest, and found against him under the second and third counts. It also found for respondent under the cross-complaint, in the sum of $200, the same to be offset against appellant's judgment, leaving the same at $838.44. Judgment was entered accordingly.

From this judgment plaintiff and appellant has taken this appeal.

[1] Many specifications of the insufficiency of the evidence to support the findings are set forth by appellant. We believe the evidence sufficient to support all of the findings referring to the first cause of action. The finding of the trial court, that appellant could not recover for the losses sustained on the grapefruit shipments, is correct. The contract contemplated the shipping of grapefruit, for it provided for a charge of $.65 per box for packing grapefruit, and the conversations as to the shipping of the grapefruit, do not indicate any arrangement different than provided by the contract. The provisions of the contract that, "The said consignee hereby guarantees a minimum net return of $ cost per box to the owner," was explained by appellant as meaning that the owner would not receive red ink, and the court properly held that this applied to each of the several sales, and not to the season's average sales. We believe that the judgment in favor of appellant, in the sum of $1,038.44 under the first cause of action in the complaint, is supported by the evidence and the findings, and should be sustained.

[2] For the reasons hereafter set forth, in dealing with the second and third causes of action, we hold that the contract was not breached by appellant failing to pick all of the oranges of the 1936–1937 crop, before frozen. Therefore, there can be no recovery by respondent, of the $200 damages allowed under the cross-complaint, for the 400 boxes of oranges found to be remaining on the trees when the freeze came.

While we agree with the conclusions of law, and the judgment of the court, denying appellant relief under the second and third causes of action set forth in his complaint, we cannot agree with the findings under which these conclusions and judgment were reached. We arrive at the same conclusion, but for different reasons. The court found that appellant breached the contract by failing to pick and market

the 400 boxes of oranges remaining on respondent's trees, after December 5, 1936, and which were frozen January 7, 1937. With this finding we do not agree. The contract did not require appellant to pick and market *all* of the oranges growing on said premises. The contract says, that the owner "employs said consignee to pick * * * and market oranges now growing on his land". It does not say "all oranges". Again it says, that the consignee accepts said employment, "and agrees to pick * * and market *all or part* of said crop or crops in such manner, at such time or place as will in his judgment yield the maximum return therefor", and, that consignee is given full power and authority to enter the property, and pick and sell "*any or all*" of said fruit. Under these provisions of the contract, appellant not only was not required to pick and sell all of the crop, but was given a discretion as to the time he might pick and sell the part he did pick. We therefore conclude that he did not breach the contract in this particular.

[3, 4] The second and third causes of action are based upon the claim that the contract was extended to include the crops for the season of 1937–1938, under the provisions of the contract, that it would be "*binding*" upon both parties until the advances and payments had been fully paid. We do not construe this as meaning that the contract was extended to include the crops of the following year. The contract covered the year from August 17, 1936, to August 17, 1937. At no place does it say that it shall be extended to include the crops of the following year, but merely says that it will be "binding" upon the parties until the advances are paid. To hold that the word "binding" would extend the contract indefinitely, to include future crops, would be doing violence to the rule of law, that in construing an instrument, the office of the judge is, "simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted". Code Civ.Proc. sec. 1858. To construe the word "binding", as extending the contract, as claimed by appellant, would have the effect of the court making a new and different contract for the parties which, of course, cannot be done. Wells v. Union Oil Co., 25 Cal.App. 2d 165, 76 P.2d 696; Grey v. Tubbs, 43 Cal. 359; Greene v. Vargas, 7 Cal.App.2d 127, 45 P.2d 347; Hill v. General Petroleum Corp., 128 Cal.App. 284, 16 P.2d 1035.

We therefore conclude that appellant cannot recover under the second and third causes of action, which seek recovery of liquidated and special damages, respectively, for the 1937–1938 crop, for the reason that they were not covered by the contract.

[5, 6] The court should have allowed interest on the advances made by appellant to respondent. We can only construe these advances as a loan, which, under the provisions of section 1914 of the Civil Code, bears interest. All of these advances, excepting $500, were made between August 17, 1936, the date of the contract, and November 30, 1936. On November 30, 1936, the first returns from the sale of oranges were received and credited by appellant. The contract was not one of sale, but of consignment. Nor was appellant a del credere factor. Therefore there was no money due respondent from appellant, until the first returns were received from the sale of oranges, and any advances made were in the nature of a loan, and in the absence of an agreement to the contrary, would bear legal interest. A factor, who is not a del credere factor, is entitled to interest on advances made. 25 Cor.Jur. p. 384, § 83; Imperial Valley, etc., Ass'n v. Davidson, 58 Cal.App. 551, 209 P. 58.

[7] This, however, does not call for a reversal of the entire judgment. Smith v. Sharp, 70 Cal.App. 336, 233 P. 374. The judgment is modified by striking therefrom the item of $200 allowed respondent under the cross-complaint, leaving the judgment in favor of appellant stand in the amount of $1,038.44, and costs in the trial court, and as so modified the judgment is affirmed as to all matters except interest on advances made by appellant. As to this portion of the judgment, it is reversed and a new trial is ordered, with instructions to proceed to ascertain the amount of interest due appellant on the advances made by him to respondent, and add said sum to the $1,038.44 which plaintiff is entitled to recover, and to enter judgment in favor of plaintiff for the total amount of principal and interest found due him. Each party to pay his own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

43 Cal.App.2d 181

WRIGHT et al. v. SUPERIOR COURT IN AND FOR CALAVERAS COUNTY et al.

Civ. 6555.

District Court of Appeal, Third District, California.

Feb. 21, 1941.

1. Courts ⇐475(1)

Where Superior Court for City and County of San Francisco had acquired and exercised jurisdiction over action for dissolution of a partnership and distribution of its assets, Superior Court for Calaveras County did not have jurisdiction to entertain a subsequent action by a member of partnership to enjoin sale of partnership assets under directions of Superior Court for San Francisco, since jurisdiction of latter court over liquidation and distribution of assets was exclusive. Code Civ.Proc. § 692.

2. Prohibition ⇐10(1)

Prohibition will lie to restrain one court from assuming jurisdiction over a matter which another tribunal having concurrent jurisdiction has already assumed and is exercising.

3. Execution ⇐172(1)

Proceedings to enjoin execution of an order or judgment of a court cannot be brought in a court of co-ordinate jurisdiction, but relief must be sought in court whose order or command is involved.

4. Courts ⇐480(1)

If member of partnership was aggrieved at action of a superior court which had acquired and exercised jurisdiction over an action for dissolution of partnership and distribution of its assets, district court of appeal, rather than another superior court of concurrent jurisdiction, was proper forum to consider member's complaint.

Original proceedings by Allen J. Wright and others against the Superior Court of the State of California, in and for the County of Calaveras, and others, for a writ of prohibition to restrain the Superior Court from taking proceedings in an action pending in such court.

Writ of prohibition issued.

J. Jos. Sullivan, Morgan J. Doyle, Clarence A. Shuey, D. Bianco, L. Ferrari, and L. Ferrari, Jr., all of San Francisco, for petitioners.

Jos. H. Huberty and Virgil M. Airola, both of San Andreas, for respondents.

PULLEN, Presiding Justice.

By this writ of prohibition petitioners seek to restrain the Superior Court of the State of California, in and for the County of Calaveras, from taking any proceedings in an action numbered therein as No. 2826, and now pending in said court.

From the pleadings and exhibits before us it appears that in 1939, petitioners herein, together with L. A. Morrison, with the exception of Bank of America, formed a limited partnership for the purpose of engaging in the business of gold dredging under the name of "San Andreas Gold Dredging Company".

In May 1940, Allen J. Wright commenced an action in the superior court in San Francisco for the dissolution of the partnership and for the sale and distribution of its assets. All of the other members of the partnership, including L. A. Morrison, answered and joined in the relief sought.

Thereafter, plaintiff therein asked for judgment on the pleadings, and the motion was set for hearing for October 25th. On the day of the hearing of the motion for judgment on the pleadings Morrison asked for and was granted leave to file an amended answer. The allegations of the amended answer were identical with his original answer, except as to the prayer, the amended answer asking that plaintiff take nothing by reason of his complaint. After a hearing, a judgment on the pleadings was granted, and a dissolution of the partnership was ordered, and the assets directed to be sold, the debts and liabilities paid, and the surplus, if any, distributed. It was also provided that the two general partners Allen J. Wright and Charles H. Thurman should proceed to sell the assets to the highest and best bidder, and that notice thereof be given as for the sale of property on execution as provided by section 692 of the Code of Civil Procedure. By proper pleadings it appeared that Morrison had assigned or encumbered a part of his interest to the Bank of America and M. H. Manuel, and to them were to have distributed out of any share belonging to Morrison, such amounts as their interests appeared at the time of distribution.

Thereafter, Wright and Thurman proceeded to advertise the property for sale for December 12, 1940. On December 11, 1940, Morrison filed a notice of appeal to the District Court of Appeal, First Appellate District, and on the same day applied to the trial judge of the superior court in San Francisco for a stay of the sale. The judge refused to consider the matter ex parte, and continued the application for a stay until two o'clock in the afternoon of that day. At that time certain of the parties being then present, the application was renewed, but by the court refused.

On the following day, December 12th, L. A. Morrison filed an action in the county of Calaveras against petitioners herein, seeking to enjoin the sale which the superior court in San Francisco had directed to be held that morning, and asked that a receiver be appointed. A temporary restraining order and order to show cause was thereupon issued by respondent herein, the superior court in Calaveras county, and the order served upon petitioners shortly before the time for the sale of the property. An ex parte application was made to respondents herein to vacate the temporary restraining order upon the ground that court was without jurisdiction, but the application was refused and the matter set for a hearing upon its merits.

This petition is now filed here to prevent respondents' proceeding in that matter, on the ground of lack of jurisdiction, and that the exclusive jurisdiction over the matter and over the liquidation and distribution of the assets of the partnership is vested in the superior court in and for the city and county of San Francisco.

[1] With this contention we must agree. The superior court in San Francisco having assumed and exercised jurisdiction over the dissolution of the partnership, and the liquidation and distribution of its assets, that court thereby acquired and has exclusive jurisdiction over said matters.

[2] That prohibition will lie to restrain one court from assuming jurisdiction over a matter which another tribunal having concurrent jurisdiction has already assumed, and is exercising, is directly held in such cases as Lee v. Superior Court, 191 Cal. 46, 214 P. 972; Dungan v. Superior Court, 149 Cal. 98, 84 P. 767, 117 Am.St.Rep. 119, and De Brincat v. Mogan, 1 Cal.App.2d 7, 36 P.2d 245.

[3] There can be no question that the superior court of San Francisco had already acquired jurisdiction over the matter in dispute and was qualified to afford all the relief sought, Crowley v. Davis et al., 37 Cal. 268, and no proceeding to enjoin the execution of an order or judgment of one court may be brought in a court of co-ordinate jurisdiction, but any relief must be sought in the court whose order or command is involved. Gorham v. Toomey, 9 Cal. 77; Rickett v. Johnson, 8 Cal. 34, 37; Revalk v. Kraemer, 8 Cal. 66, 68 Am.Dec. 304, and cases cited above.

[4] If Mr. Morrison felt aggrieved at the action of the superior court in San Francisco the District Court of Appeal to which he had directed his appeal was the proper forum to consider his complaint.

Let the writ of prohibition issue.

We concur: THOMPSON, J.; TUTTLE, J.



43 Cal.App.2d 200

GAMBLE v. CITY OF SACRAMENTO.

Civ. 6446.

District Court of Appeal, Third District, California.

Feb. 24, 1941.

Hearing Denied April 24, 1941.

1. Municipal corporations ⇐162(8), 165

A municipality's payment of salaries is a cash transaction and not a "book account" or "credit account", and mutual unsettled salary accounts do not exist between officer and municipality, and payment is in full, and if a mistake arises, a cause of action accrues immediately.

See Words and Phrases, Permanent Edition, for all other definitions of "Book Account" and "Credit Account".

2. Municipal corporations ⇐79

The provision in City of Sacramento Charter that all claims against city shall be presented within six months supersedes provision of Code of Civil Procedure relating to limitation of actions. St.1935, p. 2522, § 70.

3. Municipal corporations ⇐1005

A policeman's claim which was presented to City of Sacramento in February, 1937, for deductions from salary for the years 1932–1935, was barred under charter provision that claims must be presented within six months, as against contention that limitations did not begin to run until three years after last deduction in December, 1935, on theory that payment of salary was an open "book account" instead of cash transaction. St.1935, p. 2522, § 70.

4. Contracts ⇐125

An agreement by which policeman agreed with city to accept less than amount of his legal salary as fixed by ordinance was not void as against "public policy."

Appeal from the Superior Court, Sacramento County; J. O. Moncur, Judge.

Mandamus proceeding by Perry C. Gamble against the City of Sacramento to require payment of deductions from petitioner's salary as a member of the police department of the City of Sacramento. From a judgment denying the petition for writ of mandate, the petitioner appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

James F. Gaffney and Peter Mannino, both of Sacramento, for petitioner.

Hugh B. Bradford, City Atty., and Joseph L. Knowles, Deputy City Atty., both of Sacramento, for respondent.

PULLEN, Presiding Justice.

Petitioner at all of the times herein referred to was a member of the police department of the city of Sacramento and in receipt of a salary fixed by an initiative ordinance adopted by the people of that city.

In January, 1932, the city of Sacramento found it necessary, due to the financial and business depression, to drastically cut its expenses, and was faced with the problem of either reducing the personnel of the police department or obtaining contributions from the salaries of all its members. This matter was submitted to the members of that department, and it was unanimously agreed in writing by each officer that he would donate a designated number of days of service without pay to the city of Sacramento for the years 1932–33–34 and 1935, and each authorized the city to make up its payrolls accordingly. On each salary warrant appeared an endorsement that the same was received as full payment for the services shown therein. It is for the recovery of $514 so deducted from his salary this petition for a writ of mandate was brought and from a judgment against petitioner this appeal was taken.

The first point urged against the petition is that it is barred by the provisions of section 70 of the charter, the last deduction in salary being in December 1935, and a claim was presented to the city for the amount withheld in February 1937.

[1-3] The petition is based upon the theory of an open book account which evidences the amount here sought as unpaid salary, and claims the statutes of limitation did not begin to run against the account until three years after the date of the last item. It seems clear however, that payment of salaries by a municipality is not a book or credit account, but a cash transaction. There are no mutual unsettled salary accounts between an officer and the city; the payment is in full, and if any mistake arises, a cause of action accrues immediately. The compensation of a public officer is not in the nature of an account. Griffin v. County of Clay, 63 Iowa 413, 19 N.W. 327. As to the period of limitation the charter of Sacramento, Sec. 70, Stat.1935, p. 2522, provides that all claims or demands shall be presented within six months, and that provision supersedes the provision of the Code of Civil Procedure upon that subject. Dryden v. Board of Pension Commissioners, 6 Cal.2d 575, 59 P.2d 104; Crescent Wharf, etc., Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028.

[4] Petitioner also claims an agreement, wherein an officer of a city agrees with the city to accept less than the amount of his legal salary as fixed by ordinance is void as against public policy. This contention has, in several cases, been determined adversely to the contention of appellant. In Huntsman v. Board of State Harbor Commissioners, 17 Cal.App.2d 749, 62 P.2d 771, the facts were quite similar to the facts here. There all the employees of the state harbor board voluntarily and with full knowledge of the facts entered into a contract for reduced employment in order that the expenditures of that board might be kept within the available revenues and the employment spread as widely as possible among the employees, rather than cause a layoff of many such employees, and it was there held such employees were estopped from asserting there was no waiver by them of their rights.

In Bloom v. Hazzard, 104 Cal. 310, 37 P. 1037, 1038, a constable agreed with an execution creditor to charge less than his usual fees for levying the writ and conducting a sale. It was claimed this agreement was against public policy. The court, in refusing to so hold, said: "The agreement was not intended to work any fraud or wrong upon any party; and, so far as appears, it cannot be classed as malum in se or malum prohibitum."

Appellant cites Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L.R.A.,N.S., 244, 20 Ann.Cas. 158, and Francis v. Leavy, 131 Cal.App. 620, 21 P.2d 979, as supporting his position, but in a case decided in the superior court of the state of California in and for the county of Los Angeles, and entitled W. W. Fuller et al. v. City of Compton et al., No. 385609, Judge Emmet H. Wilson of that court, in sustaining a demurrer to a petition wherein certain public officers sought to recover money withheld by agreement, differentiated the cases of Lukens v. Nye and Francis v. Leavy, pointing out that in the Lukens case an appropriation had been made by the legislature for the purpose of satisfying a claim against the state, and in order to induce the governor to sign the bill, the claimant agreed to accept a smaller amount than appropriated. This, Judge Wilson held, was void as against public policy and unenforceable, citing People v. Board of Police, 75 N.Y. 38; Hobbs v. City of Yonkers, 102 N.Y. 13, 5 N.E. 778; De Boest v. Gambell, 35 Or. 368, 58 P.72, 353. There the agreement had not become executed and lacked the element of acceptance as here.

In the Francis case, plaintiff endorsed a warrant which recited that endorsement constituted an acknowledgment that the amount thereof was accepted in payment of the services mentioned therein, but in fact the salary of plaintiff, after having been fixed by the board, had never been reduced by the board, and plaintiff had never entered into any contract to accept a less compensation than that originally set. The endorsement of the warrant, therefore, did not constitute a waiver of his claim for the full amount of his salary.

In City of Cleveland v. Phillips, 19 Ohio Law Abstract, page 71, certain municipal judges agreed to accept a reduction in salary for the benefit of the municipality. It was there said: "It is conceded that neither Judge Phillips nor any other judge could have been compelled to accept during his term of office a compensation less than that fixed at the time he entered upon his term, but it does not follow that he could not voluntarily relinquish a part of it. We fail to see how such an arrangement is parallel to a preelection promise to accept less than the authorized compensation, because the ulterior motive of such a promise is readily understood. Here the agreement to accept less than the statutory compensation was not only not against public policy but was commendable and patriotic."

In the State ex rel. Hess v. City of Akron et al., 132 Ohio St. 305, 7 N.E.2d 411, a somewhat similar condition prevailed, and the court reached a like conclusion.

Support for the conclusions here reached is found in Barfield v. City of Atlanta, 53 Ga.App. 861, 187 S.E. 407; Steele v. City of Chattanooga, 19 Tenn.App. 192, 84 S.W. 2d 590; Schuh v. Waukesha, 220 Wis. 600, 265 N.W. 699; Taylor v. Philadelphia, 328 Pa. 383, 196 A. 64; Lehman v. City of Toledo, 48 Ohio App. 121, 192 N.E. 537; see, also, Myers v. Calipatria, 140 Cal.App. 295, 35 P.2d 377.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.



43 Cal.App.2d 161

BOYD v. LANCASTER.

Civ. 2598.

District Court of Appeal, Fourth District, California.

Feb. 20, 1941.

Rehearing Denied March 20, 1941.

Hearing Denied April 17, 1941.

1. Judgment ⇐216

Though no formal interlocutory judgment or decree in action to set aside deed and in cross-action to quiet title was ever entered, an order for that purpose would be as effective.

2. Cancellation of Instruments ⇐55

Where interlocutory order, in action to set aside a deed and in cross-action to quiet title, provided that realty should be reconveyed to plaintiff on payment of certain sum

by certain time, but that otherwise title would be quieted in defendant, right given by such order partook of nature of a "right of redemption" rather than of an "option", so that, in general, rules governing forfeitures applied, and court had power to enlarge time of payment called for, in absence of evidence that defendant was substantially prejudiced by delay.

See Words and Phrases, Permanent Edition, for all other definitions of "Option" and "Right of Redemption".

3. Cancellation of instruments ⇐55

Where court, in action to set aside deed and in cross-action to quiet title, found that grantor was of unsound mind and that consideration was grossly inadequate and ordered grantee to reconvey if grantee should be paid certain sum by August 15, and thereafter time was extended on August 16 to August 30, and on August 30 court ordered hearing on application for extension of time to be continued to September 20, and during the meantime the grantor died, suspending court's authority, and administrator was appointed on November 15, and the next day an appeal was taken, again suspending the court's power to act until the coming down of the remittitur, and before coming down of remittitur required sum of money had been tendered, there was a substantial and actual compliance with terms of interlocutory order.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by C. M. Grove, guardian ad litem of Henry O. Boyd, against J. M. Lancaster to set aside a deed, wherein the defendant filed a cross-complaint to quiet title. Henry O. Boyd died, and Joseph L. Boyd, as administrator, was substituted as plaintiff. From an adverse judgment, Joseph L. Boyd, administrator, appeals.

Judgment reversed with directions to enter judgment for plaintiff.

Edgar T. Fee, of Los Angeles, for appellant.

J. O. Reavis, of Bakersfield, and Chapman & Chapman, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action, originally filed through a guardian ad litem, to set aside a deed by which Henry O. Boyd had conveyed certain property to J. M. Lancaster. The deed recited a consideration of $10. Among other things, the complaint alleged that at the date of the deed Boyd was of unsound mind and physically and mentally incapable of handling his business affairs. In his answer the defendant Lancaster alleged, among other things, that the deed had been given and accepted in full satisfaction of certain debts theretofore owed to him by the grantor. In a cross-complaint, he sought to have his own title quieted. An amendment to the complaint was later filed, in which the plaintiff offered to pay any amounts due to the defendant, with interest thereon.

On June 29, 1937, the court signed and filed findings of fact and conclusions of law, in which it was found that at the date of the deed Boyd was "a person of unsound mind, but not entirely without understanding"; that the consideration for the conveyance was grossly inadequate; that by reason of those facts the conveyance was voidable; that Lancaster had made certain advancements to Boyd; and that there was "now due and unpaid" certain sums which with interest thereon amounted to $5,300. As conclusions of law it was found that the property should be reconveyed to Boyd by Lancaster upon the payment of $5,300 within sixty days from and after July 1, 1937, and that if it was not paid title was to be quieted in Lancaster. No interlocutory judgment appears in the record, although a purported "order modifying interlocutory judgment" was filed on July 26, 1937, purporting to grant an extension of time to August 15, 1937, in which to comply with "the interlocutory order" filed "on the 29th day of May 1937, designated 'An Interlocutory Judgment.'" No such an interlocutory order appears in the record.

On August 16, 1937, an order was entered "that a stay of proceedings to comply with the order heretofore made by the court be granted to and including August 30, 1937." On August 26, 1937, the plaintiff filed an application for an extension of time within which to deposit the funds, noticing the same for hearing on August 30, 1937. On August 30, 1937, the court entered an order on its own motion and for good cause, continuing the hearing of this matter to September 20, 1937. Sometime during the night of August 30-31, 1937, Henry O. Boyd died. In the meantime, on August 27, 1937, the plaintiff had caused an oil company to de-

posit $5,300 with a title company, which amount, however, was deposited conditionally in accordance with certain escrow instructions.

On September 21, 1937, the court entered an order reciting that the plaintiff had failed to comply "with the interlocutory judgment of June 29, 1937", and the orders of July 26, 1937 and August 16, 1937, and ordering that title to the property be quieted in the defendant "as provided in the interlocutory decree of June 29, 1937" and, after reciting that the time fixed for paying the money had expired, ordering that judgment be entered nunc pro tunc as of August 17, 1937. On September 22, 1937, a judgment was entered quieting title in the defendant and further ordering that the same be entered nunc pro tunc as of August 31, 1937.

On November 10, 1937, letters of administration in the estate of Henry O. Boyd were issued to Joseph L. Boyd and on November 15, 1937, on motion, said administrator was substituted as the party plaintiff. On November 16, 1937, he filed notice of appeal from the judgment which had been entered. That judgment was reversed by this court on the ground that the authority of the guardian ad litem had ended with the death of the ward, and that the judgment entered after the death of the real party in interest was void since no substitution of parties had been made. Boyd v. Lancaster, 32 Cal.App.2d 574, 90 P.2d 317. The remittitur was issued on July 8, 1939, but in the meantime and on June 14, 1939, the substituted plaintiff had deposited $5,300 with the clerk of the trial court, tendering the same in compliance with the interlocutory judgment and giving notice thereof. It is stated in appellant's brief, and not denied, that said sum of money has at all times since and now remains on deposit with said clerk.

On July 24, 1939, the court heard motions made by the respective parties, each asking for the entry of judgment in his favor, and on August 2, 1939, the plaintiff's motion was denied and the defendant's motion granted. On August 17, 1939, a judgment was entered adjudging and decreeing that the time limited by the respective court orders within which the plaintiff might deposit $5,300 with the clerk as a condition to obtaining the relief sought by him expired on August 30, 1937, that no extension of time beyond that date had ever been made, and that by reason of the plaintiff's failure to comply with the court orders any right he might have to recover the property had terminated. The judgment contained further provisions quieting the title to the property in the defendant. From this judgment the plaintiff has appealed.

[1, 2] So far as the record shows, no formal interlocutory judgment or decree was ever entered, but an order for this purpose may be just as effective. Thompson v. White, 63 Cal. 505. Insofar as the instant case is concerned, it seems fully to have been understood by all parties that an opportunity was given to the appellant, pending the entry of a final judgment, to pay $5,300 and thereby avoid the entry of a judgment quieting title in the defendant. In Leslie v. Federal Finance Co., Inc., 14 Cal.2d 73, 92 P.2d 906, the court held that the right given by such an interlocutory order partakes of the nature of a right of redemption rather than that of an option and that, in general, the rules governing forfeitures apply. In that case, which involved an offer of performance of the requirements of an interlocutory judgment, the offer being made some eight days after the required time had elapsed, it was not only held that the trial court had power to enlarge the time of payment called for in the interlocutory decree, but it was stated that under the circumstances and in the absence of evidence that the other party had been substantially prejudiced by the delay it was the duty of the court to grant relief from the forfeiture.

[3] In the instant case the equities are in favor of the appellant. If it be conceded that the conditional deposit of $5,300 with a title company on August 27, 1937, was not a substantial compliance with the terms of the interlocutory order the fact remains that the required amount was deposited with the clerk of the court in compliance with the order before the judgment appealed from was entered. The court's adjudication or finding that the time within which the appellant might deposit the $5,300 with the clerk of the court expired on August 30, 1937, and that no extension of time beyond that date had ever been made, is not supported by the record. On August 26, 1937, an application for an extension of time was filed and noticed for August 30, 1937. On that day, the court ordered the hearing on the same continued to September 20, 1937. It can hardly be questioned that the effect of that order,

in such a case as this, was to extend the time within which the money might be deposited to September 20, 1937. Before the matter was heard the real party plaintiff died and the court's authority to pass upon the matter was suspended, as held on the former appeal, until an administrator was appointed and a substitution made. This was completed on November 15, 1937, and the next day an appeal was taken which again suspended the power of the court to act until the appeal was determined. Nothing was done on November 15, 1937, with respect to passing upon the application for an extension of time which was then pending, and nothing could be done thereafter until the remittitur was issued on July 8, 1939. In the meantime, and before any action could be taken by the court, the required amount was deposited with the clerk. We think it must be held that the time within which the deposit could be made was extended beyond August 30, 1937, and that the death of the party and the former appeal, which successively suspended the power of the court to act in the meantime, extended the time until the coming down of the remittitur, at which time the required amount had been deposited. We conclude, therefore, that there was a substantial and actual compliance on the part of the appellant with the terms of the interlocutory order within the time allowed under the law, and that the court erred in holding to the contrary.

The judgment is reversed with directions to enter judgment in favor of the appellant, with an appropriate order turning over the money deposited to the respondent.

We concur: MARKS, J.; GRIFFIN, J.

RUST v. HILL et al.

L. A. 17646.

Supreme Court of California.

March 3, 1941.

Rehearing Denied March 31, 1941.

1. Limitation of actions ⇐112

Where a debtor has resorted to the beneficial provisions of a moratorium act, but ineffectively, the provisions of the act do not grant to his creditor an extension of time for commencing an action for balance due after the exercise of power of sale. St. 1935, p. 1214, § 19, as amended by St.1937, p. 60; p. 466.

2. Limitation of actions ⇐112

A mortgage creditor is not entitled to an extension of time for bringing an action for a deficiency where debtor has had no opportunity to invoke the beneficial provisions of the moratorium act for reason that the power of sale was exercised before the moratorium act became effective. Code Civ.Proc. § 337, subd. 1, § 580a; St.1935, pp. 56, 60, § 1 et seq., § 8; p. 1214, § 19, as amended by St.1937, p. 60; p. 1216, § 31; p. 466.

3. Mortgages ⇐338

The primary purpose of the moratorium act was to afford relief to debtors by postponement of sales and forfeitures of their interests in real property which were bound as security for the discharge of their obligations and the extensions thereby made available to creditors were granted to protect their interests which otherwise might be jeopardized by the delays invoked by debtors pursuant to the act. St.1935, p. 1216, § 31.

4. Limitation of actions ⇐112

Where pursuant to power contained in trust deed securing note executed in January, 1931, property was sold on April 24, 1935, action instituted on April 1, 1938, was barred by statutes requiring action for deficiency to be brought within three months after foreclosure sale, since debtor was never in a position to avail himself of benefit of moratorium act which did not become effective until after the creditor had sold the property. Code Civ.Proc. § 337, subd. 1; § 580a; St.1935, p. 1214, § 19, as amended by St.1937, p. 60; p. 466.

Appeal from Superior Court, Los Angeles County, Robert W. Kenny, Judge.

Action on a note by Richmond A. Rust against Frank P. Hill and others. From a judgment entered upon an order sustaining defendants' demurrer to the complaint with leave to amend, plaintiff appeals.

Affirmed.

Prior opinion, 103 P.2d 578.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for appellant.

Marcus Muskat, of Los Angeles, for respondents.

J. H. Nutt and Henry F. Walker, both of Los Angeles, amici curiae for respondents.

PER CURIAM.

This is an appeal by the plaintiff from a judgment entered upon an order sustaining the defendants' demurrer to the complaint with leave to amend, and the plaintiff's election to stand upon the complaint as filed.

The plaintiff sued to recover the balance due on a promissory note for $7,600, dated January 1, 1931, and due in three years. The note was secured by a deed of trust on real property of the defendants. Upon default in payment, the real property was sold pursuant to the power of sale in the deed of trust for the sum of $1,000. After application of the proceeds of the sale the deficiency, or balance due on the note, and for which suit was brought, was $8,522.29. The complaint was filed April 1, 1938, and showed that it was filed more than four years after the maturity of the note and more than three months after the sale under the deed of trust.

By their demurrer the defendants pleaded the bar of subdivision 1, section 337, of the Code of Civil Procedure, which provided for a four-year limitation of actions on "any contract, obligation or liability founded upon an instrument in writing", and which also provided that the time within which an action for a deficiency may be brought shall not extend beyond three months after the time of sale under a deed of trust or mortgage. The defendants also pleaded in bar the provisions of section 580a of the Code of Civil Procedure, which likewise limited the time to three months within which an action for a deficiency may be commenced following the exercise of the power of sale in a deed of trust or mortgage. The plaintiff contends that the limitation under both statutes was tolled by the

provisions of the Mortgage and Trust Deed Moratorium Acts of 1935, St.1935, p. 1208, 1214, and 1937, St.1937, p. 57, 60; St.1937, p. 460, 466.

The defendants contend that the moratorium acts had no application to the facts of this case wherein it is disclosed that the plaintiff foreclosed his trust deed and sold the property pursuant to the power of sale before the act of 1935 went into effect. The complaint shows that the real property described in the deed of trust was sold on April 24, 1935. The moratorium act went into effect on June 21, 1935, or about two months after the sale. The defendants insist that it was the purpose of the moratorium acts to provide, as an economic necessity, for the postponement of foreclosures under mortgages, deeds of trusts and contracts of purchase affecting real property upon a proper showing for such postponement on the part of the debtor, at the same time safeguarding the rights of the creditor in the event of such postponement; that there is nothing in those acts relating to any necessity for the postponement of the time within which actions may be brought independent of and apart from the postponements authorized by the acts, and that where, as here, the creditor has sold the property and thus irrecoverably foreclosed all interest of the debtor therein before the effective date of the Moratorium Act of 1935, the debtor was never in position to avail himself of its benefits.

The plaintiff relies on the cases of Bakersfield Home Building Company v. J. K. McAlpine Land & Development Company, 26 Cal.App.2d 444, 79 P.2d 410, and Everts v. Newhouse, Inc., 28 Cal.App.2d 407, 82 P.2d 703, wherein it was held that the action for a deficiency judgment after exercise of the power of sale under a deed of trust was an action founded upon a written instrument secured by a deed of trust and that the moratorium statutes applied to extend the time within which the creditor could commence such action.

[1] In each of those cases it appeared that the power of sale was exercised after the effective date of the applicable moratorium act, and it must be assumed that in such cases the debtor had an opportunity to obtain a postponement of the sale by invoking the appropriate procedure under the act. Whether the cases relied on by the plaintiff have been correctly decided is not a question which concerns us at this time. For present purposes it is sufficient to note the factual distinction between this case and the cases relied on by the plaintiff, and particularly the fact that the debtor in the present case never had an opportunity to obtain a postponement of the sale pursuant to the act which is here invoked by the creditor. The courts have recognized that where the debtor has resorted to the beneficial provisions of a moratorium act, but ineffectively, the provisions of the act do not grant to his creditor an extension of the time for commencing an action for the balance due after the exercise of the power of sale. In Christina v. McLoughlin, 18 Cal.App.2d 410, 63 P.2d 1174, after the effective date of the act of January 31, 1935, St.1935, p. 60, the power of sale was exercised under a deed of trust and the creditor brought an action for a deficiency more than four years after the note became due and more than three months after the sale. In that case the debtor had applied for relief, but the proceeding to stay the sale was ineffective, and postponement was denied for the reason that the application was filed too late. The court held that the extension to the creditor did not apply. That distinction was recognized in Harris v. Fitting, 9 Cal.2d 117, 121, 69 P.2d 833.

[2] It is observed that section 8 of the act of January 31, 1935, involved in Christina v. McLoughlin, provided that when the time within which an action might be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust, or contract of purchase of real property, would have expired by virtue of section 337 of the Code of Civil Procedure during the period of postponement ordered pursuant to the provisions of the act, such time was extended for the period of postponement; and that the court placed its conclusion on the ground that there had been no postponement. It is also observed that the provisions of section 19 of the acts invoked by the plaintiff herein do not contain any similar limitation. Nevertheless, considering the express objects to be attained by the moratorium acts, it unquestionably follows that the creditor is not entitled to an extension of the time for bringing an action for a deficiency where the debtor has had no opportunity to invoke the beneficial provisions of the act for the reason that the power of sale was exercised before the act became effective.

[3, 4] The provisions of the acts under consideration demonstrate that their primary purpose was to afford relief to debtors

by postponement of sales and forfeitures of their interests in real property which were bound as security for the discharge of their obligations. The extensions thereby made available to creditors were complementary and co-ordinate and were granted to them to protect their interests, which otherwise might be jeopardized by the delays invoked by debtors pursuant to the terms of the acts. Sec. 31, Trust Deed and Moratorium Act of 1935, St.1935, p. 1216; Bennett v. California Trust Co., 6 Cal.2d 381, 57 P.2d 914; Harris v. Fitting, supra.

It follows from the foregoing that the demurrer was properly sustained.

The judgment is affirmed.



DAVIS v. STATE BAR OF CALIFORNIA.*

L. A. 17656.

Supreme Court of California.

Feb. 28, 1941.

Rehearing Granted March 28, 1941.

1. Attorney and client ⇐53(1)

In a disbarment proceeding, intendments are in favor of the accused attorney.

2. Attorney and client ⇐57

In disbarment proceeding, findings of local administrative committee in favor of attorney supported by evidence were followed by the reviewing court in preference to findings of Board of Governors on same evidence, since local committee had an opportunity to hear witnesses and was in a better position to determine truth concerning disputed facts than reviewing board or court.

3. Attorney and client ⇐58

Where attorney signed a verification in blank which was thereafter used in connection with a cross-complaint filed in a replevin action against the attorney, attorney was suspended from the practice of law for a period of three months from and after the date on which decision of the Supreme Court should become final.

CARTER, J., dissenting.

Proceeding by Harold L. Davis to review the recommendations of the Board of Governors of the State Bar of California that petitioner be disbarred from the practice of law.

Petitioner suspended from the practice of law for a period of three months.

Morris Lavine, of Los Angeles, for petitioner.

Claude Minard, of San Francisco, for respondent.

PER CURIAM.

This proceeding was brought to review the recommendations of the board of governors of The State Bar that the petitioner be disbarred from the practice of law.

The petitioner's difficulties arose out of his dealings with Mrs. Marie Monast, who was arrested and placed in jail on a charge of possessing narcotics. Through a man named Evans, a self-styled "bouncer" in a Hollywood night club, she employed the petitioner and another lawyer, G. Bentley Ryan, to represent her. To secure the payment of their fee of $2,000 she pledged with Davis two diamond rings having a value in excess of that sum. The petitioner signed a typewritten receipt for them which, as originally written, recited that they were deposited as security for attorneys' fees "and bond". When the receipt was offered in evidence, a line had been drawn through the words "and bond".

Davis procured a bail bond from a surety company and Mrs. Monast was released from jail. She paid the premium on the bond. The attorneys' fee was paid in three instalments, the last of which was made on May 26, 1937. On July 19, 1937, when she failed to appear for trial in the superior court, the bond was forfeited. Later, upon representations of Davis that she was ill, the matter was continued one week. At that time there was a trial by the court, a jury having been waived, and judgment of conviction. She immediately filed an application for probation, which was granted the same day. A condition of probation was that she should leave California and not return. A few days later she sailed for Honolulu and has not returned. Upon this disposition of the case her bond was exonerated.

On July 17, 1937, Irene Davidson and Catherine Wall were arrested and jailed in Los Angeles on charges of grand theft. They, too, through Tom Evans, retained Davis and Ryan as counsel. Shortly after their arrest, Davis filed a petition for a

* Subsequent opinion 118 P.2d 818.

writ of habeas corpus and secured their release on bail by posting a bond of $1,000 for each one of them. These bonds were secured by Davis from the same surety company which had posted bail for Marie Monast. When arraigned in municipal court, the bail of each defendant was increased to $3,500. This they were unable to furnish, and in consequence they were remanded to the county jail, where they remained until sentenced. At the preliminary hearing, Ryan appeared for them on behalf of Davis and himself, but neither had any further connection with the case.

When these two women were arrested, Marie Monast had paid the premium on her bond and all of her attorneys' fees in her case. On the day after she was to appear for trial, the petitioner pawned for $350 the two diamond rings pledged with him by her. Approximately two months after Mrs. Monast left for Honolulu, Davis sold the pawn ticket for $200, and the purchaser subsequently redeemed the rings from the pawnbroker. Thereafter Mrs. Monast brought a replevin action against Davis to secure possession of the rings. Davis then repurchased the rings and after the institution of the disciplinary proceedings against him, returned them to her.

All of the facts which have been stated stand undisputed. But there is a direct conflict between the petitioner and Mrs. Monast concerning the agreement under which she pledged the rings with him. He testified that when he signed the receipt for the rings the words "and bond" had not been crossed out. Mrs. Monast testified positively that she refused to accept it until this was done.

In further explanation of his action in disposing of the jewelry the petitioner testified that "they were to be returned to her when the bond was either exonerated or otherwise had been disposed of and the fee had been paid". He also testified that he represented Catherine Wall and Irene Davidson upon the representation of Evans "that he had talked to Mrs. Monast and that she was willing to take care of their case and for me to come and get them out [of jail]". Later, he said, he talked with Mrs. Monast and told her Tom Evans had called him in connection with the case of these women. "And did she indicate", he was asked, "in anywise whatsoever that she was not going to be responsible for their bond and attorneys fees?" "No", was his reply. "If she had, I wouldn't have gone ahead with them." According to his testimony, he told Mrs. Monast "in the beginning" that his fee would be $250 for each woman and that he was going to keep the jewelry. But he also related a conversation he had with Mrs. Monast at the county jail when "she apparently was highly dissatisfied and said that these two girls were dissatisfied the way the preliminary hearing had been handled; said they were going to get other counsel and that she didn't intend to pay for their fee or bond".

The testimony of Mrs. Monast, taken by deposition, is in direct contradiction to that of petitioner. She said: "I never talked to Mr. Davis concerning Katherine Davidson and Irene Wall. * * * I am positive that I never told Harold L. Davis, or anyone else, that I would pay the fees for [them] * * *, or either of them, as I had no reason for assisting these women. * * * I never told [them] * * * that I would be responsible for their bonds or attorney's fees at any time in the county jail in Los Angeles, or any place else."

The charges made against the petitioner are that he improperly disposed of the diamond rings pledged with him, that he filed a false and improper cross-complaint in the replevin action, and that he gave false testimony in a deposition taken in connection with that litigation. The local administrative committee of The State Bar before whom the issues were tried found in petitioner's favor on all charges with the exception of that concerning the allegations of the cross-complaint. On that issue it found that such allegations were due to the error of Davis' associate in preparing the cross-complaint and through the careless conduct of the petitioner in signing a verification of it in blank. Upon these findings the committee recommended that Davis be given a private reprimand. When the matter came before the board of governors, it held a hearing in which Davis was sworn and testified, adopted findings of fact contrary to those of the committee and recommended the disbarment of the petitioner.

The conclusion of the board of governors that the petitioner violated his oath as an attorney at law and is guilty of conduct involving moral turpitude rests upon its findings that although the agreement of Mrs. Monast, to secure the performance of which she had pledged the rings, had been fully performed, Davis sold

them as his own property; that he testified falsely upon the taking of his deposition concerning the transaction; and that he swore to certain allegations in a cross-complaint which were false and untrue. In reaching its decision, the board of governors considered not only the record of the proceeding before the local administrative committee, but also the testimony of the petitioner given when this record was under review. But as presented to this court, the case is one in which the board of governors, upon substantially the same evidence as that before the local committee, concluded that the petitioner had violated his oath as an attorney at law although the committee absolved him.

To state with certainty the agreement which was made between two persons in a series of conversations many months before is a difficult task under any circumstances. In an opinion filed by the local administrative committee in connection with its findings and recommendation, it recognized this difficulty and stated the problem before it as follows: "The determination of most of the issues in this proceeding depends upon whether respondent or Marie Monast is to be believed with respect to these matters. We state frankly that the evidence was far from satisfactory. However, considering the proof made available several items of testimony corroborate respondent's story rather than that of Marie Monast. * * * Respondent appeared before us personally and while his testimony was not as precise as some others might give it, it is obvious, both from his testimony before us and on depositions, that often his statements were conclusions which as an attorney he reached and stated as facts rather than the facts themselves. We did not have the benefit of the personal appearance of Marie Monast and her deposition was far from satisfactory. Under these circumstances we have resolved the conflict in favor of respondent. We conclude that respondent was authorized to hold the rings as security for the Marie Monast bond and for the bond and fee of the Wall and Davidson women."

[1] The State Bar recognizes the rule that in a disbarment proceeding the intendment should be in favor of the accused attorney. But it insists that in this case there is only one reasonable inference which can be drawn from the facts in evidence. This reasonable inference, says The State Bar, points to the petitioner's guilt because it "appears unlikely" that a woman who had insisted upon receiving the receipt signed by him "would have been satisfied to permit rings of value in excess of $2,000 to be retained for a fee of $500, with no more explicit instructions than that if she was not able to pay the money he could use the rings as he saw fit". "Such conduct", it continues, "would not be reasonable in the light of all the circumstances."

However, the local administrative committee weighed the same evidence considered by the board of governors and decided that Mrs. Monast delivered the rings to him as security for the payment of a balance of the fee and also as security for the bond pursuant to which she was released from custody. It also found that at the time Davis pawned the rings, he had been authorized by her to dispose of them "to take care of other obligations which she had incurred" to him in connection with the cases of Catherine Wall and Irene Davidson. Undoubtedly the evidence supports these findings as well as those of the board of governors, and the contrary conclusion drawn from it results from two different opinions concerning the credibility of the witnesses.

[2] The rule which will be followed by this court under such circumstances has been stated in a number of cases. In re Werner, 13 Cal.2d 666, 91 P.2d 881; Egan v. State Bar, 10 Cal.2d 458, 75 P.2d 67; Mauer v. State Bar, 219 Cal. 271, 26 P.2d 14. The local administrative committee which had an opportunity to hear the witnesses is in a much better position to determine the truth concerning disputed facts than a reviewing board or an appellate court, and, ordinarily, its findings will be followed. That rule is applicable to the present case.

[3] But the committee found that the act of petitioner in signing a verification in blank which was thereafter used in connection with a pleading "was reprehensible conduct which should severely be condemned". When this finding is considered in connection with the fact that the verification was used with a cross-complaint in the action brought by Mrs. Monast to recover her jewelry, and that this cross-complaint alleged that Mrs. Monast was indebted to the petitioner for professional services, it would seem that the discipline to be administered should be greater than

a private reprimand. Accordingly, it is ordered that the petitioner be and he is hereby suspended from the practice of law for a period of three months from and after the date this decision becomes final.

CARTER, Justice (dissenting).

I find myself unable to agree with the conclusion reached by the majority of the court that petitioner should be suspended from the practice of the law for a period of three months. The majority opinion purports to accept the determination of the local administrative committee that the only conduct for which petitioner could be disciplined was the signing of a verification in blank which was thereafter used in connection with a pleading filed on behalf of petitioner in an action brought against him by the complaining witness. While in my opinion, the signing of such verification did not constitute unprofessional conduct, if it could possibly be held that it did, certainly the discipline of a public reprimand recommended by the local administrative committee is of sufficient severity to satisfy even those who may be classified as "strict disciplinarians".

While it is true that the signing of a verification in blank for use in connection with a pleading to be subsequently prepared, is a dangerous practice, and is very apt to involve the signer thereof in difficulty, it is impossible for me to understand how this act alone can be held to constitute moral turpitude, dishonesty or corruption, or a violation of any of the rules of professional conduct promulgated by The State Bar of California. However, if the purpose of the signing of such a verification was to permit either the signer thereof or someone else to accomplish some fraudulent purpose or design, then, of course, such act would constitute unprofessional conduct and would subject the signer thereof to discipline if he were a member of the bar.

On the other hand, if there was no thought or intention on the part of the person signing the verification to have the same made use of to accomplish some fraudulent purpose or design, but the verification was thereafter used for this purpose without his knowledge or consent, even though the signer of such verification might be subjected to civil liability for his negligence, his act should not subject him to a disciplinary proceeding by The State Bar of California.

In my opinion a public reprimand is ample discipline to be administered for the alleged misconduct committed by petitioner in this case.



17 Cal.2d 521

LYNCH et al. v. BENCINI et al.

L. A. 17699.

Supreme Court of California.

March 5, 1941.

1. Appeal and error ⇐347(1)

A judgment entered after default does not relate back to the time when default was entered so as to cut off the right of appeal where entry of judgment is delayed until time for appeal has expired.

2. Appeal and error ⇐347(1)

A judgment reciting that it was entered upon application of plaintiff who at the time judgment was entered was dead and at time when statute imposed duty on court to dismiss the action, which judgment included large amount of interest accruing between entry of default and date that judgment was entered, did not relate back to the time when default was entered so as to defeat right of appeal. Code Civ.Proc. § 581a.

3. Judgment ⇐126(1), 131

Under statute authorizing clerk to enter default judgment in action arising upon contract for the recovery of money or damages only, clerk has right to enter default judgment only where the proper amount appeared from terms of contract as alleged in complaint or follows therefrom by mere mathematical computation, and he has no power to enter such judgment where the exercise of discretion, and taking of evidence, is necessary to determine amount of damages. Code Civ.Proc. § 585 sub. 1, 2.

4. Judgment ⇐131

In action to recover price of stock which defendants under contract agreed to buy from plaintiff, whether clerk was authorized to enter a default judgment against one of defendants was not dependent on whether

complaint stated a cause of action but whether the complaint stated a cause of action within statute authorizing the court to enter default judgment in an action arising upon contract for the recovery of money or damages only. Code Civ.Proc. § 585 sub. 1.

5. Judgment ⇐131

Where creditor agreed to take stock of corporation in payment of debt as soon as permit was issued by corporation commissioner and directors agreed to buy certain part of stock at a future time on certain contingencies and it was agreed that dividends were to be applied on purchase price and there was no stipulation as to amount of damages in event of breach, in creditor's action to recover from directors purchase price of the stock agreed to be purchased, clerk was not authorized to enter default judgment since taking of evidence was necessary to determine amount of damages. Code Civ.Proc. § 585 sub. 1.

6. Judgment ⇐131

In determining whether an action is one arising upon contract for the recovery of money or damages only so as to authorize the clerk to enter default judgment, allegations of complaint and the terms of the contract are to be considered notwithstanding that the prayer is for the certain amount. Code Civ.Proc. § 585 sub. 1.

7. Appeal and error ⇐105
Dismissal and nonsuit ⇐53(1)

Under statute providing that all actions must be dismissed by the court in which the same are pending on court's own motion if summons has been served and no answer has been filed and plaintiff fails to have judgment entered within three years after service of summons, duty is imposed on court to dismiss action if plaintiff fails to perform duty upon him, and, where defendant has not taken steps for his own protection, court's error in failing to perform duty is one which may be corrected on appeal if taken within statutory time. Code Civ.Proc. § 581a.

8. Appeal and error ⇐127

Where clerk after death of plaintiff entered default judgment against a defendant more than three years after he was served with summons in action arising out of contract for the purchase of certain stock, and defendant made timely motion after judgment to dismiss the action, and court did not perform duty imposed by statute providing for dismissal of action if plaintiff fails to have judgment entered within three years after service of summons, default judgment was not immune from direct attack on appeal. Code Civ.Proc. §§ 579, 581a, 585.

9. Appeal and error ⇐934(1)

There is no presumption in favor of a judgment entered by a clerk. Code Civ.Proc. § 585 sub. 1.

In Bank.

Appeal from Superior Court, San Diego County; E. J. Kelly, Judge.

Action by Frank Lynch against C. H. Bencini and others for the price of certain stock which defendants under a contract agreed to buy from plaintiff, wherein Georgia A. Lynch and F. C. Lynch, as executrix and executor respectively of the last will and testament of Frank Lynch, deceased, were substituted as plaintiffs on the death of Frank Lynch. From a default judgment entered by the clerk and from orders denying a motion to vacate the judgment and to dismiss the action, Leroy A. Wright appeals.

Judgment and orders reversed with directions. For prior report see 104 P.2d 823.

J. A. Donnelley and C. M. Monroe, both of San Diego, for appellant.

Dempster McKee, of San Diego, for respondents.

PER CURIAM.

A petition for hearing in this case was granted to the end that further consideration be given to the contentions of the plaintiffs. On such consideration, we agree with the disposition of the appeal by the District Court of Appeal of the Fourth Appellate District and adopt, with a slight deletion, the opinion of that Court, prepared by Presiding Justice Barnard, as the opinion of this Court. It is as follows:

"On August 23, 1929, a written agreement was prepared which purports to be between Frank Lynch on the one hand and six named persons on the other hand. However, only five of the latter signed the agreement. The agreement provides that whereas a named corporation is indebted to Lynch in the sum of $275,000, Lynch agrees to cancel this debt and accept in lieu thereof enough shares of stock in said corporation which at 4/5ths of their par value would amount to $275,000, the same to be delivered as soon as a permit was

issued by the corporation commissioner. It further provides that in consideration of this cancellation of the debt of the other six persons, as directors of the corporation, jointly and several agree to purchase from Lynch within seven months after delivery of the stock to him, so much of said stock as at 4/5ths of its par value would represent $175,000. Lynch then agrees to sell to the others 'any portion or all of said stock' at a named price if all or any part of said stock is purchased within thirty days after he acquires the stock, and at slightly increasing prices if said stock is purchased in succeeding months up to the seventh. The contract then provides: 'Should dividends be paid on the above stock during the life of this contract, such dividends are to be credited on the purchase price hereinbefore set forth.'

"In this action, which was filed on February 8, 1934, by Frank Lynch, only four of the other parties who signed the contract were named as defendants. The contract of August 23, 1929, was attached to the complaint and made a part thereof. The complaint alleges that on September 29, 1929, the plaintiff canceled the note for $275,000 and as consideration therefor accepted 13,750 shares of the stock of this corporation which were issued to him on that day; that the plaintiff has duly done and performed all things which were to be done by him under the terms of said contract; that the defendants have not, nor has any one of them, purchased from the plaintiff the said stock or any part thereof which they agreed to purchase under the terms of the contract; that the whole of the purchase price, to-wit, $190,312.50, together with interest from April 29, 1930, is due and unpaid from the defendants and from each of them; and that demand has been made. The prayer is for judgment against each of the defendants for $190,312.50, with interest at 7 per cent from April 29, 1930.

"Two of the four defendants were never served, so far as the record shows. The defendant Wright was not served until January 10, 1936, and the return of this service was not filed until August 4, 1936, on which date this default was entered. The defendant Gray filed a demurrer on July 30, 1936, and filed an answer on September 15, 1936, with an amended answer on February 5, 1937. He alleged that he had signed the agreement on the express condition that it was not to be effective as to him until the signature of the sixth other party had been obtained, and that this had not been done. Nothing further was done until June 29, 1939, when the clerk entered a default judgment against the defendant Wright for $312,429.64, being the full amount prayed for in the complaint with interest at 7 per cent from April 29, 1930, to June 29, 1939. On April 22, 1939, and before this judgment was entered, Frank Lynch died, and the present plaintiffs were appointed executrix and executor of his will on May 12, 1939. On July 11, 1939, they applied for and obtained an order of court substituting them as plaintiffs in this action. On July 21, 1939, there was filed a dismissal of the action with prejudice, as to the defendant Gray only, the dismissal being dated June 3, 1937.

"On July 12, 1939, the defendant Wright served and filed notice of motion for an order vacating this judgment and dismissing the action, which motion was later made and denied. Subsequently, a motion to reopen and reconsider was made and denied. Within the statutory time, the defendant Wright appealed from the judgment and from the orders denying his motions.

"The questions presented involve the powers of the clerk under section 585 of the Code of Civil Procedure and the effect of sections 579 and 581a of that code under the circumstances here appearing. The respondent contends that these other sections have no application here since under section 585 it was the duty of the clerk to enter judgment immediately upon entering the appellant's default and that, in contemplation of law, it must be deemed that this judgment was entered on August 4, 1936, within three years after the summons were served, and that no discretion remained to be exercised by the court.

[1, 2] "While it has been stated in some cases, as sufficient under the circumstances and for the purposes therein, that the judgment entered by the clerk might be regarded as relating back to the time when default was entered this is not necessarily always true and would not be true where a timely appeal from the judgment is taken. If an appeal otherwise possesses merit, it could hardly be held that this legal fiction applied and cut off the right of appeal. See De Leonis v. Walsh, 140 Cal. 175, 73 P.

813. If this were true, the plaintiff could prevent an appeal from a default judgment by having the clerk, after entering the default, delay the entry of judgment until the time for appeal has expired. Moreover, the judgment here entered by the clerk discloses on its face reasons why it should not be considered as having been entered at the date of the default. The judgment recites that it is 'hereby' entered 'upon the application of said plaintiff'. Not only was this judgment entered at a time when the plaintiff was dead, and at a time when the statute made it the duty of the court to dismiss the action, but it is for an amount which includes more than $38,000 interest accruing between the entry of the default and the date judgment was entered.

"The first question that should be considered is whether this action is one of the kind in which a clerk has power to enter judgment. In other words, whether this is 'an action arising upon contract for the recovery of money or damages only', within the meaning of that provision in subdivision 1 of section 585.

[3] "It has been held in a number of cases that a clerk has the power to enter judgment only where the proper amount appears from the terms of the contract as alleged in the complaint or follows therefrom by mere mathematical computation. For this reason it has been held that in an action involving any sort of accounting the clerk cannot enter a judgment. Crossman v. Vivienda Water Co., 136 Cal. 571, 69 P. 220. It is clear that the clerk has no such power where the taking of any evidence is necessary and it has been held that he has no such power where the reasonable value of services or goods must be determined. In Landwehr v. Gillette, 174 Cal. 654, 163 P. 1018, 1019, the meaning of this provision of section 585 is given more thorough consideration than in any other case to which our attention has been called. The court there said:

" 'While it is true that the language used in subdivision 1 of the section is quite broad and authorizes the clerk after default to enter up judgment in all actions "arising upon contract for the recovery of money or damages only," still what is meant by that language is that the contract to warrant the exercise of such authority by the clerk alone in entering judgment must by its terms as set forth in the complaint call for the payment of some fixed and definite sum in money or damages. In the nature of things this provision of the Code must be construed to apply to contracts which provide for some definite fixed amount of damages ascertainable from the contract sued on or from the terms of which a certain computation or calculation may be made by the clerk. As the duty of the clerk is purely ministerial, his power could only be exercised and properly apply in the case of such a contract, and must be limited thereto. If the contract declared on is indefinite and uncertain in the amount of damages which plaintiff is entitled to recover on it, and in the nature of things must be ascertained and fixed, the matter then is necessarily one for judicial determination by the court, and not for ministerial action by the clerk. Hence it must appear from the contract sued on, either from its terms as set forth in the complaint or from the allegations in the latter respecting it, that a definite or liquidated sum of money is to be paid as damages; an amount which is definitely fixed by the contract sued on or which from the allegations of the complaint may be ascertained by mere computation or mathematical computation of the clerk.'

"The court then pointed out that under any other circumstances the default of the defendant merely admits that something is due but does not admit that the amount prayed for constitutes that amount.

"We think this interpretation of this statutory provision is eminently correct and should not be departed from. The language used in section 585 indicates an intention to provide, in subdivision 1, for the entry of judgment by the clerk where no evidence is necessary to disclose the correct amount, and by subdivision 2 for judgment by the court when the taking of evidence or the exercise of discretion is necessary. Evidence is as necessary in order to fix the amount of damages for breach of contract as it is in tort actions, unless this is fixed by the agreement. Subdivision 1 of section 585 seems to refer more to actions based upon contract than to those based upon a breach of contract, although it would include an action for breach of contract in which the amount of the damages had also been agreed upon. But, as pointed out in Landwehr v. Gillette, supra, it must appear from the terms of the contract that a definite sum was thereby fixed, to be paid as damages.

[4] "The respondents mainly contend, with respect to this question, that their

complaint stated a cause of action. The question, however, is not whether the complaint states a cause of action but whether it states one that falls within subdivision 1 of section 585. The respondents rely on Christerson v. French, 180 Cal. 523, 182 P. 27, in which the plaintiff was allowed to recover under a default judgment for the breach of a contract. Very few facts are given in the opinion, although the court does say that the action is 'based on contract for the recovery of damage'. It may be that the contract there in question fixed the amount of damages for the breach in question. However that may be, it does appear that the court gave little consideration to the point now before us. Apparently the court assumed that the action was one coming within the provisions of subdivision 1 of section 585 since that question was not raised, and since the defendant was relying upon the contentions that the filing of a demurrer and motion to strike raised questions which must be decided by the court and that the complaint failed to state a cause of action. If it be assumed that this case in any way conflicts with the views expressed in Landwehr v. Gillette, supra, we prefer to follow the latter case.

"In the instant case it is difficult to tell upon what the plaintiff based his demand. The contract did not provide for a present sale of the stock. In fact, the plaintiff did not then have the stock and it was not known whether or not the commissioner of corporations would ever permit the stock to be sold and delivered to him. The other parties merely agreed to buy the stock at a future time, contingent upon certain other things. The plaintiff affirmatively alleges that the defendants have not, nor has any one of them, purchased from the plaintiff said stock or any part thereof. It could hardly be an action for the purchase price of stock which was never purchased and, if it was, there are no allegations showing a delivery or tender of the stock or of facts which would justify a judgment for the full purchase price while leaving the plaintiff in full possession of stock which was supposedly worth $190,000. Moreover, the contract specifically provides that if any dividends are paid on the stock such amounts are to be credited on the named purchase price. It is not alleged that no dividends were ever received, although the plaintiff held the stock for ten years, and there is no allegation that it is or ever was worthless. While the plaintiff alleges that he had done everything to be performed on his part under the terms of the contract this would still be true if he had received very substantial dividends on the stock.

[5, 6] "It seems quite clear that this is an action for damages for breach of the contract to purchase the stock and the contract makes no provision, definite or otherwise, for the amount of damages in case of its breach. The complaint contains no allegations even purporting to show the amount of damage sustained, or as to the value of the stock or what has become of it. As a matter of common justice, if the stock has a value, the plaintiff should not be allowed to keep it and also recover the full purchase price. If it has some value but less than the amount the others agreed to pay he might be entitled to damages in some amount but no attempt was made to allege anything as to this, definitely or otherwise. While the prayer is for a certain amount, the allegations of the complaint and the terms of the contract are to be considered in determining whether or not the action is one coming within the provisions of subdivision 1 of section 585, under the authorities above cited. The allegations of the complaint are so indefinite, incomplete and uncertain as to fairly and clearly require, in any court of justice, that evidence should be taken to determine the amount to which the plaintiff was entitled. If we assume that the complaint is sufficient in the sense that, in the absence of a demurrer, it will permit a recovery in some amount, this is not sufficient for the purposes now under consideration. The amount to which the plaintiff was entitled under the allegations of the complaint is not ascertainable from any mere ministerial computation that could be made by the clerk. The allegations of the complaint are such as, at best, called for the taking of evidence and the exercise of judicial action.

"The respondents contend that objections based upon the absence from the complaint of allegations as to the delivery of this stock, the passing of title, the value of the stock and like matters, are completely answered by the case of Mason v. Lievre, 145 Cal. 514, 78 P. 1040, 1043, from which they quote:

" 'The intention to sell and the intention to buy are both clear and unmistakable from the written expressions of the parties,

and whatever significance might attach to the acts of payment and delivery would be in the nature of evidence, and not as of the essence of the contract.'

"In that case the sale was complete, and the language quoted has no application here, although the latter part thereof is suggestive. The very fact that such things are evidentiary matters emphasizes their absence and indicates the impropriety of allowing a clerk to enter a judgment before they have been presented and considered by a court.

"The next question suggested is as to whether, assuming that the clerk otherwise had power under section 585 to enter this judgment, he had such power in view of section 579, which provides that in an action against several defendants the court may, in its discretion, render judgment against one and leave the action to proceed against the others whenever a several judgment is proper. To the extent that that section requires a court to exercise judicial discretion and decide whether a several judgment is proper before entering judgment against one defendant and allowing the action to proceed against others, that section seems to conflict with subdivision 1 of section 585, which seems to permit the clerk to enter a judgment against one of several defendants without regard to whether or not a several judgment is proper. This would seem to give the clerk more power in such a case than has the court and by exercising it the clerk would seem to be depriving the court of the opportunity of exercising the discretion imposed upon it by section 579. This case is an illustration of the good reasons that might exist for not depriving the court of the discretion mentioned in section 579. While all of the signers of this contract were severally liable they were also equally liable one with another. At the time the appellant defaulted, the defendant Gray had appeared and the action was still pending against him in what is, in a very real sense, the same obligation. It was, in fact, a case in which the matter should have been held in abeyance until it was also decided against Gray, although the judgment, when finally determined upon, would be equally applicable against both of these defendants. The injustice of the action taken particularly appears in view of the fact that a dismissal with prejudice was later, and before judgment was entered against the appellant, given to the defendant Gray. If, as is probable, something was paid by Gray for this great benefit, whatever he paid should have been applied as a reduction of the judgment against the appellant.

"In this connection the appellant relies upon the case of Trans-Pacific T. Co. v. Patsy F. & R. Co., 189 Cal. 509, 209 P. 357, 359. The respondent contends that this case has no bearing here because the 1933 amendment to section 585 struck out the reference therein to section 414 of the Code of Civil Procedure, it being argued that this amendment was adopted for the purpose of nullifying the effect of the opinion in the case cited. That case has no direct bearing here as it involved a situation where all of the defendants had been served. The 1933 amendment to section 585 does not affect our present problem for since then, as well as before, section 585 purports to permit the clerk to enter a judgment when some but not all of the defendants are served. However, in the case last cited, the court did say:

" 'The liability of the defendants and appellant as stockholders being several (Brown v. Merrill, 107 Cal. 446, 40 P. 557, 48 Am.St.Rep., 145), the case falls under section 579 of the Code of Civil Procedure, which provides: "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." Under this section the discretion vested is a judicial one, to be exercised by the court, and not the clerk. The court erred in refusing to exercise this discretion and vacate the judgment entered by the clerk against appellant.'

"While this is suggestive here and while the apparent conflict between these sections raises an interesting question, it is not necessary to further consider the same under the view we take upon the other points raised.

"If it be assumed that the clerk had power to enter judgment in this case under section 585 and irrespective of section 579, the next question is whether a judgment thus entered is not only good upon its face but conclusive and immune from a direct attack on appeal. This question involves the effect of the last paragraph of section 581a, which was added by amendment in 1933. This paragraph reads:

"'All actions, heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons.'

"The precise question seems never to have been determined. The respondents rely on certain cases as controlling on this point, but we do not so regard them. In Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357, a judgment had not been entered and the effect of section 581a under an appeal from the judgment was not considered. While there is some dicta in the opinion the holding is merely that prohibition will not lie against the performance of a ministerial act. In Merner Lumber Co. v. Silvey, 29 Cal.App.2d 426, 84 P.2d 1062, a motion was made more than a year and a half after the judgment was entered, and after it had become final, to set it aside and dismiss the action. It was there held that the court had jurisdiction in spite of section 581a, so the judgment was not void upon its face. However, the clerk in entering a default judgment, is acting for the court and to hold that a court has jurisdiction in such a case is far from holding that such an act, if taken in disregard of another statute, is free from error and that a judgment so entered may not be directly attacked on appeal. * * * The respondents also rely upon several other cases, including Christerson v. French, supra. These cases were all decided long before the last paragraph was added to section 581a and at a time when no further duty rested upon the plaintiff. In several of these cases it is stated that the failure of the clerk to do his duty cannot prejudice the rights of the plaintiff or confer any rights upon the defendant whose default has been entered. While this may have been true at that time, a statute can impose a duty upon a plaintiff with a resulting benefit to a defendant, and this has been done by the last paragraph of section 581a where a specific penalty is provided when the plaintiff fails to perform a further duty which is imposed upon him.

"The respondents contend that the word 'must' in section 581a does not indicate any curtailment of jurisdiction to enter judgment under subdivision 1 of section 585. While this may be true, the last paragraph of section 581a, taken as a whole, imposes a duty upon the plaintiff and imposes a duty on the court to dismiss the action if the plaintiff fails to perform that duty. While formerly the only duty in such a case was one resting upon the clerk, with no penalty for his delay, it is now made the duty of the plaintiff to 'have judgment entered' within the prescribed time, in other words to take affirmative steps to that end.

[7, 8] "When the plaintiff fails to perform that duty his rights are affected and a benefit is conferred upon the defendant by the provision that the court must dismiss the action. The duty thus imposed on the court, however, is not confined to where such action is requested by the defendant but is one which the court is required to exercise 'on its own motion.' This statutory provision is clearly intended to apply to cases where the defendant is not yet taking any steps for his own protection. Clearly, under the statute, it is error for the court to fail to perform this duty directly imposed upon it. While a judgment so entered may not be void for lack of jurisdiction the court's error in failing to perform that duty is one which may be corrected on appeal from the judgment, if taken within the statutory time. The duties and rights of the parties are still affected by the last paragraph of section 581a and the judgment itself is still subject to review on a direct and timely appeal. Assuming that the clerk had here a duty to perform in his ministerial capacity, and that he had no power to pass upon the effect of the last paragraph of section 581a, the court had both the power and the duty to do so, the matter was directly presented to it on timely motions after judgment, and the matter is now properly here for review. Under such circumstances the error may be corrected and the judgment, entered and allowed to stand in disregard of the provisions of section 581a, should be reversed.

"The provision of section 581a which we have been considering would be largely meaningless if, where such a judgment is applied for in the absence of the defendant, the judgment is to be taken as conclusive and immune from direct attack. To so construe this provision would be not only to disregard that part thereof which provides that the action must be dismissed by the court 'on its own motion', but would be to write in a provision that the amend-

ment was to apply only when the defendant objected at the time the judgment was applied for. No such provision was included by the legislature and should not be added by judicial decision to the plain language of the statute. This statutory provision was plainly intended to apply in just such a case as this where the defendant did not appear. The direct requirement of the statute would be rendered nugatory if the disregard thereof may not be corrected on a timely appeal.

"A further consideration is that at the time this judgment was entered the plaintiff was dead. No substitution of parties had been made and there was no party plaintiff before the court. Under somewhat similar circumstances the entry of a judgment has been held improper. Maxon v. Avery, 32 Cal.App.2d 300, 89 P.2d 684; Boyd v. Lancaster, 32 Cal.App.2d 574, 90 P.2d 317; Scoville v. Keglor, 27 Cal.App. 2d 17, 80 P.2d 162, 167. In the last named case, where it was contended that a judgment could be entered nunc pro tunc as of a date before the death of the plaintiff, this court said:

" 'We are unable, in view of the Supreme Court's language in De Leonis v. Walsh [supra] to avoid the conclusion that the trial court erred in undertaking to file its findings of fact and conclusions of law and to enter its judgment before making an order of substitution of the administratrix of the estate of J. M. Scoville for that plaintiff. In so far as the interest of the decedent was concerned there was at the date when the findings of fact and conclusions of law were actually filed and the judgment entered no plaintiff before the court. To be sure, after the findings of fact and conclusions of law should be properly filed and the judgment properly entered they would be treated by the law for the purpose of avoiding the lapsing of the cause of action as having been made as of the date to which it was provided that, nunc pro tunc, they should relate. But if when they were respectively filed and entered in fact there was as to the decedent's interest no plaintiff before the court the defect would appear to us to go to the jurisdiction to file and enter them.'

[9] "It is well settled that there are no presumptions in favor of a judgment entered by a clerk. It is peculiarly appropriate that we are required to indulge in no presumptions in favor of this judgment. The strange and unusual facts, including the many and long delays on the part of the plaintiff, the singling out of certain persons as against others, the dismissal as to the only one who appeared and the entry of judgment against this appellant alone, the ignoring of all such matters as the value of the stock still retained and whether or not dividends had been received thereon, and the taking of judgment by other parties shortly after the death of the plaintiff, all suggest that the true facts and actual situation are not disclosed by the record here. While these matters are not, in themselves, controlling, they illustrate the wisdom of the statutes and rules we have held applicable, and strongly indicate that their application here will result in no injustice."

The judgment and orders are reversed with directions to the trial court to dismiss the action as to the appellant.

HOUSER, J., took no part in the decision of this case.



17 Cal.2d 506

HUME v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 17610.

Supreme Court of California.

Feb. 27, 1941.

Rehearing Denied March 28, 1941.

1. Contempt ⇐67

Payment of fine imposed against petitioner on a charge of contempt did not render question of propriety of contempt proceedings a "moot question" so as to preclude petitioner from having such proceedings reviewed by certiorari, where payment was made under protest.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

2. Contempt ⇐67

On certiorari to review judgment convicting petitioner of contempt, sole question before Supreme Court was whether trial court had jurisdiction to render judgment, and if trial court acted within its jurisdiction inquiry ended and judgment would be

affirmed, but if trial court was without jurisdiction to pronounce judgment or exceeded its jurisdiction in doing so, contempt proceedings would be annulled.

3. Contempt ⇐54(4)

An accusatory affidavit alleging that statements contained in documents filed by attorney in federal District Court during pendency of proceedings before Superior Court involving attorney's clients were impertinent, and reflected upon integrity of Superior Court and judge thereof, and that statements were false and known to be false by attorney when made was sufficient to give Superior Court jurisdiction of contempt proceedings against attorney.

4. Contempt ⇐54(4)

An accusatory affidavit in contempt proceedings against an attorney was not insufficient for failure to allege intention of attorney to commit contempt, where affidavit charged that contemptuous statements made by attorney were false and were known by attorney to be false when made.

5. Contempt ⇐28(1)

That allegedly contemptuous statements were contained in pleadings or other papers filed in court was not a defense to a charge of contempt.

6. Contempt ⇐8

"Contempt" may be committed by incorporating impertinent, scandalous, insulting or contemptuous language reflecting on integrity of the court in pleadings, motions, notice of motions, affidavits and other papers filed in court.

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt".

7. Contempt ⇐29

In contempt proceedings against an attorney, fact that some of the contemptuous statements were contained in a third party's affidavit which attorney caused to be filed in court proceedings was not a defense to attorney, since by procuring filing of affidavit containing contemptuous statements attorney became equally guilty with affiant.

8. Judges ⇐49(1), 51(3)

Under statute, any party to an action may object to a judge upon ground that judge is so prejudiced as to be incapable of trying cause fairly and impartially, and such party may support his objection by affidavit showing bias, but allegations in affidavit must be pertinent and material and must set forth specifically the facts upon which charge of bias is based. Code Civ.Proc. § 170, subd. 4.

9. Contempt ⇐28(1)

Where defendants' attorney, during pendency of proceedings before Superior Court wherein defendants were charged with conspiracy to promote pool selling and bookmaking on results of horse races, commenced proceedings in federal District Court to enjoin Superior Court proceedings as to defendant which was a resident of Mexico and such defendant's agents in California, and documents which attorney caused to be filed in District Court contained no allegations of fact as basis for contemptuous statements therein charging prejudice by Superior Court, attorney could not avoid liability for contempt on ground that contemptuous statements were privileged because made in effort to secure removal of case to District Court on ground of diversity of citizenship. Pen.Code, § 337a; Code Civ.Proc. § 170, subd. 4; Jud.Code § 28, 28 U.S.C.A. § 71.

10. Contempt ⇐8

Where defendants' attorney, during pendency of proceedings before Superior Court wherein defendants were charged with conspiracy to promote pool selling and bookmaking on results of horse races, commenced proceedings in federal District Court to enjoin Superior Court proceedings as to defendant which was a resident of Mexico and such defendant's agents in California, and documents which attorney caused to be filed in District Court contained no allegations of fact as basis for contemptuous statements therein charging prejudice by Superior Court and judge thereof, an order of Superior Court finding that attorney was guilty of "contempt" was proper. Pen.Code, § 337a; Code Civ.Proc. § 170, subd. 4.

11. Contempt ⇐61(6)

Where complaint, amended complaint and supporting affidavit filed by an attorney in federal District Court contained contemptuous statements respecting Superior Court, and accusatory affidavit filed in contempt proceedings before Superior Court contained four counts, the first three of which were based upon matters contained in complaint, amended complaint and supporting affidavit, it was proper to find that attorney was guilty of contempt upon the first three counts, as against contention that attorney was subjected to plural punishment for a single act.

12. Contempt ⇐54(2)

An accusatory affidavit charging contempt of court with respect to matters contained in an affidavit which an attorney caused to be filed in court proceedings should not have set up separate allegations in affidavit as separate counts in charge of contempt, but all charges of contempt with respect to affidavit should have been set forth in one count under accusatory affidavit.

EDMONDS, J., dissenting.

Certiorari proceedings by David E. Hume against the Superior Court of the state of California in and for the County of Los Angeles and others to review an order of the Superior Court convicting petitioner of contempt of court.

Judgment finding petitioner in contempt upon the first three counts of the accusatory affidavit affirmed, and proceeding in which petitioner was found guilty of contempt under the fourth count dismissed.

Rehearing denied; EDMONDS, J., dissenting.

David E. Hume in pro. per., and Wyman G. Reynolds, of Los Angeles, for petitioner.

Earl Warren, Atty. Gen., Herbert E. Wenig and Lewis Drucker, Deputies Atty. Gen., and J. H. O'Connor, Co. Counsel, and Ned Marr, Deputy Co. Counsel, both of Los Angeles, for respondents.

CURTIS, Justice.

This is a proceeding by certiorari to review an order of the Superior Court of Los Angeles County convicting the petitioner, David E. Hume, of contempt of court. The proceedings against petitioner were commenced by the filing of an affidavit by Warren Olney, deputy attorney general of the state of California, setting forth in four separate counts the conduct of petitioner which was alleged to be contemptuous.

The circumstances leading up to the contempt proceedings may be briefly stated as follows: On May 7, 1940, a complaint was filed in the Superior Court of Los Angeles County by the attorney general of the state of California to abate a public nuisance, in which the Piedras Negras Broadcasting Company of Tia Juana, Mexico, was named as one of several defendants. The substance of said complaint was that the several defendants named therein were acting in furtherance of a conspiracy to foster and promote the business of making and accepting bets and wagers and pool selling and bookmaking on the results of horse races in violation of section 337a of the Penal Code of this state. The complaint alleged that the defendants were conspiring with one another and with a large number of owners and operators of pool selling and bookmaking establishments and with patrons of said establishments within the state to the end that the defendants should sell and supply "scratch sheets" and rapid, up-to-the-minute horse racing news and information to said establishments and to their patrons, thereby encouraging, inducing and facilitating unlawful gambling on horse races in the said establishments. The modus operandi, so the complaint alleged, was as follows: Certain of the defendants would print and publish in the county of Los Angeles a daily supply of "scratch sheets" which consist of small pieces of paper having printed thereon the date and the names of all race tracks at which races are held in the United States, Republic of Cuba, and Dominion of Canada, followed by a list of the names and post positions of all horses and jockeys entered in each race, the betting odds, and other information concerning such races, including "tips" as to the probable winners. There was also printed on each "scratch sheet" a number opposite the name of each horse, said number being used to designate the horses, so as to make more rapid, reliable, convenient and secret the transmission of horse racing information. The Piedras Negras Broadcasting Company, owned by certain individual defendants and operating radio station XELO, located just over the state line in Tia Juana, Mexico, would throughout the day furnish to the buyers of said "scratch sheets," rapid, last-minute horse racing news and information by means of a radio broadcast given in code. In said radio broadcast none of the horses was referred to by name, but the horses were designated by numbers, the number used being identical with the number printed opposite the respective names of the horses on the "scratch sheets". These broadcasts were given in the English language and were obviously intended to be received and understood in the state of California, since the other radio broadcasts from the same station were in Spanish, the official language of the Republic of Mexico. The complaint alleged that the sole use of said "scratch sheets" was to encourage, induce and facilitate unlawful gambling on horse races in said pool selling and bookmaking

establishments, and that the promotion of said unlawful business by defendants was contrary to the established public policy of the state of California and should be abated. The Piedras Negras Broadcasting Company was never served in said action. It was apparently the theory of the attorney general that although radio station XELO was outside the jurisdiction of the state of California, nevertheless the individual defendants might possibly be served with summons within the state and that if a court of equity obtained jurisdiction of the parties, it could compel them to abate said nuisance notwithstanding the fact that one of the links to the project, the radio station, was situated outside of the physical jurisdiction of the court. California Development Company v. New Liverpool Salt Co. [Salton Sea Cases] 9 Cir., 172 F. 792, certiorari denied 215 U.S. 603, 30 S.Ct. 405, 54 L.Ed. 345.

Upon the verified complaint and points and authorities, Judge Emmet H. Wilson issued a temporary restraining order and an order to show cause returnable before him on May 13, 1940. At the hearing of the order to show cause David E. Hume, a member of the bar of Texas, but not admitted in California, was granted leave to appear as attorney for certain defendants. He proceeded to represent them by filing a "Special Appearance on the Matter of the Order to Show Cause and Temporary Restraining Order." Upon his motion, the order to show cause was continued to May 20, 1940. On said date David E. Hume appeared before said court, and argued in opposition to the order to show cause, but presented no evidence, although an opportunity was afforded him to do so. Thereupon the matter was submitted. Pending the determination of the issues raised by the order to show cause, David E. Hume caused to be filed on June 5, 1940, in the United States District Court, Southern District of California, Central Division, a complaint signed and sworn to by him seeking to enjoin the prosecution of the injunction proceedings against the Piedras Negras Broadcasting Company and its agents in the state court. Subsequently on June 8, 1940, he filed an amended complaint. An order to show cause was issued out of the federal court directed to Emmet H. Wilson, as Judge of the Superior Court of Los Angeles County, and to the other defendants, including Earl Warren, attorney general of the state of California, and Warren Olney, deputy attorney general.

Before the hearing in the federal court on June 12, 1940, the Superior Court of Los Angeles County made its rulings on all matters in the action pending before it and granted a preliminary injunction against those defendants who had been served with process, but did not grant any preliminary injunction or take any action with respect to Piedras Negras Broadcasting Company and one of the defendants in said action who had not been served with any process. The trial of said action was then set for August 16, 1940, at the request of David E. Hume. On June 20, 1940, David E. Hume caused to be filed in the Federal District Court, in support of his amended complaint, an affidavit of Phillip Tapper. Subsequently upon motion of the defendants, said action in the Federal District Court was dismissed. Thereafter the accusatory affidavit charging the petitioner with contempt was filed by Warren Olney in the Superior Court of Los Angeles County. The basis of said charge of contempt against the petitioner was the filing of the complaint, the filing of the amended complaint and causing the affidavit of Phillip Tapper to be filed in the Federal District Court. The accusatory affidavit alleged that the allegations contained in said documents were "impertinent, scandalous, insulting, contumacious, imputing partiality and improper motives and reflecting upon the integrity of the court and the judge thereof", and were false in fact and were known to petitioner to be false in fact at the time they were made.

The complaint, upon which the first count of the accusatory affidavit was based, contained the allegations that upon the hearing to show cause in the respondent court, the respondent court refused to hear any proof offered by petitioner; that petitioner feared the respondent court contemplated rendering a decision which would prevent the said company from proving the falsity of the allegations of the complaint; that upon securing jurisdiction the respondent court and the attorney general and his deputy intended to postpone the actual hearing of the action until the Piedras Negras Company would be forced to go out of business because of its inability to broadcast news of race track events; and that because of the prejudice and local influence the petitioner would be unable to obtain justice in said court or any court in California. The amended complaint, the basis of count 2, contained almost identical allegations, with

the added averment that the respondent court would contrive to continue to keep the matter under advisement without decision for a period of ninety days to prevent trial, and thereafter to secure other postponements, until the end of the racing season, with the result that the business of the broadcasting company would be destroyed. While the causing of the filing of the affidavit of Phillip Tapper constituted but one act, this affidavit was made the basis of two separate counts for contempt based upon the different character of two of the allegations contained therein. The first of these allegations which was the basis of count 3 of the accusatory affidavit was to the effect that while the respondent court knew that the acts alleged in the complaint to state a public nuisance did not constitute a nuisance under the laws of the state of California, nevertheless, said court pretended to believe that they did constitute a nuisance, and had entered into an agreement with counsel for plaintiff to make it appear that a conspiracy and confederation existed between the parties defendant, and said respondent court and attorney for plaintiff intended to acquire jurisdiction of the Piedras Negras Broadcasting Company as if for the violation of the statutes defining nuisances, and intended to hold all officers of said corporation if apprehended for conspiracy to commit a nuisance, although there was no legal justification for such action. The other allegation of said affidavit of Phillip Tapper, which was the basis of count four, was to the effect that upon the hearing said court would decline to notice or take into consideration any evidence except allegations of the complaint filed by the attorneys for the plaintiff, and would issue an injunction against the Piedras Negras Broadcasting Company, and its officers, if served with summons, without hearing any evidence they might desire to present and without taking into consideration anything except the bare allegations of the complaint.

[1] Upon the filing of the accusatory affidavit, the respondent court issued its order to show cause why he should not be adjudged guilty of contempt, directed to petitioner. After a hearing, the respondent court on July 1, 1940, found petitioner guilty of contempt on all four counts, and fined him the sum of $250 upon each of said counts with the alternative provision of imprisonment in the county jail of one day's imprisonment for each $2 of said fine. The court also vacated and set aside its order theretofore made permitting petitioner to appear as an attorney in the action and precluded him from appearing at any time in the future as an attorney in any other action before said court. Petitioner served three days' imprisonment and on July 3 paid his fine under protest. As the fine was paid under protest, the question has not become moot by virtue of said payment. Dreher v. Superior Court, 124 Cal.App. 469, 477, 12 P.2d 671. After application to the District Court of Appeal, Second Division, Second District, for a writ of prohibition and for a writ of habeas corpus, both of which were denied without opinion, application by petitioner for a writ of certiorari was made to this court.

[2] The sole question here before us is one of jurisdiction of the trial court to render the judgment under review. If the trial court in the rendition of said judgment acted within its jurisdiction, the inquiry ends, and the judgment of the trial court must be affirmed. If, however, the trial court either had no jurisdiction to pronounce said judgment or exceeded its jurisdiction in doing so, then the proceedings should be annulled. Bridges v. Superior Court, 14 Cal.2d 464, 94 P.2d 983; Otis v. Superior Court, 148 Cal. 129, 82 P. 853; People v. Latimer, 160 Cal. 716, 117 P. 1051.

[3] We are satisfied that the accusatory affidavit filed by Warren Olney instituting said proceedings was sufficient to give the respondent court jurisdiction to hear the matter of petitioner's contempt, and the facts found by respondent court to be true were adequate to sustain the respondent court's judgment of contempt.

[4] There is no merit in petitioner's contention that the accusatory affidavit was insufficient in that it failed to allege the intention of petitioner to commit contempt. The accusatory affidavit contains allegations with respect to each of the contemptuous statements covered by each of the four counts that said contemptuous allegations were false in fact and were known by David E. Hume to be false in fact at the time he uttered them. This was a sufficient averment of the intent of petitioner. In re Jarvis, 57 Cal.App. 533, 538, 207 P. 494.

An examination of the allegations of the complaint, the amended complaint and the affidavit filed by petitioner clearly confirms the conclusion that said statements were contemptuous in that they reflected upon

the integrity of the trial court and the judge thereof, imputing collusion of the judge with the attorney-general to postpone improperly the hearing in said matter, and to delay the decision therein, and to decide deliberately the matter regardless of the law. To charge the trial judge with such improper motives and conduct was to charge him with being wholly lacking in the fundamental basic attributes of a judicial officer. Petitioner has made some slight attempt to explain said allegations in such a way as to give them a meaning different from that which plainly appears on their face. But we are not inclined to give much credence to said explanation.

[5-7] The chief defense to said charge of contempt relied upon by petitioner is in the nature of a claim that said allegations were privileged because they were made by petitioner in an effort to secure a removal of the cause from the state court to the federal court, which claim for removal to the federal court was based primarily upon the diversity of citizenship. However, the fact that the alleged contemptuous statements were contained in pleadings or other papers filed in court does not furnish any excuse or defense against the charge of contempt. It is well settled that contempt may be committed by incorporating impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court in pleadings, motions, notice of motions, affidavits, and other papers filed in court. 13 Corpus Juris., pp. 31, 32; 17 C.J.S., Contempt, § 28; Lamberson v. Superior Court, 151 Cal. 458, 91 P. 100, 11 L.R.A.,N.S., 619; In re Lapique, 26 Cal.App. 258, 146 P. 690; Hallinan v. Superior Court, 27 Cal.App.2d 433, 81 P.2d 254. Neither does the fact that some of the contemptuous statements were contained in an affidavit of a third party caused to be filed by the attorney afford any defense to the attorney. By procuring the filing of an affidavit containing contemptuous statements, he became equally guilty with the affiant. Lamberson v. Superior Court, supra.

[8-9] It is true that, based upon the statutory right conferred by subdivision 4 of section 170 of the Code of Civil Procedure, any party to an action may object to a judge upon the ground that he is so prejudiced and biased as to be incapable of trying the cause fairly and impartially, and it has been held that such party may support his objection by affidavit showing bias. Works v. Superior Court, 130 Cal. 304, 62 P. 507; Webb v. Superior Court, 28 Cal. App. 391, 152 P. 957. Prior to the amendment to said code section no such right existed. In re Jones, 103 Cal. 397, 37 P. 385. But it is also true that the allegations made therein must be pertinent and material and must set forth specifically the *facts* upon which the charge of bias and prejudice is based. Works v. Superior Court, supra; Lamberson v. Superior Court, supra. The contemptuous allegations contained in the pleadings filed by the petitioner and the affidavit procured to be filed by him do not come within the scope of the claimed privilege. In the first place, the Piedras Negras Broadcasting Company, being an alien, is not within the provisions of the removal statute, sec. 71, title 28, U.S. C.A., as there is no provision therein that where an alien is a party, a removal is authorized on the ground of prejudice or local influence. See note 617, sec. 71, title 28, U.S.C.A. Not being entitled to a removal on this ground, the allegations with reference thereto were neither pertinent nor material. Fleming v. United States, 9 Cir., 279 F. 613, 615. An examination of the documents filed in the federal court also clearly shows that no facts are set forth giving any basis or foundation for the charges made in said documents against the respondent judge. Petitioner at the hearing testified that he had been informed by certain persons that the situation was that set up by him in the documents filed in the Federal District Court, but gave no information as to the identity of such persons, and utterly failed to state any fact which would substantiate the truth of the charges filed by him on information and belief. The language employed in Lamberson v. Superior Court, 151 Cal. 458, 463, 91 P. 100, 102, 11 L.R.A.,N.S., 619, which involved an affidavit of prejudice filed against a state trial judge under section 170 of the Code of Civil Procedure, is, we think, singularly appropriate to the instant case, as the cases are in this regard strikingly similar:

"* * * It [the affidavit] states the mere belief of Bashore, without any supporting fact, * * * the whole declaration is but the purported belief of this aged invalid, with no attempt to state even the source of his information or origin of that belief. It cannot impress the unprejudiced mind as being other than a deliberate intent to insult and defame the judge. Let it be

understood that we are not here declaring that if a judge has in fact indulged in corrupt practices, or has in fact given a ruling or decision through a corrupt motive, that those facts may not be stated. They may be. And they would be prepotent evidence of bias and prejudice. But it may not for one moment be countenanced that, without supporting facts, lawyer or litigant may wantonly charge a judge with corrupt and improper motives, and seek protection from the just consequences of such outrage under the shield of the Code provision. [Citing cases.] So, while it is true that matters which are pertinent to the consideration and which are charged as facts are admissible without reference to their effect upon the reputation of the judge, or of any one else, it is equally true that neither attorney nor litigant has any right to present such degrading accusations under the guise of mere belief, without the aid of a single supporting fact. [Citing case.]"

[10] The filing of said documents in the instant case wholly unsupported by any facts to sustain them, was entirely unwarranted, and the trial court was clearly justified upon the showing made to adjudge petitioner in contempt therefor.

[11, 12] Petitioner argues that "dividing the judicial proceedings into four parts constitutes plural punishment for a single act". But we are satisfied upon the authority of Lindsley v. Superior Court, 76 Cal.App. 419, 245 P. 212, Blodgett v. Superior Court, 210 Cal. 1, 290 P. 293, 72 A.L.R. 482, and In re Shuler, 210 Cal. 377, 292 P. 481, wherein the court held that separate publications of contemptuous matters constituted distinct and separate offenses, that the trial court was justified in finding petitioner guilty of contempt upon each of the first three counts. But inasmuch as only one affidavit by Phillip Tapper was procured to be filed by petitioner, we are somewhat doubtful as to the propriety of dividing the charge of contempt with reference to the filing of this affidavit into separate counts and the court's finding the petitioner guilty of contempt upon each of said counts. We are cited to no authority supporting the practice of setting up in an accusatory affidavit separate allegations in the same document as separate counts, and since the filing of said affidavit constituted but a single act, we are of the opinion that the proper practice would have been to combine count three and count four in the accusatory affidavit.

The judgment of the trial court finding petitioner in contempt upon the first three counts is affirmed. The proceeding in which petitioner was found guilty of contempt under the fourth count is dismissed.

We concur: HOUSER, J.; TRAYNOR, J.; SHENK, J.; CARTER, J.

EDMONDS, Justice (dissenting).

The record of this proceeding shows, to my satisfaction, that the petitioner's actions in connection with the proceeding initiated by him in the federal court went far beyond the limits of professional ethics and cannot be justified as being either necessary or desirable for the protection of his client's interests. However, the legislature has, by statute, declared that no speech or publication reflecting upon a judge shall be punished as a contempt of court unless made in the immediate presence of the court while in session and in such manner as to actually interfere with judicial proceedings. Sec. 1209, Code Civ.Proc. As I have heretofore pointed out, in my opinion, the legislature may, within constitutional guarantees, take from judicial officers the authority to punish persons for acts not committed in the presence of the court which might otherwise amount to a constructive contempt, and I can find no basis for striking down the code provision as a limitation upon inherent judicial power. Times-Mirror Co. v. Superior Court, 15 Cal.2d 99, 98 P.2d 1029.

For these reasons, I believe that each of the judgments of contempt should be annulled.

43 Cal.App.2d 292

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6551.

District Court of Appeal, Third District, California.

March 1, 1941.

1. Workmen's compensation ⇐51

Workmen's Compensation Act should be liberally construed.

2. Workmen's compensation ⇐702

Where ranch laborer, who was operating a tractor, went to ranch house to get some planks to extricate tractor, and when starting back in a truck on a private lane on ranch was struck in the neck by a bullet from a rifle fired by a boy who was shooting at a bird, and the boy was not a member of rancher's household and was not in the habit of shooting or hunting on the ranch or in close proximity to ranch employees, ranch laborer did not sustain compensable injuries "arising out of employment". St.1937, p. 269, § 3600; St.1917, p. 877, § 69.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Employment".

3. Workmen's compensation ⇐609

To give rise to liability for compensation under the compensation act, there must be some causal connection between the injury and the employment. St.1937, p. 269, § 3600.

Proceeding by the Associated Indemnity Corporation against the Industrial Accident Commission of the State of California for writ of review to review a compensation award of the Industrial Accident Commission in favor of Fred Zurbuchen.

Award annulled.

Purvis, Jakobsen & Kennedy, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PULLEN, Presiding Justice.

This is a petition to review an award of the Industrial Accident Commission.

The facts are brief. Fred Zurbuchen, the applicant, was employed as a laborer on the ranch of John W. Flint. On the day in question Mr. Zurbuchen, who was operating a tractor, went to the ranch house to get some planks to extricate the tractor from some soft ground. He then started back to the tractor, riding in the truck with the planks by way of a private lane on the land of his employer, when he was struck in the neck by a bullet from a rifle fired by a boy, who was shooting at a bird, just as the truck came around the corner of the barn. The boy did not see the truck, and the incident was purely accidental. The boy was not a member of the household of the rancher but lived on a neighboring place, and was not in the habit of shooting or hunting on the Flint ranch or in proximity to the employees of the ranch.

It is conceded that Mr. Zurbuchen was in the course of his employment at the time of the accident, but the question here is whether or not the accident was one that arose out of his employment. This element is important, for section 6(a) of the Workmen's Compensation Act, Statutes of 1917, as amended, now found in 3600 of the Labor Code, Stat.1937, c. 90, p. 269, provides: "Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, * * *."

The Industrial Accident Commission have found that the injury of the applicant did arise out of his employment, and able counsel have appeared before us in support of that finding.

[1, 2] We are familiar with, and are in full accord with the admonition of the act that courts, in interpreting its provisions, shall liberally construe the same that its benefits may be extended for the protection of persons injured in the course of their employment, (sec. 69, Workmen's Compensation Act) but we cannot find in the record before us facts that will support the conclusion of the commission.

[3] That there must be some causal connection between the injury and the employment is essential. In California Casualty Indemnity Exchange v. Industrial Accident Commission, 190 Cal. 433, 213 P. 257, 258, it was said:

"It was not intended by the Compensation Act that the employer who comes within its provisions shall be the insurer of his em-

ployee at all times during the period of his employment.

"The employer is liable for compensation only when an injury occurs to the employee while performing some act for the employer in the course of his employment, or incidental to it. Fairbank Co. v. Ind. Comm., 285 Ill. 11, 13, 120 N.E. 457. There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured party to the kind or character of hazard and danger (in this case an ordinary street risk) which caused the injury. The injury must have its origin in a risk connected with the employment, and must have flowed from that source as a rational and natural course."

In at least four cases the commission has, itself, on facts quite similar to the present case, held the injury did not arise out of the employment.

In Matsusaka v. Shearer & White, et al., 12 I.A.C. 222, the employee, a farm laborer, was fatally wounded by a stray bullet while at work on a ranch. There was evidence that on several previous occasions the owner of a neighboring ranch had used a rifle to shoot squirrels on her place. A death benefit was denied on the ground that the risk of being struck by bullets due to shooting at squirrels or targets on neighboring premises is not a hazard of employment as a farmhand and therefore death from being struck by a stray bullet does not arise out of the employment.

In Travelers Ins. Co. v. Moon Chin, 12 I.A.C. 150, the employee, employed as a cook in a restaurant, was struck by a bullet fired by a third person in the restaurant. It was held that the employee's occupation did not expose him to the risk of being struck by bullets at the hands of customers, and the risk, if any, was a risk common to all and the injury therefore did not arise out of the employment.

In Hicks v. White, et al., 18 I.A.C. 80, the employee was struck by a stray bullet while he was picking oranges in the employer's grove. The bullet came from an unknown source. It was held that the injury did not arise out of the employment.

Also in Gayton v. State Compensation Ins. Fund, 9 I.A.C. 215, a truck driver, while in the course of his duties, was traveling upon a public highway, and was struck by a stone thrown by some unknown person who was throwing stones across the highway at some birds. The injury was purely accidental. It was held that notwithstanding the applicant was present at the time and place of his injury only because of his performance of the duties of his employment, he nevertheless was not exposed by his employment to any risk of such injury in excess of that of the commonalty, and therefore the injury did not arise out of the employment and was not compensable.

The respondents strongly rely upon the case of Frigidaire Corp. v. Industrial Accident Commission, 1929, 103 Cal.App. 27, 283 P. 974, 975. There an award of compensation to the dependents of an employee, who was killed by a stray bullet from the gun of a police officer who was pursuing a suspected criminal, was upheld. At the time of the accident, the employee, a zone manager of the Frigidaire Corporation, had completed his business in Reno for his employer and was standing on the railroad station platform awaiting the arrival of a train which would return him to his home in San Francisco. The award was upheld on the ground that the injury arose from a risk incident to the employment, in that case a "street risk". The court there said: "The danger must result from the place to make it a street risk, but that is enough if the workman is in the place by reason of his employment, and in the discharge of his duty to his employer. The street becomes a dangerous place when street brawlers, highwaymen, escaping criminals, or violent madmen are afoot therein as they sometimes are. The danger of being struck by them by accident is a street risk because it is incident to passing through or being on the street when dangerous characters are abroad. Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair, and crowds jostle, but mad or biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things may happen from which accidental injuries result to people on the streets which are peculiar to the use of the streets and do not commonly happen indoors."

However, the court, after reviewing many other cases, also there said: "The theory upon which compensation is awarded in the class of accidents above mentioned is that the causal connection between the employment and the injury, which is essential to make it compensable, consists in the fact that the employment requires the presence of the employee upon the street and the fact that the injury was caused by some human or mechanical instrumentality incidental to the use of the street."

From this it is apparent the court has differentiated that case from the instant case. Mr. Zurbuchen was a farm laborer and was not subjected to the so-called "street risks".

The respondent commission also cites the case of Larson v. Industrial Accident Commission, 193 Cal. 406, 224 P. 744. There an employee on a large grain ranch was injured when a choreman, to revive a fire burning in a wood stove in the bunkhouse, poured oil into the stove, which exploded, injuring several. The commission made an award, and in upholding such an award the court pointed out the employees were compelled by their employer to lodge in the bunkhouse, and in accordance with the general rule that where employees, under their contract of employment, are required to sleep upon the premises of their employer, the employee is considered as performing services for his employer during all the time he is on the premises. The employee was rightfully in the bunkhouse, and the choreman was performing his regular duties in attending the fire in the bunkhouse; there was thus a causal connection between the employee and his duties.

In Paulsen v. Industrial Accident Commission, 6 Cal.App.2d 570, 45 P.2d 285, also cited by respondent, an employee, in sandpapering a wall, injured his finger upon a hidden nail and suffered an infection. The respondent compares the coming in contact with the nail to one who comes in contact with a stray bullet. However, the situations are not similar—the man sandpapering the wall was exposed to the risk of accidental injury coming from that wall. There was not such causal connection between the farm employee and a bullet from a rifle, in the absence of some special exposure on the employer's premises.

North Carolina has a provision in her compensation laws similar to ours (Pub. Laws 1929, c. 120 part of para. 4) that injury must arise out of as well as in the course of employment, and has held that an employee accidentally shot by a third person other than a fellow employee cannot recover from his employer.

In Whitley v. North Carolina State Highway Commission, 201 N.C. 539, 160 S.E. 827, an employee, working on a truck, was accidentally shot by a hunter, the truck being located in the employer's shop. It was held the injury did not arise out of the employment.

In Lebeda v. Pongracz, 230 App.Div. 606, 246 N.Y.S. 293, a nightwatchman, while on the sixth floor of a building, was shot by a stray bullet from New Year's revelers. An award by the Industrial Accident Commission was reversed, the court holding the injury was not an accidental one arising out of the employment within the meaning of the statute; citing McCarter v. La Rock, 240 N.Y. 282, 148 N.E. 523, 526. In the McCarter case, supra, an artillery shell exploded, injuring an employee working on an adjoining building. Among other things the court said in denying relief: "* * * however strong may be the economic and sociological arguments in favor of a compensation statute which practically insures the employee against everything except his own misconduct, we think that this court is thoroughly and justifiably committed to an interpretation of our present statute, which requires as the basis for an award a causal connection, apparent to a reasonable mind upon consideration of all the circumstances, between the conditions under which the work is required to be performed and the resulting injury; injury from an accident which need not have been foreseen or expected, but which after the event must appear to have had its origin in a risk incidental to the employment and to have flowed from that source as a rational consequence, and that there must be more than a mere location of the employee in the pathway of an accident entirely disconnected from his employment."

We are unable to find that the injury to Mr. Zurbuchen arose out of his employment. The award is annulled.

We concur: THOMPSON, J.; TUTTLE, J.

43 Cal.App.2d 149

SOUTHERN COUNTIES THRIFT CO. v. RAIRDON et al.

Civ. 2911.

District Court of Appeal, Fourth District, California.

Feb. 18, 1941.

1. Appeal and error ⇐800

Where motion to dismiss appeal for failure of appellant to file opening brief within time prescribed by court rule was set for hearing February 13, 1941, and on February 10, 1941, appellant filed its opening brief, the motion was denied. Rules for the Supreme Court and District Courts of Appeal, rule 1, § 4.

2. Appeal and error ⇐800

Where appellant files opening brief before motion to dismiss appeal for failure to file such brief within time prescribed by court rule comes on for hearing, the appellant has sufficiently complied with the rule to justify denial of the motion. Rules for the Supreme Court and District Courts of Appeal, rule 1, § 4.

Appeal from Superior Court, Orange County; Harry C. Westover, Judge.

Action by the Southern Counties Thrift Company against C. W. Rairdon and others. From an adverse judgment, the plaintiff appeals. On motion to dismiss appeal.

Motion denied.

Frank T. O'Neill, of San Francisco, and Brooke Mohun, of Pasadena, for appellant.

Forgy, Reinhaus & Forgy and C. E. Sprague, all of Santa Ana, for respondents.

GRIFFIN, Justice.

[1, 2] This is an appeal from a judgment against appellant Southern Counties Thrift Co., a corporation, and in favor of respondent C. W. Rairdon. Respondent Rairdon, on January 10, 1941, filed a motion to dismiss the appeal under rule 1, section 4 of the rules for the Supreme Court and District Courts of Appeal, for the reason that appellant failed to file its opening brief within the time prescribed in said rule. The motion was duly set down for hearing for February 13, 1941. On February 10, 1941, appellant filed its opening brief. Where the brief is filed before the motion comes on for hearing appellant has sufficiently complied with the rule to justify a denial of the motion. Hall v. Wolford, 22 Cal.App.2d 537, 71 P.2d 596; Graybiel v. Consolidated Associations, Ltd., 14 Cal.App.2d 547, 58 P.2d 665.

The motion to dismiss the appeal is denied.

I concur: BARNARD, P. J.



43 Cal.App.2d 310

TWISSELMAN v. REED et al.

Civ. 11565.

District Court of Appeal, First District, Division 2, California.

March 3, 1941.

Estoppel ⇐83(5)

Where, upon death of landlord, his administrator entered into negotiation for sale of premises, and both administrator and purchasers consulted with tenant as to nature of his lease, and tenant represented that he held only under an oral lease, when in fact he was holding under a concealed written lease, tenant was "estopped" from claiming right to possession under the written lease. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by T. F. Twisselman against Chancy O. Reed and another to quiet title to a leasehold interest in land. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Alex Webster, of Paso Robles, for appellant.

Andrew Renetzky, of San Luis Obispo, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued in equity for a judgment quieting his title to a leasehold interest in certain farming land, and admitting him to possession of the premises. The defendants had judgment. The issue on the appeal is whether the plaintiff is estopped from claiming the right to possession as a tenant because of his representations to defendants that he held as a tenant under an oral lease from the defendants' grantor when in fact he was holding under a concealed written lease.

On March 15, 1933, Phelps as owner in fee entered into a written lease of the premises with plaintiff, the lease to run from October 1, 1933, for a period of three years and thereafter "until the said party of the first part shall notify the said second party in writing, thirty (30) days previous to October 1st of any year thereafter".

The lessor died December 17, 1936, and his administrator entered into negotiations with defendants for the sale of the premises to them. The plaintiff was consulted by the administrator and by all the defendants to all of whom he represented that he was holding under an oral lease only. At all these times the written lease was kept concealed by plaintiff, and the defendants made the purchase without any knowledge of its existence.

The trial court concluded that plaintiff was estopped to deny that the lease under which he held was an oral lease and to deny that notice of termination was given as required. The findings of fact upon which these conclusions of law are based read: "That it is true that defendants before they purchased said real estate asked plaintiff what his interest in said property was and that plaintiff informed defendants on or about the month of August, 1937, that he was holding said property and had been holding said property under an oral agreement of lease for several years last past.

"That it is true that said statements of plaintiff were false, that plaintiff knew they were false and intended defendants to rely upon them, and that defendants believed and relied upon said statements of plaintiff and thereafter purchased said property. That had said plaintiff truthfully informed defendants of the written lease under which said plaintiff held said property, defendants would not have purchased said property and that the possession of defendants would be delayed for at least one year under said written contract.

"That it is true that said plaintiff knew said written lease provided 'that this lease shall continue, after the said term of three years has expired, and until the said party of the first part shall notify the said second party in writing, thirty (30) days previous to October 1st of any year thereafter', and that plaintiff falsely informed defendants that he was relying on an oral agreement, and willfully concealed from defendants said written lease and particularly said clause thereof.

"That said defendants or either of them had no knowledge of said written lease or any part thereof, and were misinformed by plaintiff as to the existence thereof and the contents thereof; and thereby prevented by said plaintiff from giving the notice of termination as provided therein until the time had elapsed within which said notice was required to be given, and thereby would continue plaintiff's possession for at least a year thereafter, to the exclusion of defendants from said property."

Throughout the hearing in the trial court, and upon this appeal, the plaintiff has admitted his fraud and misrepresentations as found by the trial court, but he seeks to excuse his conduct by the assertion that he was in fact holding under an oral modification of the written lease. This asserted modification related only to the manner and time of making payments of the rent reserved. It had no relation to the term of occupancy. Plaintiff made no effort to prove that he was holding under an oral lease with a tenancy running from year to year and, as such terminable upon notice. And since he at no time informed the defendants that his oral lease was a modification of a written lease which he had in his possession, he is estopped to deny that notice of termination was given as required.

The case in all its features is a typical one for the application of the principles found in subdivision 3 of section 1962 of the Code of Civil Procedure which reads: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

The negotiations for the purchase of the premises and the representations of the plaintiff regarding the nature of his tenancy ran from March, 1937, until November, 1937, the time when the sale to de-

fendants was made. If the parties had known of the existence of the written lease, notice of termination could have been given prior to October 1st of that year. The injury to the defendants caused by the misrepresentations is obvious.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



43 Cal.App.2d 328

STATE COMPENSATION INSURANCE FUND v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12839

District Court of Appeal, Second District, Division 2, California.

March 4, 1941.

1. Workmen's compensation ⇐1359

To enable an applicant to obtain an award for compensation, he must show that the service he was rendering at the time of the injury grew out of and was incidental to the employment.

2. Workmen's compensation ⇐670

Where it appeared that city bill collector and inspector of signs was driving automobile towards city's garage, that he noticed two men for whom he had summons and complaint, that he endeavored to make service, that when he returned to his automobile he slipped on mud at curbing and fell, that employee occasionally served papers for private parties and that at time of accident the papers were being served for a personal friend, who paid employee $5, the employee was not entitled to compensation since the injuries did not grow "out of" and were not "incidental to the employment", even if employee had been granted permission to serve legal papers occasionally.

See Words and Phrases, Permanent Edition, for all other definitions of "Out of" and "Incidental to the Employment".

Proceeding by the State Compensation Insurance Fund, insurance carrier for the City of Beverly Hills, against the Industrial Accident Commission of the State of California and others to annul an award made by Commission on behalf of John W. Ruffner.

Award annulled.

Donald Gallagher, of San Francisco, W. C. Flynn, of Los Angeles, and Edmund J. Thomas, Jr., of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

WOOD, Justice.

The petitioner, insurance carrier for the city of Beverly Hills, seeks to annul an award made by respondent Commission on behalf of John W. Ruffner, who had performed services for the city as a bill collector and as an inspector of signs.

Ruffner was driving an automobile owned by the city to the city's garage at approximately 4:45 p.m. on May 3, 1940. His working hours were from 8 a.m. to 5 p.m., but at times he collected bills for the city earlier in the morning or later in the evening when he could find the debtors in their homes. On the occasion of the accident as Ruffner was driving on Roxbury drive towards the garage he noticed two men coming from a building to enter a parked automobile. Ruffner had in his pocket a summons and complaint in a court action which he had carried for some time for the purpose of making service. The men who entered the automobile were the parties he desired to serve. He stopped his car and went across the street in an endeavor to make the service. When he returned to his own car he slipped on some mud at the curbing and fell, receiving the injuries for which he sought compensation from the city.

Ruffner occasionally served papers for private parties and received compensation for these activities. At the time of the accident the papers were being served for a personal friend, who paid him the sum of $5. The service of the papers had nothing whatever to do with Ruffner's employment with the city.

[1, 2] To enable an applicant to obtain an award for compensation he must show that the service he was rendering at the time of the injury grew out of and was

incidental to the employment. California C. I. Exchange v. Industrial Acc. Comm., 190 Cal. 433, 213 P. 257. It is manifest that Ruffner was rendering no service whatever to the city of Beverly Hills when he walked across the street to serve legal papers in a matter in which the employing city was not interested. The respondent Commission, however, takes the position that "the serving of private papers really became a part of his work" because of consent which it is claimed was given to Ruffner to serve legal papers occasionally. Ruffner testified that he spoke to the city attorney of Beverly Hills concerning the matter, who said that "he didn't think there was any objection to it". The city attorney had no authority to extend the liability of the city beyond the scope of Ruffner's employment by the city. When Ruffner left his work to serve the summons he was performing an act for the benefit of himself and a person other than his employer. Mere permission to perform such an act, even if it be conceded that the city attorney did grant such permission, would not make the city liable to compensate for injuries arising from its performance. Campbell on Workmen's Compensation, Vol. 1, p. 202, par. 209; Kadow v. City of Los Angeles, 31 Cal.App.2d 324, 87 P.2d 906; Brindamour v. Murray, 7 Cal.2d 73, 59 P.2d 1009.

The award is annulled.

We concur: MOORE, P. J.; McCOMB, J.



43 Cal.App.2d 238

PEOPLE v. CRANDALL.

Cr. 3417.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1941.

1. False pretenses ⇐49(1)

Evidence *held* to authorize conviction of grand theft, committed by procuring money from elderly woman without intention of repaying, on false representations that money was to be used in business venture, as against contention that defendant was given money by the woman.

2. Criminal law ⇐539(1)

In prosecution for grand theft, where victim's testimony at preliminary hearing was not objected to on ground of mental incompetency, and clearly indicated that victim then had sufficient understanding to apprehend obligation of oath and to give correct account of matters involved, competency of such testimony at final trial was a matter addressed to judgment of the trial judge, and admission of such testimony was not error, though victim had been adjudged insane and confined in state hospital shortly after preliminary hearing. Code Civ.Proc. § 1880.

3. Witnesses ⇐78

The fact that witness has been recently found of unsound mind and is inmate of insane asylum, is prima facie evidence that he is of unsound mind, imposing burden of showing his competency on party offering him, but such rule should not be applied in retrospect and is applicable only where witness has been adjudged insane a short time before he is produced.

4. Witnesses ⇐78

An adjudication of insanity is not conclusive upon the question of competency of witness, since whether person is so insane as to be incapable of taking care of his person or property, or criminally irresponsible, does not determine whether he is so insane as to be incapable of testifying. Code Civ. Proc. § 1880.

5. Witnesses ⇐78

In prosecution for grand theft, statement in psychopathic report, based upon interview with victim's attorney, that onset of victim's insanity was of specified duration, was pure "hearsay" except for impeachment purposes, and could be of no significance in determining admissibility of testimony given by victim at preliminary hearing shortly before she was adjudged insane.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

6. False pretenses ⇐42

In prosecution for grand theft, committed by procuring money from elderly woman without intention to repay, upon false representation that it would be used in a business venture or the like, evidence of expenditures and gifts made by defendant for mere-

ly personal purposes was admissible to show defendant's intent in obtaining money from victim.

7. Criminal law ⇐1159(5)

In prosecution for grand theft, committed by procuring money from elderly woman without intention to repay, on false representation that money was to be used in business venture or the like, bare statement by defendant that he and victim were partners could be of no avail on appeal.

8. Criminal law ⇐371(3)

In prosecution for grand theft committed by obtaining money from elderly woman without intention to return it, on false representations that money was to be used in business venture or the like, checks, check stubs, and ledger sheet of victim's brokerage account were admissible to show that amounts charged in information were but part of total amount obtained, and hence to show intent of defendant in procuring the money.

9. Criminal law ⇐829(1)

Refusal of requested instructions was not error where points raised thereby were fully covered in instructions given.

10. Criminal law ⇐782(1), 785(3)

Instructions on credibility of witnesses, opinions of experts, and weight of evidence were sufficient to guide jury in weighing testimony of detectives and such persons.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Benjamin F. Crandall was convicted of grand theft, and he appeals.

Affirmed.

Spencer L. Halverson and Harold L. Davis, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant, charged by information with ten counts of grand theft, with a prior conviction of grand theft and of issuing checks without sufficient funds, was found guilty on each of the ten counts by separate verdicts of the jury returned after trial. Appellant admitted the prior conviction, but appeals from the present judgments and the order denying his motion for a new trial.

The record reveals the following facts. Appellant was released on parole from San Quentin state prison on or about August 5, 1939. A few days later, while stopping at the Hollywood Roosevelt Hotel, he chanced to meet Mrs. Nellie B. Lantz, a widow past sixty years of age. After her husband's death Mrs. Lantz had been under the guardianship of her attorney from 1932 to 1937, and was then restored to competency by court order in June, 1937, at which time there was turned over to her property and money to the extent of approximately seventy to eighty thousand dollars. Appellant's acquaintance with Mrs. Lantz appears to have rapidly ripened into a friendship and about September of 1939 Mrs. Lantz began advancing sums of money to appellant. The money appears to have been advanced largely for investment in various business ventures. According to appellant's testimony, he and Mrs. Lantz had decided to become partners and she would furnish the money while he would do the work. According to Mrs. Lantz' testimony, given at the preliminary hearing and read into evidence at the trial, she advanced the money because of representations made to her by appellant, chief of which appears to be his claim to ownership of a large estate in Connecticut, and because appellant seemed to know a number of people she knew and one, whom Mrs. Lantz regarded as a reputable business man, commended appellant to her. Appellant also appears to have played somewhat on Mrs. Lantz' sympathy. From September, 1939, to about June, 1940, Mrs. Lantz advanced to appellant a total sum in excess of $65,000, of which about $10,000 seems to have been placed by appellant in business ventures. There is evidence that during the same period appellant made various personal expenditures, including purchases of jewelry, mostly feminine, in the sum of $10,918.47. One witness, an actress, testified to receiving from appellant during that period, among other things, gifts of jewelry, a fur coat and a Buick car. The evidence further reveals appellant to have been otherwise liberal and his assumed social standard to have been somewhat expensive.

[1] Appellant's principal business ventures were concerned with the publication of certain magazines or periodicals having

to do with life in Hollywood and the affairs of the motion picture and radio world. The record as a whole, however, scarcely furnishes a reasonable basis for any inference that appellant's expenditures and some of his activities noted above formed a necessary part of his business career. In any event, the evidence in this respect clearly presented a question of fact for the jury.

The record clearly supports the evident conclusion of the jury that Mrs. Lantz did not intend to make appellant a gift of the money. She held his note or notes to cover the same. The record is also replete with evidence from which the jury might reasonably infer that at the time appellant received the money he had no intention of ever paying it back and in fact intended at the time to appropriate it as his own. The entire picture presented by the evidence is one of an apparently unscrupulous man taking advantage of an elderly woman plainly incapable of looking after her own affairs. Mrs. Lantz never received her money back from appellant or any value therefor.

[2] By the time of appellant's preliminary hearing before the magistrate on the charges herein Mrs. Lantz had suffered a collapse and was confined to the Rosemead Sanitarium. She was brought in from the sanitarium to testify at the preliminary hearing, which was held on June 24, 1940. On July 9, 1940, she was adjudged insane and ordered confined in the Camarillo State Hospital. No objection was made as to her mental competence to testify at the preliminary hearing and her testimony there given clearly indicates that at the time she was possessed of a sufficient understanding to apprehend the obligation of an oath and to be capable of giving a correct account of the matters in reference to the charges against appellant. At the trial the prosecution introduced evidence of the then existing mental condition of Mrs. Lantz, her confinement in the state hospital, and asked permission to read into the record her testimony given at the preliminary hearing in lieu of calling her to the stand in person. The offer met with objection by appellant on the ground that the prosecution had established by its own evidence that Mrs. Lantz was incompetent to testify at the time of the preliminary hearing, under section 1880 of the Code of Civil Procedure. The objection was overruled and the prosecution was permitted to read the testimony into the record, which ruling appellant assigns as prejudicial error.

[3-5] Under a statute such as section 1880 of the Code of Civil Procedure, it has been held that a person who can apprehend the obligation of an oath and is capable of giving a fairly correct account of the things he has seen or heard is competent as a witness, although he may be afflicted with some form of insanity. See 28 R.C.L. 452, sec. 38. Appellant, however, contends that the burden was upon the prosecution to show that Mrs. Lantz was competent to testify since the prosecution had proven the witness insane at the time of her production, and relies for support of his contention upon the rule that the fact that a person has been recently found of unsound mind by a court of competent jurisdiction and that he is an inmate of an asylum for the insane is prima facie evidence that he is of unsound mind and imposes the burden on the party offering him to show his competency. It should be pointed out that here the adjudication of insanity was made subsequent to the time the witness gave her testimony. Manifestly, the rule relied on is applicable only in situations where the witness has been adjudged insane a short time *before* he is produced. Owing to the nature of insanity, its many forms, varying effects and attendant uncertainties, it would be obviously unjust to apply such a rule in retrospect. Moreover, the character of Mrs. Lantz' testimony given at the preliminary hearing was of itself proof of her competency as a witness at the time; and an adjudication of insanity is not to be taken as conclusive upon the question of the competency of a witness. "The question whether a person is so insane as to be incapable of taking care of his person or property, or criminally irresponsible, does not determine the question whether he is so insane as to be incapable of testifying. Hence, an inquisition of lunacy does not conclusively render the subject incompetent as a witness." 28 R.C.L. 453, sec. 40. A statement contained in a psychopathic report, based upon an interview with Mrs. Lantz' attorney, that the "onset" of Mrs. Lantz' condition was "approximately six weeks" could be of no significance or importance, under the circumstances, in view of what has already been said here. Indeed such a report except for impeachment purposes, is pure hearsay. In any event, the question of the admissibility

of the testimony of the witness as given at the preliminary, and the competency of the witness as well, was in the first instance addressed to the judgment of the trial judge. There is nothing in the record indicating that the trial judge erred either in judgment or as to the law.

[6, 7] Appellant's contention that the court erred in admitting evidence of expenditures and gifts made by appellant, during the period in question, is without merit. Money had been obtained from Mrs. Lantz upon the representation that it would be used or invested in a business venture or in relation thereto, or upon some similar representation. Evidence of the use appellant made of money during that period was clearly pertinent as to the question of the intent with which he had obtained such a large sum of money from Mrs. Lantz. People v. Stone, 16 Cal. 369; People v. Eastman, 77 Cal. 171, 19 P. 266. Appellant's bare statement that he and Mrs. Lantz were partners has no support in the evidence. Moreover, it can be of no avail on appeal.

[8] Nor is there merit in the contention that the court committed prejudicial error in admitting into evidence a large number of checks, check stubs and the ledger sheet of a brokerage account of Mrs. Lantz. Appellant claims they have no bearing on the case. Respondent contends that these records showed that the amounts in the ten counts charged in the information were but a part of the total amount of $65,407.55 which the appellant obtained from Mrs. Lantz and that they went to show the commission of offenses similar to those charged, and hence the intent with which appellant committed the acts charged. Respondent's position is well taken and the matter objected to was properly admitted to that end. People v. Hennessey, 201 Cal. 568, 582, 258 P. 49; People v. Eley, 121 Cal.App. 53, 59, 8 P.2d 885.

[9, 10] In regard to the assignments of error on the part of the court in refusing to give certain instructions requested by appellant, it is sufficient to state that as to the matter of insanity of a witness the requested instruction did not correctly state the applicable rule; and as to all of the said instructions so requested, the points attempted to be raised thereby were fully covered in the instructions given by the court. As to the manner of weighing the testimony of detectives and other such persons, respondent properly points out that in view of the instructions given on the credibility of witnesses, the opinions of experts and the weight of the evidence, ample instructions were given to guide the jury in weighing the testimony of all the witnesses.

The facts presented to the jury were amply sufficient to justify an inference of appellant's guilt and the verdicts rendered may not be disturbed on appeal. People v. Hennessey, supra, 201 Cal. at page 571, 258 P. 49. Appellant's motion for a new trial was properly denied.

The judgments of conviction are affirmed and the order denying the motion for a new trial is also affirmed.

We concur: YORK, P. J.; WHITE, J.



43 Cal.App.2d 316

PEOPLE v. BURKE.

Cr. 2160.

District Court of Appeal, First District, Division 2, California.

March 3, 1941.

1. Criminal law ⇐308
Death ⇐1, 2(1)

In bigamy prosecution where evidence disclosed that defendant had married three separate women, that first wife left defendant about a month after the marriage and that defendant had not seen or heard of her since, the jury was permitted to presume or infer, either that the first wife was living at the time of the third marriage, or that she was dead at the time of the second.

2. Criminal law ⇐308

In bigamy prosecution where evidence disclosed that defendant had married three separate women, that first wife left defendant about a month after the marriage and that defendant had not seen or heard of her since, in face of positive evidence that the second wife was living at the time of the third marriage there was no room for presumption of innocence in relation to the third marriage.

3. Criminal law ⇐1144(13)

The District Court of Appeal was under duty to assume that the jury accepted whatever presumption or inference was necessary to sustain its verdict.

4. Criminal law ⇐371(9)

Where evidence disclosed that defendant had married three separate women, that first wife left defendant about a month after the marriage and that defendant had not seen or heard of her since, evidence relating to the second marriage was admissible in bigamy prosecution based on the third marriage as part of the state's case in chief as well as evidence of intent and was not objectionable as being evidence of a distinct crime.

5. Criminal law ⇐1130(2)

Appellant's brief stating that several instructions were objectionable and erroneous but not presenting further citation or comment did not present a debatable question on appeal.

6. Criminal law ⇐778(4)

In bigamy prosecution based on third marriage, defendant's requested instructions to the general purport that jury must presume that wife number one was alive at time of second marriage and dead three months later when third marriage was contracted and that jury must presume that defendant was guilty of crime in the second marriage but innocent in the third were properly rejected as confusing.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Boyd Burke was convicted of bigamy, and he appeals.

Affirmed.

John W. Montgomery and Francis E. Zingheim, both of San Jose, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary and James A. Arnerich, Deputies Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was convicted of the crime of bigamy upon an information charging a marriage on October 4, 1938, he then "having a wife living". The state proved, and the defendant admitted, that he had married three separate women—one on July 30, 1936; another on July 16, 1938, and another on October 4, 1938. The first and third marriages were contracted under assumed names. Upon arraignment the defendant first pleaded guilty, then withdrew his plea and entered a plea of not guilty and admitted a prior conviction of petty theft.

The first wife was twenty-one years of age at the time of her marriage in July, 1936. She left defendant about a month after the marriage and defendant had not seen or heard of her since. The second wife appeared at the trial and testified. Competent proof of all three ceremonies was made. The main ground of appeal is that the evidence is insufficient to prove that the defendant had a "wife living" at the time of the third marriage.

[1-3] Appellant's argument rests wholly upon a confusion of the weight of presumptions as evidence. It is that, since he is presumed innocent of crime at the time of his third marriage, then the presumption of "continued life" running to the first wife is dispelled. But, upon the same theory, the presumption of innocence running to the second marriage would dispel the same presumption. Hence, the second marriage would have been valid, and the wife of that marriage appearing in court was sufficient proof that appellant had "a wife living" at the time he contracted the third marriage. Thus the two presumptions of innocence running to the second and third marriages conflict with each other, and the jury was permitted to presume, or infer, either that the first wife was living at the time of the third marriage, or that she was dead at the time of the second. It might have rejected both of these presumptions of law and inferred, from the evidence and physical condition of the first wife, and other facts proved, that she was alive at the time of the third marriage, or it might have rejected all these presumptions and inferences and inferred that she was dead at the time of the second marriage. In the face of the positive evidence that the second wife was living at the time of the third marriage there is no room for the presumption of innocence in relation to the third marriage. But the circle ends with the duty of this court to assume that the jury accepted whatever presumption or inference may be necessary to sustain its verdict.

[4] The evidence relating to the second marriage is objected to as being evidence of a distinct crime. It was clearly admissible as a part of the state's case in chief. as well as evidence of intent.

[5, 6] The appellant's brief states that several instructions were objectionable and erroneous, but without further citation or comment. This manner of presentation does not present a debatable question on appeal. We have examined the proposed instructions and find that they were properly rejected as they would have served only to confuse the jury. They were to the general purport that the jury must presume that wife number one was alive at the time of the second marriage, and dead three months later when the third marriage was contracted; that the jury must presume that the defendant was guilty of crime in the second marriage but innocent in the third.

There is no error in the record.

The judgment and order denying a new trial are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



43 Cal.App.2d 263

SAN FRANCISCO BANK v. LANGER et al.

Civ. 6266.

District Court of Appeal, Third District, California.

Feb. 28, 1941.

1. Waters and water courses ⇐107(3)

In action to quiet title to water flowing from springs on plaintiff's land and to enjoin and recover damages for diversion of portion thereof, evidence *held* sufficient to support trial court's findings that water flowed in natural channels on plaintiff's land, that defendant wrongfully and deliberately diverted part of water by constructing ditch and obstructing flow of water in natural channel, and that plaintiff was owner and entitled to entire flow of water from such springs.

2. Waters and water courses ⇐101

Water flowing from spring into water course is part of natural flow thereof, and its use is governed by riparian rights doctrine, so that owner of land on which arises a spring, from which a stream flows, has no absolute ownership of waters in spring, but is entitled only to reciprocal share thereof as riparian owner in common with other such owners farther down stream, but where natural flow from spring does not pass beyond boundary of land on which it is located, landowner may use all of it.

3. Waters and water courses ⇐127

Adverse use of water, to mature prescriptive right thereto, must be accompanied by actual, open, notorious control and use, be adverse and hostile to title of owner of land over which it flows, be under claim of exclusive right, and be continuous and uninterrupted for over five years.

4. Appeal and error ⇐1011(1)

The trial court's fact finding on conflicting evidence is controlling on appeal.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by the San Francisco Bank against Albert Langer and others to quiet title to water, enjoin defendants from diverting flow thereof, and recover damages for such diversion, in which defendants filed a cross-complaint to quiet title to and recover possession of part of such water. From a judgment for plaintiff and cross-defendant, defendants and cross-complainants appeal.

Affirmed.

Johnson & Brawman, of Yreka, for appellants.

Tapscott & Tapscott, of Yreka, and Orrick, Dahlquist, Neff & Harrington, of San Francisco, for respondent.

THOMPSON, Justice.

The defendants and cross-complainants have appealed from a judgment quieting title in plaintiff and cross-defendant to all the water flowing from springs located on its property through natural channels on the same land. The defendants were restrained from interfering with the flow of water in those channels and damages in the sum of $150 were assessed against them for diverting the water by means of a ditch which they constructed. The defendants claimed title to the water flowing in the ditch as owners of the land riparian thereto.

The respective parties to this action are owners of adjoining farms in Siskiyou

county which are separated by a fence called the "Langer fence" extending north and south between the property of plaintiff in Section 12, Township 47 North, Range 1 East, M.D.B. & M., and the property of defendants in Sections 7 and 18, Township 47 North, Range 2 East, M.D.B. & M. The defendants' land is situated east of the fence and the plaintiff's property is west of that fence.

The amended complaint alleges that plaintiff is the owner of the particularly-described land adjacent to the fence on the western side thereof, upon which land there is located certain springs called "Jack Springs"; that the water of those springs flows in considerable quantity northerly upon plaintiff's land in natural channels emptying into a slough; that the water first flows through one channel for a distance of 160 feet from the springs, and then separates into two channels, both of which extend northerly upon plaintiff's land to the slough; that the defendants wrongfully obstructed the water in the easterly channel and diverted it to their own land east of the fence by means of a ditch which they constructed, to plaintiff's damage in a specified sum.

It is not contended the defendants obtained title to the water by adverse possession. Adverse possession of the water in question was neither pleaded by the defendants nor proved at the trial.

The defendants filed an answer and cross-complaint denying the material allegations of the complaint, except that it was admitted "Jack Springs" were located on the property described in the complaint and that the water flowed in natural channels northerly therefrom a short distance and then divided into two channels, the easterly one of which, it is asserted, carried the bulk of the water and extends over and across the property of defendants, upon which land they have used the water for many years for agricultural and irrigation purposes, and that they are the owners and entitled to the possession of all the water flowing in that branch of the channel.

In an answer to the cross-complaint the plaintiff denied the affirmative allegations thereof. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff and cross-defendant in every material respect. A judgment was thereupon rendered quieting title in plaintiff and cross-defendant to all of the water from the springs flowing in both branches of the channel, enjoining the defendants from claiming title thereto and from diverting the water therefrom. Damages were awarded plaintiff in the sum of $150. From that judgment the defendants have appealed.

[1] The appellants contend that the findings and judgment are not supported by the evidence. It is asserted the evidence shows, without substantial dispute, that a portion of the water from the springs flows in a natural channel easterly upon defendants' land, entitling them, as riparian owners of the land adjacent thereto, to the use of that water. In support of the foregoing claim, it is maintained the topography and elevations, shown upon maps which were received in evidence, prove that the water from the springs would naturally flow easterly upon the land of the defendants.

We are of the opinion the findings and judgment are adequately supported by the evidence. The court specifically determined that the springs were located on plaintiff's land; that the water from the springs flowed northerly therefrom in natural channels which are also located on plaintiff's land, and empties into a slough; that none of the water from the springs naturally flows in a channel upon the land of the defendants; that defendants wrongfully obstructed the flow of water in the easterly channel and diverted it therefrom to their land by means of "ditches, obstructions and other works", constructed by them, to plaintiff's damage in the sum of $150, and that plaintiff is the owner and entitled to the use and possession of all of the water from "Jack Springs".

It would be an idle task to attempt to recite the evidence in support of the findings and judgment. There is a conflict of testimony. There is, however, substantial evidence that until some time between 1919 and 1926 the water from the springs flowed northerly in two natural channels located entirely upon the plaintiff's land west of the Langer fence, at which time one of the channels was obstructed by placing rocks and earth therein, and that the water was diverted to defendants' land east of the fence by means of a ditch which was constructed by them. Four witnesses, Archie McDonald, James D. Fairchild, J. W. Churchill and Frank Howell, testified to those facts. The first witness mentioned said he moved to that vicinity in 1919, at which time the water from "Jack Springs" flowed northerly in two natural channels

which extended west of the fence. He definitely said no water then flowed east of the fence which divided the property of these litigants, but that, "A channel was dug in there [east of the fence], I would say about 1923". He also testified that even after the construction of the diverting ditch the water would not flow from its original channel until it was first filled up and dammed by rocks and other obstructions. He asserted that the natural channel was obstructed several times and that he repeatedly removed the rocks and debris after which the water would continue to flow northerly therein upon plaintiff's land. Mr. Fairchild became a resident in that vicinity as early as 1893. He testified that the water from the springs then flowed northerly upon plaintiff's land in natural channels. Mr. Churchill testified that for many years prior to 1926 the water from Jack Springs flowed northerly in natural channels until someone dug a ditch from the east channel to and upon the land of defendants, thereby diverting the water from its natural course. He said, "Some one had a dam laid of rocks into the north [the east] channel, and turned the water into this ditch", which caused it to flow easterly beyond the fence to the land of the defendants. He testified that he removed the obstructions from the channel several times, and that he repeatedly filled the artificial ditch.

The testimony of Mr. Zumwalt, upon which the defendants rely, merely results in a conflict of evidence. The defendant, Albert Langer, admitted that he dug the ditch and placed rocks and sod in the east channel. He claimed that the water overflowed the channel at times and spread out upon his land east of the fence, and that his son dug the ditch to drain his land. He testified in that regard:

"It [the water from the springs] went through the fence in here into that low place and it just spread itself every place. * * *

"Q. And you and your son dug out this so called ditch? A. Yes. * * *

"Q. Did you put any gates across the canal at that time in 1919? A. I did right away when I had the ditch dug. * * *

"Q. You are sure those gates weren't constructed in 1929? A. Well, why would I dig a ditch for water and turn that waste water into the canal.

"Q. Now, why did you dig a ditch across here to take that water, when you already had a ditch going right to the north? * * * A. Because I wanted to get that water on my land. * * *

"Q. Are you sure you didn't do anything over there besides putting this one flat rock in the north branch about that time? A. Well, once in a while, a fellow put in a sod or something like that.

"Q. What did you put that in there for? A. Because I wanted to get all the water I can out of the spring."

The evidence sufficiently supports the findings and judgment to the effect that the water from Jack Springs flows in natural channels upon the land of plaintiff; that it was wrongfully and deliberately diverted by the defendants by means of an artificial ditch constructed by them, and by obstructing the flow of water in its natural channel, to the damage of plaintiff, and that plaintiff is the owner and entitled to the entire flow of water from those springs.

[2] There is little dispute regarding the principles of law with respect to the title to water which flows from springs in natural channels, or the riparian rights incident thereto. The only controversy in this case arises in attempting to apply those principles to the facts adduced by the evidence. It is true that the owner of land upon which there is located springs, the water from which flows in natural channels across his land and thence upon or through the lands belonging to other individuals, does not necessarily own the exclusive title to all of the water. On the contrary, under such circumstances the doctrine of riparian water rights is applicable. It follows that if the defendants in this case were the owners of land actually riparian to a natural channel in which the water from plaintiff's springs was accustomed to flow, they might be entitled to a portion of the water from Jack Springs. But the court determined that their land was not riparian to a natural channel connected with those springs, and that they were therefore not entitled to any of the water therefrom. The principle of law which is controlling in this case under the facts determined by the trial court is concisely stated in 25 California Jurisprudence, p. 1106, § 113, as follows: "Irrespective of its source, water from a spring flowing into a watercourse is part of its natural flow and its use is governed by the doctrine of riparian

rights. It follows that the owner of land upon which a spring arises and from which a stream flows has no absolute ownership of the waters in the spring, but is entitled only to a reciprocal share, as a riparian owner, in common with other owners farther down on the stream. But where the natural flow from a spring does not pass beyond the boundary of the land on which it is located, the owner may use all of it; he owns it as completely as he owns the soil."

The preceding text is supported by numerous California authorities, including Stepp v. Williams, 52 Cal.App. 237, 242, 198 P. 661, and Simons v. Inyo Cerro Gordo Mining & Power Co., 48 Cal.App. 524, 192 P. 144.

[3] Title by adverse possession to the water diverted by the defendants from the natural channel and used by them is not involved on this appeal. Prescriptive use of the water was neither pleaded nor proved by the defendants. Adverse use of water which will mature a prescriptive right thereto must be accompanied by actual, open, notorious control and use; it must be adverse and hostile to the plaintiff's title; it must be under a claim of exclusive right, and it must be continuous and uninterrupted for more than five years. Ketcham v. Modesto Irrigation District, 135 Cal.App. 180, 191, 26 P.2d 876; Galbreath v. Hopkins, 159 Cal. 297, 113 P. 174; 2 Kinney on Irrigation, 2d Ed., p. 1875, § 1048; 27 R.C.L. p. 1290, § 201; 1 Cal.Jur. 549, §§ 38-41.

[4] Appellants contend that the topography and elevations appearing on the maps received in evidence refute the possibility of the water from the springs running in natural channels northerly on plaintiff's property. There is no merit in that assertion. Our attention is not called to specific elevations on the map which disprove that fact. It is true that the elevations of the surface of defendants' land east of the springs appear to be lower than the immediate vicinity of the springs. It is also true that the elevations north from the springs on the plaintiff's land west of the fence also decrease. It is not disputed that the water actually flowed northerly in the western channel from the springs. There is an abundance of evidence that it also flowed northerly on plaintiff's land in the easterly natural channel, although the record contains conflicting evidence in that regard. The most that may be said regarding the weight of evidence in that respect is that it is conflicting. The finding of the court in that regard is therefore controlling.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



43 Cal.App.2d 306

SHEARER v. PACIFIC GAS & ELECTRIC CO.

Civ. 11532.

District Court of Appeal, First District, Division 2, California.

March 3, 1941.

Rehearing Denied April 2, 1941.

Hearing Denied May 1, 1941.

1. Appeal and error ⇐1002

In action for personal injuries where, although evidence was conflicting, there was substantial evidence to sustain verdict for plaintiff upon issues of defendant's negligence and the amount of damages, such issues were not open to argument on appeal.

2. Negligence ⇐68

One who is himself not negligent is entitled to rely upon presumption that others will exercise due care, and therefore it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another.

3. Electricity ⇐16(3), 18(2)

By permitting a charged electric wire to remain upon a public thoroughfare, an electric company maintained a "public nuisance" in violation of law, and as respects contributory negligence of person injured thereby some three hours after reporting to company that wire was down, and being assured that it would be taken care of immediately, such person was entitled to assume that current in wire had been cut off. Pen. Code, §§ 370, 372.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

4. Negligence ⇐136(9)

It is only when the facts are clear and indisputable, and when no other inference but that of negligence or contributory negligence can be drawn from the facts, that issue as to negligence or contributory negligence becomes one of law, rather than of fact.

5. Evidence ⇐100

Evidence as to a person's habit of doing a thing as a definite course of action is admissible and of probative value as showing that on a particular occasion the thing was done as usual.

6. Negligence ⇐135

Although evidence as to a person's habit of doing a thing in a certain way is insufficient to raise a presumption of due care on the part of an injured person except in cases where there were no eye witnesses to the accident, such evidence may be sufficient to sustain jury's inference as to due care.

7. Electricity ⇐19(12)

In action for injury to superintendent of sanitary district caused by high-tension wire broken by windstorm and lying across truck, which belonged to district and was parked on public street, whether superintendent was contributorily negligent in attempting, some three hours after notifying electric company of broken wire and being assured it would be attended to immediately and while wire still lay on truck, to open door of truck to examine contents thereof as usual before truck was placed in storage for the night, was for jury.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by A. B. Shearer against the Pacific Gas & Electric Company for personal injuries. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Thos. J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, for appellant.

Julian D. Brewer and O'Connor, Neubarth & Moran, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Plaintiff sued for damages for personal injuries and had a verdict for $3,000. Three issues were submitted to the jury—the negligence of defendant, the contributory negligence of plaintiff, and the amount of damage suffered by plaintiff. The defendant concedes that the evidence was conflicting on the first and third issues. Substantial evidence was offered to sustain the verdict upon both of those issues, hence the only question open for argument on this appeal is whether the plaintiff was guilty of contributory negligence as a matter of law.

The evidence upon this issue is without substantial conflict. The plaintiff was the superintendent of the sanitary district in the city of San Anselmo. An unusual windstorm throughout the day had caused damage to defendant's power lines maintained in the city. At about 2 o'clock p. m. one of defendant's power lines parted and fell extending through a tree over and upon a truck used by the sanitary district and parked across the street opposite the offices of the district. At about the same hour plaintiff notified the defendant of the fallen wire and was assured that it would be attended to immediately. Defendant failed to send anyone to fix the wire and also failed to shut off the current. Three hours later two of plaintiff's fellow employees came out of the district offices, one with a bamboo rake and one with a wooden cane, for the purpose of removing the wire from the truck so that it could be driven to its place of storage for the night. Plaintiff followed these employees across the street, and, before they were able to remove the wire, he took hold of the door handle with the intention of examining the contents of the truck before its removal. As he seized the handle of the truck he received an electrical shock causing the injuries for which he sued. His explanation of his conduct is that he assumed that the defendant had turned off the power during the three hours intervening between notice to the company and the time of the injury.

[2-4] With this state of the facts two principles of law control the decision: (1) "One who is himself not negligent is entitled to rely upon the presumption that others will exercise due care, so that it is not negligence to fail to anticipate danger which can come only from a violation of law or duty upon the part of another." 19 Cal.Jur. p. 596. In permitting the charged electric wire to remain upon a public thoroughfare to the peril of the entire pub-

lic the defendant was maintaining a public nuisance in violation of law. Pen. Code, sections 370, 372. The plaintiff was entitled to assume that this violation would not continue. (2) "It is only when the facts are clear and indisputable, and when no other inference than that of negligence or contributory negligence can be drawn from the facts, that the issue becomes one of law and not of fact." McQuigg v. Childs, 213 Cal. 661, 663, 3 P.2d 309, 310.

In denying defendant's motion for judgment notwithstanding the verdict the learned trial judge filed a memorandum opinion which is made a part of the clerk's transcript. This we deem a better practice than that of copying the opinion in the briefs of counsel, as here we have a certification that the opinion is a true copy. Though it probably may not be included in a bill of exceptions if the appeal is taken under that method its value in aid of the appeal has long since been recognized. Estate of Felton, 176 Cal. 663, 667, 169 P. 392.

The pertinent portions of the opinion which we approve and adopt as reasons for an affirmance of the judgment read:

[5] "It appears without contradiction that the custom at closing time was for Shearer to examine the truck before it was taken home to determine whether or not there were any articles in it that should be removed. From the fact that such was his custom, the jury might infer, if it saw fit to do so, that that was his purpose at the time he was injured. Wigmore on Evidence, sec. 92, cited in American Can Co. v. Agricultural Ins. Co., 27 Cal.App. 647, 150 P. 996. In the case of Wallis v. Southern Pac. Co., 184 Cal. 662, 195 P. 408, 15 A.L.R. 117 the court quotes with approval from Greenleaf on Evidence as follows: 'A habit of doing a thing is naturally the probative value, as indicating that on a particular occasion the thing was done as usual, and if clearly shown as a definite course of action, is constantly admitted in evidence.' The court also quotes from Wigmore on Evidence as follows: 'Of the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of habit or custom there can be no doubt. Every-day experience and reason make it clear enough.'

[6] "Although this principle is no longer held to be sufficient to raise a presumption of due care on the part of an injured person except in cases where there were no eyewitnesses to the accident (White v. Shepardson, 116 Cal.App. 716, 3 P.2d 346), the principle is applicable to a situation such as here involved, where we are not considering presumptions which must be drawn from certain facts but instead are considering possible inferences which the jury might draw.

[7] "The jury might also properly have drawn one of two additional inferences from the evidence. The first of such inferences would be that, an adequate time having elapsed within which the defendant company could have attended to the broken wire, as it had said it would do, as a result of the lapse of such time Shearer believed that it had made the necessary repair. If such were the view taken by the jury, it can not be said, in my opinion, that as a matter of law such view was an unreasonable one. In the Kentucky case cited by defendant (Kentucky Wagon Mfg. Co. v. Gossett, 142 Ky. 842, 135 S.W. 394) the court held that the plaintiff had attempted to extend the assurance made by the defendant 'beyond the fair import' of the words used. In the instant case we have no such situation presented."

Here the undisputed evidence is that the defendant was given ample notice and ample opportunity to remove the danger by the simple process of turning off the electric current; that the plaintiff did not know, and had no reason to have known, that the wire was charged with between 2,300 and 4,000 volts instead of the usual voltage of 110 to 220. Hence whether he was reasonable in assuming that defendant would not permit a wire charged with such high voltage to remain upon the throughfare was a question of fact for the jury. From the verdict in favor of plaintiff we must assume that the jury drew the inference that plaintiff was not guilty of contributory negligence, and there is no basis upon which an appellate court could rule that such an inference was not reasonable under the facts shown.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

43 Cal.App.2d 244

FISCHER v. KEEN.

Civ. 12268.

District Court of Appeal, Second District, Division 1, California.

Feb. 27, 1941.

1. Appeal and error ⇐989

When judgment on jury's verdict is attacked as unsupported by evidence, appellate court has power only to determine whether there is any substantial evidence supporting verdict.

2. Appeal and error ⇐930(1)

On appeal from judgment for defendant in action to recover damages for negligence, all conflicts in evidence must be resolved in defendant's favor and all legitimate and reasonable inferences indulged in to uphold judgment, if possible.

3. Appeal and error ⇐930(1)

On appeal, all intendments are in favor of judgment arrived at on conflicting testimony.

4. Appeal and error ⇐996

Where contradictory inferences can reasonably be drawn from facts in evidence, appellate court will not substitute its deductions or inferences for those of jury, though such court might have reached different conclusion.

5. Appeal and error ⇐996

In action for injuries to pedestrian struck by automobile driven by defendant, appellate court may not disturb trial court's judgment on jury's verdict for defendant, unless no inference of plaintiff's contributory negligence can be drawn from clear and undisputed facts.

6. Automobiles ⇐245(72)

In action for injuries to pedestrian, struck by automobile driven by defendant, plaintiff's contributory negligence in failing to look toward approaching automobile from time when he first saw it 300 feet away and started across street until he arrived at position only four feet in front of it past center of street was fact question for jury.

7. Automobiles ⇐160(4)

An automobile driver was not excused from performing statutory duty to yield right of way to pedestrian, walking within unmarked crosswalk at street intersection, by fact that misty condition of windshield prevented driver from seeing to his left or fact that he was blinded by headlights of approaching automobiles. Vehicle Code, § 560, St.1935, p. 188.

8. Automobiles ⇐168(6)

When automobile driver, proceeding at 25 miles per hour, found that he could not see to his left and ascertain whether any one was within unmarked crosswalk at street intersection because of mist on windshield and headlights of approaching automobiles, it was his duty to slacken speed and place his automobile under such control that he could stop within time and distance intervening between time when he was able to see crosswalk and his arrival thereat. Vehicle Code, § 560, St.1935, p. 188.

9. Automobiles ⇐160(4)

It was duty of automobile driver, approaching unmarked crosswalk at street intersection, to know whether pedestrians were using crosswalk. Vehicle Code, § 560, St. 1935, p. 188.

10. Automobiles ⇐160(4)

An automobile driver, failing to yield right of way to pedestrian walking within unmarked crosswalk at street intersection, violated statute and was negligent per se. Vehicle Code, § 560, St.1935, p. 188.

11. Automobiles ⇐217(5)

A pedestrian owes duty, as ordinarily prudent man, to look in direction from which danger is to be anticipated from approach of automobile before placing himself in position of danger by starting across street, and to continue to look, not one way only, but in direction or directions of anticipated danger, and to be alert to safeguard himself against injury.

12. Automobiles ⇐244(50)

In action for injuries to pedestrian, crossing street in unmarked crosswalk at intersection when struck by automobile driven by defendant, evidence *held* sufficient to sustain jury's implied finding of plaintiff's contributory negligence in failing to look in direction from which automobile was approaching until he passed center of street and arrived practically at point of impact.

13. Automobiles ⇐246(50)

In action for injuries to pedestrian, struck by automobile driven by defendant at street intersection, where defendant alleged and testified that he was suddenly confront-

ed with perilous situation without fault on his part when plaintiff suddenly appeared out of darkness directly in path of automobile, defendant was entitled to instruction on doctrine of sudden peril.

14. Appeal and error ⇐1064(1)

In action for injuries to pedestrian, struck by automobile driven by defendant, plaintiff was not prejudiced by giving of instruction on sudden peril doctrine, relating solely to defendant's acts and not directed to question of plaintiff's contributory negligence, even if unsupported by evidence.

15. Automobiles ⇐246(31)

In action for injuries to pedestrian, struck by automobile driven by defendant while walking in unmarked crosswalk at street intersection, instruction that pedestrian cannot proceed blindly and in reckless disregard of obvious danger, even though he has right of way, but must exercise ordinary care to avoid collision with automobile, if avoidable by exercise of such care, was not erroneous. Vehicle Code, § 560, St.1935, p. 188.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Lewis W. Fischer against Charles Edward Keen for personal injuries. Judgment for defendant, and plaintiff appeals.

Affirmed.

Edgar T. Fee and Chas. X. Arnold, both of Los Angeles, for appellant.

Parker & Stanbury, Harry D. Parker, and Vernon W. Hunt, all of Los Angeles, for respondent.

WHITE, Justice.

This action was instituted to recover damages on account of personal injuries sustained by plaintiff in an automobile accident. At the time of the accident, which occurred between 5:30 and 6 o'clock on the evening of January 14, 1938, plaintiff, a man 75 years of age, was on his way home from the business section of the city of Alhambra, carrying some purchases. When he arrived at the intersection of Chapel and Park streets, it was nearing darkness and the lights on the automobile operated by defendant were turned on. Plaintiff was walking on the south side of Park street and was crossing Chapel street from the west to the east on what is known as an "unmarked crosswalk" at the intersection.

Trial was had before a jury, resulting in a verdict for defendant. A motion for a new trial having been denied, this appeal is prosecuted by plaintiff from the judgment entered upon the verdict in favor of defendant.

Plaintiff testified that as he approached Chapel street he looked both ways and saw a car coming from the south; that he saw no automobile approaching from the north as he entered Chapel street. The one automobile which he testified he saw was approaching from his right about 300 feet away. He started to cross the street. His eyesight was good. He then testified further: "After I started to cross I looked to the left again and I was pretty near to the intersection before I looked, and I looked and saw the car coming, and I thought I could get across before he came, but before I got across he struck me. I had one or two steps to cross. The fender or bumper hit me. I was between 5 and 10 feet from the east curb line when I was hit. One or two steps and I would have been across."

The defendant testified that the illumination at the intersection was poor, consisting solely of a single light of an obsolete type suspended directly over the center of the intersection; that this light shines directly in the center of the intersection rather than upon the four corners thereof, and that there are low-hanging trees which cast shadows and darkness in the immediate vicinity of the accident; that plaintiff was dressed in dark clothing; that it was raining and the pavement was wet. Defendant further testified that he was operating his car at a speed of about 25 miles per hour, with its headlights lighted and its windshield wiper working; that he was operating his car with its left side about 3 or 4 feet from the center line of Chapel street and its right side about 8 or 10 feet from the east curb of said street; that as his car drew near Park street he noted a series of cars coming south on Chapel street with their headlights on and traveling 8 or 10 feet out from the west curb; that while those cars were approaching him he could not distinguish any object on his left; that he was about 250 feet south of Park street when he first saw this group of cars; that they were rather close together, and that their lights "perhaps blind-

ed me slightly". Defendant further testified that it had been a misty day, raining off and on, and "I believe that it was raining at the time of the impact, but I am not certain. It had been raining on the way home, off and on, and there was a natural accumulation of moisture that accumulates on any windshield from a rain. This possibly obscured my vision of the intersection after I passed the last headlights."

The defendant further testified that he was driving 25 miles per hour at the time of the accident; that he had not removed his foot from the accelerator or applied any brakes at any time prior to the accident; that after he had passed the last car that was approaching him from the opposite direction there was nothing to obscure his vision. That the first time he saw the plaintiff the latter was on the left-hand side of defendant's automobile and moving in the general direction of the front of the left side of the automobile. That when he passed the last automobile which approached from the north he was about 15 or 18 feet south of the south edge of the sidewalk on Park street; that at the time he first saw the plaintiff the latter was about 4 feet directly in front of the automobile. The right front headlight on defendant's automobile was bent back about 1 inch, indicating that the same came in contact with plaintiff. The defendant further testified that when he first saw the plaintiff the latter "seemed to be moving more rapidly than an ordinary walk; he seemed to be taking long steps and moving beyond an ordinary walk".

The complaint filed by plaintiff contained the usual allegations of negligence and carelessness on the part of defendant, while the latter's answer, after denying most of the allegations contained in the complaint and in particular those alleging carelessness or negligence, also set up affirmative defenses of contributory negligence and unavoidable accident.

[1-4] Appellant first challenges the judgment on the ground that the record is barren of any substantial evidence to support the verdict and judgment in favor of respondent. In such a situation the powers and duties of an appellate tribunal were thus defined by this court in Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486, 487: "When a judgment is attacked as being unsupported by the evidence, the power of the appellate court in passing on this question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury; and, on appeal from a judgment for defendant in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the defendant, and all legitimate and reasonable inferences indulged in to uphold the judgment, if possible; and, when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183. * * * All intendments are in favor of the judgment arrived at upon conflicting testimony. Where the facts are such that contradictory inferences can reasonably be drawn from them, an appellate court will not substitute other inferences for those adopted by the trial jury. [Citing cases.] This is the rule even where the reviewing court might have reached a different conclusion. * * *" See, also, Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660.

[5-10] Therefore, even though we conclude that as a matter of law respondent driver was negligent, we may not disturb the judgment unless we can say that from clear and undisputed facts no inference of contributory negligence on the part of appellant can be drawn therefrom, because the question of contributory negligence, like that of negligence, is a question of fact for the jury. Appellant was walking within an unmarked crosswalk. It was therefore the duty of respondent to yield the right of way to the former. Vehicle Code, sec. 560, subd. a, St.1935, p. 188. In the performance of this duty respondent was not excused by the fact that the misty condition of his windshield prevented him from seeing to his left or that he was blinded by the headlights of approaching automobiles. When he found that he could not see to his left and thereby ascertain whether any one was within the crosswalk, it was his duty to slacken his admitted speed of 25 miles per hour and place his car under such control that he could stop within the time and distance intervening between his ability to see the crosswalk and his arrival thereat. It was respondent's duty to know whether pedestrians were using the crosswalk. The obligation rested upon him to yield the right of way to appellant, and this he did not do. He there-

fore violated the hereinbefore mentioned section of the Vehicle Code, and his act in so doing was negligence per se. Nicholas v. Leslie, 7 Cal.App.2d 590, 594, 46 P. 2d 761.

[11] Coming now to a consideration of appellant's conduct, it appears to us that the only possible theory upon which contributory negligence might be charged against him would be that after he first saw respondent's automobile 300 feet away and started across the street, he never again looked in the direction of the approaching car until he had traveled past the center of the street and had arrived at a position only 4 feet in front of the oncoming automobile, at which time he again saw it about the same instant it struck him. There devolved upon appellant, as the act of an ordinarily prudent man, the duty, before placing himself in a position of danger, to look in the direction from which danger was to be anticipated, and certainly an ordinarily prudent person would anticipate an existent danger from the approach of an automobile only 300 feet away at the time such person started to cross an intersection. Further, this was a continuing duty, and was not met by plaintiff's looking once and then looking away. That this is the law has been the holding without disagreement in many cases, including Sheldon v. James, 175 Cal. 474, 479, 166 P. 8, 2 A.L.R. 1493; Wright v. Foreman, 86 Cal.App. 595, 603, 261 P. 481; Bullock v. Western Wholesale Drug Co., 91 Cal.App. 369, 266 P. 978; Wing v. Kishi, 92 Cal.App. 495, 498, 268 P. 483; Chase v. Thomas, 7 Cal.App.2d 440, 46 P. 2d 200; Deike v. East Bay St. Rys., Ltd., 7 Cal.App.2d 544, 550, 46 P.2d 812; Finkle v. Tait, 55 Cal.App. 425, 203 P. 1031; Horton v. Stoll, 3 Cal.App.2d 687, 690, 40 P.2d 603; Koeppel v. Daluiso, 118 Cal.App. 442, 448, 5 P.2d 457. By the foregoing statement we do not mean to say that there is a duty to look one way and to continue so to look, but rather to look in the direction or directions of anticipated danger and to continue to be alert to safeguard against injury. Lavin v. Fereira, 10 Cal.App.2d 710, 52 P.2d 518.

[12] In the instant case appellant testified that he saw no cars coming from his left, while respondent testified that several cars were approaching from the left, the headlights of which more or less blinded him. The jury may have disbelieved appellant's testimony that there were no cars approaching from his left, and may have accepted as true respondent's testimony to the contrary, and may have determined that appellant as he crossed the street continued to watch the machines approaching from his left and neglected to look in the direction from which respondent's automobile was approaching until appellant had passed the center of the street and had arrived practically at the point of impact with respondent's car. That such a deduction would be reasonable cannot be denied, and even though other inferences could reasonably be drawn from the facts, this court is without power to substitute its conclusions for those of the trial jury. Crawford v. Southern Pac. Co., supra. The jury in the case now before us impliedly found that appellant was guilty of contributory negligence and therefore could not recover in this action, and as there is substantial evidence in the record to sustain the verdict of the jury in that regard, the judgment based upon their verdict cannot be disturbed on the ground of insufficiency of the evidence to support it.

Appellant contends that the evidence is not sufficient to sustain this verdict because the evidence for respondent is inherently improbable and because the so-called physical facts, supported by mathematical calculations, clearly demonstrate that the accident occurred because of the negligence of respondent. We are not impressed with this argument because, as was said in Nagamatsu v. Roher, 10 Cal.App.2d 752, 755, 756, 53 P.2d 174, 175, "there is no possibility of mathematical exactness in such testimony as to the position and speed of another car. As is well known, such estimates of speed and distance are only approximations and in the nature of things could not be exact. * * * As has been frequently pointed out in cases of this nature, such arguments are unreliable because they fail to take into account the human element * * *. 'Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred.'"

[13, 14] We come now to a consideration of appellant's contention that the court erred in the giving of certain instructions. The instruction first challenged reads as follows: "You are instructed that if a driver is operating an automobile with ordinary care, and if you further find from the evidence that suddenly a confusing

emergency arises without fault on his part which would naturally overpower the normal judgment of the ordinary prudent driver, such driver is not required to exercise the same degree of care as that which would be required of him under normal circumstances; but under such circumstances, the driver is required only to use that degree of care which would be used by a careful and prudent driver under the same circumstances. Therefore, if you find that at, and prior to the happening of the accident in question, Mr. Keen was operating his automobile with ordinary care under all the circumstances, and that the plaintiff, Mr. Fischer, appeared in the roadway at such a time and in such a manner as to constitute a confusing emergency as I have just defined it to you, then Mr. Keen was not required to exercise the highest degree of care, but only that degree of care which would be used by a person of ordinary prudence under such circumstances, and would not be required to exercise the same calm judgment as would be required of him under normal circumstances, and would not be negligent in so acting if he used such care, even if you do find that he made some error of judgment or that some other course of conduct on his part might have avoided the accident."

It was respondent's theory, both in his answer and by his testimony, that without fault upon his part he was suddenly confronted with a perilous situation when appellant suddenly appeared out of the darkness directly in the path of his machine and only 4 feet ahead of it. In this state of the pleadings and the evidence, an instruction on the doctrine of sudden peril was a proper one. Raymond v. Hill, 168 Cal. 473, 143 P. 743; Kohlhauer v. Bronstein, 21 Cal.App.2d 4, 6, 67 P.2d 1078; Graham v. Consolidated M. T. Co., 112 Cal.App. 648, 297 P. 617; Nitta v. Haslam, 138 Cal.App. 736, 33 P.2d 678. Respondent was entitled to have this theory presented to the jury. Appellant earnestly contends that there was no evidence in the case supporting such instruction. Even though we concede this to be true, the instruction related solely to the acts of the driver of the car, and the claim of appellant that it was negligently operated. The challenged instruction was not in any way directed to the question of contributory negligence of appellant, and he was not, therefore, prejudiced by the giving of the same, even if it was unsupported by the evidence, a fact which we do not believe is borne out by the record.

[15] We find no error in the giving of instruction No. 35. By it the jury was advised that even though a pedestrian has the right of way, he cannot proceed blindly and in reckless disregard of obvious danger, but must exercise ordinary care to avoid a collision if the same could be avoided by the exercise of such care. The two other instructions, numbered 20 and 21, respectively, of which appellant complains, were manifestly correct statements of the law and were applicable to the issue of contributory negligence on the part of the plaintiff as presented by the pleadings and raised by the evidence.

For the reasons herein stated, the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.



43 Cal.App.2d 330

GALBREATH et al. v. DINGLEY et al.

Civ. 2605.

District Court of Appeal, Fourth District, California.

March 4, 1941.

Rehearing Denied April 1, 1941.

Hearing Denied May 1, 1941.

1. Taxation ⇐614

Proceedings on tax sales are in invitum, and every essential step leading to the execution of a tax deed must be strictly followed or the deed executed pursuant thereto will be void. Pol.Code, §§ 3764, 3771a, 3897.

2. Statutes ⇐225
Taxation ⇐676

The statute relating to tax sales made in June of each year under addenda to delinquent tax list, the statute stating that no bid for property sold for taxes will be accepted for less than amount of all taxes, penalties, and costs due, and the statute relating to tax sales of property deeded to the state for nonpayment of taxes, must be read and considered together, and a sale

made under the latter statute must be made in accordance with the provisions of the two former statutes, and hence no bid could be received for one-half of amount due and a second bid for the other half. Pol.Code, §§ 3764, 3771a, 3897.

3. Taxation ⇐761

Under statutes relating to the sale of land for taxes and stating that no bid for land will be accepted for less than amount of all taxes, penalties, and costs due, where certain land was assessed as a whole, two deeds reciting sale in undivided one-half interests to each of two purchasers were void, and purchasers acquired no title thereunder. Pol.Code, §§ 3764, 3771a, 3897.

4. Taxation ⇐684(4)

Entries in tax collector's books that certain land was sold by him for taxes in undivided interests to two persons were "prima facie evidence" that sale was made in that manner. Code Civ.Proc. §§ 1920, 1926; Pol.Code, §§ 3764, 3771a, 3897.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

5. Taxation ⇐817

Where entries in tax collector's books stated that land was sold for taxes by him in undivided interests to two persons, and collector testified that he sold land to one of those persons, that testimony at best raised a conflict for the trial court to determine. Code Civ.Proc. §§ 1920, 1926; Pol. Code, §§ 3764, 3771a, 3897.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action to quiet title to realty by J. W. Galbreath and another against W. E. Dingley and others, wherein defendants filed a cross-complaint. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Wagy & Hulsy, of Bakersfield, for appellants.

Clark Clement, of Lemoore, for respondents.

KLETTE, Justice pro tem.

This is an action by J. W. Galbreath and L. J. Wyseur, plaintiffs and Appellants, to quiet title to certain real property. The complaint was in the usual form of a quiet title action. The answer and cross-complaint of defendants and respondents denied the allegations of the complaint, alleged that on March 11, 1938, the tax collector of Kern county sold an undivided one-half interest in the real property to each of the appellants, and executed and delivered to them two deeds conveying to each an undivided one-half interest to the real property; that the real property was never assessed nor sold to the state, in undivided interests; that they were the owners of the property; that they tendered and offered to pay appellants all sums paid by them, with interest; and prayed that title be quieted in them.

At the trial, May 26, 1939, appellants produced and placed in evidence a tax deed from the tax collector, bearing date, March 7, 1938, bearing acknowledgment the day before the trial, and delivered and recorded on the morning of the trial, which deed purported to convey all of said real property to J. W. Galbreath, one of the appellants. It was stipulated in open court that the property in question had not been assessed, or sold to the state, in undivided interests, and that the notice advertising the property for sale described it as a whole; that the two deeds issued to appellants conveyed an undivided one-half interest to each. The tax collector testified that he made the sale on March 7, 1938, to J. W. Galbreath, for $375; that L. J. Wyseur did not bid on the property; that he made two deeds conveying a half interest to each of the appellants; that on the advice of the district attorney he executed the third deed to Galbreath conveying the entire property to him; that neither of the appellants had reconveyed to him any interest received by them under the first two deeds. The book of the tax collector, in which he kept the official record of lands sold to the state, and then resold to individuals, was produced in court, and recited that an undivided one-half interest had been sold to each of the appellants.

The trial court found in favor of respondents and rendered judgment quieting title in them, and requiring that they repay appellants the $375.00 paid out by them, with interest. From this judgment plaintiffs and appellants have appealed.

[1] The rule is firmly established that the proceedings on tax sales are in invitum, and that every essential step leading to the execution of a tax deed must be strictly followed or the deed executed pursuant thereto will be void. Numitor Gold Mining Co. v. Katzer, 83 Cal.App. 161, 256 P. 464;

Russell v. Mann, 22 Cal. 131; Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, L.R.A. 1915C, 492; Dougery v. Bettencourt, 214 Cal. 455, 6 P.2d 499.

[2] In section 3771a, Political Code, which relates to tax sales made in June of each year, under the addenda to the delinquent tax list, it is provided as follows: "On the day and hour fixed for the sale in accordance with subdivision two of section three thousand seven hundred sixty-four of this code, all property which has not been redeemed from the sale to the state or the sale thereon canceled, shall be sold by the tax collector at public auction to the highest bidder for cash in lawful money of the United States; but no bid shall be accepted at such sale for a sum less than the amount of all taxes, penalties and costs due as shown in the advertised list; * * *."

The notice of sale provided for in section 3764, Political Code, above referred to, provides that the tax collector will: "Sell or offer for sale at public auction to the highest bidder, for cash, in lawful money of the United States, the several parcels and lots of property hereinafter described upon which date five years will have elapsed from the date of the sale of said property to the state. No bid for said property will be accepted for less than the amount of all taxes, penalties and costs due on said property for the year the same was sold to the state * * *."

Section 3897, Political Code, which relates to tax sales under authorization of the board of supervisors and the state controller, of property deeded to the state for nonpayment of tax, provides that the tax collector shall "sell at private sale or public auction to the highest bidder for cash in lawful money of the United States, or by the contract of sale", etc. It is silent as to the manner of conducting the sale, as provided in section 3764 and 3771a, Political Code, above referred to. We believe, therefore, that these several sections of the Political Code must be read and considered together, and that the sale made under section 3897, Political Code, must be made in accordance with the provisions of sections 3764 and 3771a of the Political Code. Or to state it more directly: "No bid for said property will be accepted for less than the amount of all taxes, penalties and costs due on said property for the year the same was sold to the state", "as shown in the advertised list". Since no bid could be received for "less than the amount of all taxes, penalties and costs due", it naturally follows that no bid could be received for one-half of the amount, and a second bid for the other one-half thereof.

In an early California case (Roberts v. Chan Tin Pen, 23 Cal. 259) it was held that when the assessment is not of an undivided interest, but of an entire tract or parcel of land, the tax collector has no power or authority to sell an undivided interest therein for the nonpayment of tax. While a number of cases from other jurisdictions have been called to our attention, which hold that where land has been assessed as an entirety it cannot be sold in undivided interests, our attention has not been called to any California case so holding. We do find cases, however, which in passing upon sections 3764 and 3897, supra, said: "When the law speaks of the sale of 'the property,' it means all of the land, and, when it says that the land shall be sold to the 'highest bidder,' it means him who will make the highest cash bid for all the property." Fox v. Wright, 152 Cal. 59, 91 P. 1005, 1006; see, also, Merchants' Trust Co. v. Wright, 161 Cal. 149, 118 P. 517.

[3] Since the land in question was assessed as a whole, and the two deeds issued to appellants on March 11, 1938, recite the sale thereof in undivided one-half interests to each, said deeds were void, and appellants acquired no title thereunder.

[4, 5] We come now to a consideration of the deed which was issued by the tax collector on May 25, 1939, and delivered on the day of the trial to J. W. Galbreath, one of the appellants. We are at once confronted with the inconsistency in the evidence of the tax collector. His oral testimony was that he sold the property to J. W. Galbreath for $375. The record book of his office, which he was required by law to keep, showed that an undivided one-half of the property was sold to J. W. Galbreath, and an undivided one-half to L. J. Wyseur.

If he sold the property to Galbreath, then this deed might be good to convey title to him, unless there were other valid legal objections thereto. If he sold an undivided one-half to each of the parties, then the deed of the entire property to Galbreath would be void. Which shall prevail, the written records of the office, or the oral testimony of the tax collector?

Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a

duty specially enjoined by law, are prima facie evidence of the facts stated therein. Secs. 1920, 1926, Code Civ.Proc. The entries in the books of the tax collector that the property was sold by him in undivided interests to two persons, are prima facie evidence that the sale was made in that manner. Was this overcome by the testimony of the tax collector that he sold to Galbreath alone? We think not. At best it raised a conflict in the evidence, which the trial court resolved in favor of respondents. There being a conflict in the evidence, we cannot disturb the finding of the court that appellants had no interest in the property.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



43 Cal.App.2d 302

McCRACKEN v. HUMMEL et al.

Civ. 2609.

District Court of Appeal, Fourth District, California.

March 1, 1941.

Hearing Denied April 26, 1941.

1. Appeal and error ⇐110

An order denying a motion for new trial is not an "appealable order". Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Mines and minerals ⇐73

An oil lease for an indefinite period creates in lessee an "estate in realty".

See Words and Phrases, Permanent Edition, for all other definitions of "Estate in Realty".

3. Mines and minerals ⇐73

Under an oil lease for an indefinite period, the relation between landowner and his lessee is similar to that between tenants in a tenancy in common.

4. Taxation ⇐338

An estate of lessee created by oil lease for indefinite period may be assessed for taxation separately from balance of the fee. Political Code, §§ 3628, 3629.

5. Taxation ⇐317(1), 414

The county assessor had duty of assessing all taxable property in county and hence was required to assess whatever interest grantor owned in oil rights in lands conveyed, and a mistake in name of person to whom oil rights were assessed would not invalidate their assessment. Political Code, §§ 3628, 3629.

6. Evidence ⇐83(1)

A public official is presumed to have performed his duty.

7. Taxation ⇐776

Where grantor in deeds conveying lands reserved the oil and gas rights and there was no separate tax assessment of such oil rights, and assessment for balance of fee showed no reduction in assessment because of separate ownership of the oil rights, the assessed valuation placed on lands by assessor included the assessed valuation of oil rights, and hence person who deraigned his title to lands through tax deeds also owned the oil rights as against contention that grantor's successors in interest owned such oil rights. Political Code, §§ 3628, 3629.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Courtney McCracken against Edna Daniels Hummel, etc., and others to quiet title to land. From an adverse judgment, and from an order denying their motion for a new trial, defendants appeal.

Judgment affirmed, and attempted appeal from order dismissed.

Hearing denied; CARTER, J., dissenting.

Hugo McKinley, of Delano (Vernon F. Gant, of Modesto, of counsel), for appellants.

Bradley & Bradley and Leroy McCormick, all of Visalia, for respondent.

MARKS, Justice.

[1] Plaintiff brought this action to quiet his title to two parcels of land in Tulare county. He had judgment and this appeal followed. Defendants have attempted to appeal from the order denying their motion for new trial which is not an appealable order. Sec. 963, Code Civ.Proc.

Plaintiff deraigns his title through tax deeds. No question is raised as to their validity, but only as to the quantity of the

estate they conveyed. Defendants claim they are the owners of "the oil and gas rights" in the land in controversy. We will assume that by the expression "the oil and gas rights" is meant the oil and gas in place, if any, together with the right to enter upon the land, drill for those substances and remove them, if found.

In January, 1915, J. S. Daniels, now deceased, acquired the fee title to the half section of land here in question. On October 9, 1923, he conveyed half of the property to Edna Hummel and the other half to Ruth G. Daniels. In each deed he reserved to himself "the oil and gas rights" in the properties. The defendants are (1) the personal representative; (2) the heir at law; and (3) the personal representative of a deceased heir at law of Daniels.

The properties were respectively assessed to Edna Hummel and Ruth G. Daniels. No deductions for the oil and gas rights which had been reserved by Daniels were made in these assessments. These oil and gas rights were never separately assessed. The taxes were not paid and became delinquent. Plaintiff, through a deed to himself and mesne conveyances from others, became the owner of the tax title.

The sole question presented is whether plaintiff, through his tax title, or defendants as successors to any interest owned by J. S. Daniels, are the owners of the oil rights in the property. We are cited to no California case deciding the question. Defendants rely principally on Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 284 P. 1072, where the assessor had assessed mineral rights as personal property, which was held to be erroneous. We get little assistance from this case.

[2, 3] It is now settled that an oil lease for an indefinite period creates in the lessee an estate in real property. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Pimentel v. Hall-Baker Co., 32 Cal.App.2d 697, 90 P.2d 588; Andrews v. W. K. Co., 35 Cal.App.2d 41, 94 P.2d 605. Under such a lease the relation between the landowner and his lessee is similar to that between the tenants in a tenancy in common. Payne v. Callahan, 37 Cal.App.2d 503, 99 P.2d 1050.

[4] It is also well settled that the estate of the lessee created by such an oil lease may and perhaps should be assessed separately from the balance of the fee. Central Mfg. Dist., Inc. v. State Board of Equalization, 214 Cal. 288, 5 P.2d 424; Texas Co. v. Moynier, 129 Cal.App. 738, 19 P.2d 280; Barnsdall Oil Co. of California v. Merriam, D.C., 8 F.Supp. 185. While this rule is recognized, we are cited to no case holding an assessment void if the assessor assesses the total value of the two estates in the land to the owners of the fee as distinguished from the owner of the oil rights.

As all proceedings in connection with the various assessments and sales of the properties occurred prior to the adoption of the Revenue and Taxation Code, our citations will be to sections of the Political Code.

Subject to exceptions not important here, section 3628 of the Political Code makes it the duty of a county assessor to assess all taxable real property in the county "to the persons by whom it was owned or claimed, or in whose possession or control it was", at noon on the first Monday in March of each year. It also provides that no mistake in the name of an owner or supposed owner shall render an assessment invalid and that nothing in the section shall release an owner from his duty to file a statement of his taxable property with the assessor.

Section 3629 of the same code places on each owner of taxable property the duty of filing with the county assessor a statement disclosing all of his property which is subject to taxation.

In Webster v. Somer, 159 Cal. 459, 114 P. 575, it was held that the fact that the assessor made a mistake in the name of an owner to whom he assessed property would not invalidate an assessment. See Palomares Land Co. v. County of Los Angeles, 146 Cal. 530, 80 P. 931; Hanson v. Goldsmith, 170 Cal. 512, 150 P. 364.

In Traverso v. Tate, 82 Cal. 170, 22 P. 1082, it was said that it was proper to assess the full value of property to one of two tenants in common who was in possession.

By analogy, the cases of Spring Valley Water Co. v. County of Alameda, 24 Cal. App. 278, 141 P. 38, and Spring Valley Water Co. v. County of Alameda, 88 Cal. App. 157, 263 P. 318, are helpful. The Spring Valley Water Company had purchased certain water rights from riparian land owners and had diverted the water for use elsewhere. The assessor assessed the lands to the owners of the fees without any deduction for the riparian water rights that had been severed. He also assessed the

value of the riparian rights to the Spring Valley Water Company. That company paid the taxes under protest and brought suit to recover the sums so paid. Judgments in its favor were affirmed on the ground that the riparian lands having been assessed without any deduction for the water rights that had been sold, established that the assessments included the value of the water rights and that when the taxes on the lands, levied pursuant to those assessments, had been paid, the taxing power had been exhausted; that the assessment of the same water rights to the Spring Valley Water Company constituted double taxation which was prohibited by law. In the last case (88 Cal.App. 157, 263 P. 318) assessments levied on the riparian rights for certain districts in Alameda county were held void for additional reasons.

[5-7] It was the duty of the assessor of Tulare county to assess all taxable property in that county. Thus it was his duty to assess whatever interest J. S. Daniels owned in the oil rights in the lands in question. A mistake in the name of the person to whom those oil rights were assessed would not invalidate their assessment. The presumption that a public official has performed his duty is too well established to need the citation of supporting authorities. As there was no separate assessment of those oil rights, and as the assessments of the balance of the fee showed no reduction in the assessments because of the separate ownership of those oil rights, we must conclude that the assessed valuation placed on the properties by the assessor included the assessed valuation of the oil rights. Any other conclusion would have to be based on the assumption, without supporting evidence, that the assessor failed to perform his duty and failed to assess taxable property situated within his county. This we are not permitted to do without evidence showing such a breach of duty.

As the oil rights were assessed by including their valuation in the assessed valuation placed on the properties, it follows that plaintiff became the owner of them through the tax deeds which he and his predecessors in interest received.

The judgment is affirmed. The attempted appeal from the order denying the motion for new trial is dismissed.

We concur: BARNARD, P. J.; GRIFFIN, J.

In re FRAZER'S ESTATE.
FRAZER et al. v. TRACY.
Civ. 12956.

District Court of Appeal, Second District, Division 1, California.

March 4, 1941.

1. Executors and administrators ⇐400

Where legatee, to whom testator specifically willed his house provided funeral expenses were paid, agreed to sale of house because of fraudulent representations of administrator with will annexed that sale was necessary to pay expenses of estate, proceeds of sale were properly ordered distributed to legatee, rather than testator's heirs at law. Probate Code, § 300.

2. Courts ⇐202(5)

An order of probate court denying a motion for new trial is not appealable. Code Civ.Proc. § 963, subd. 3; Probate Code, §§ 1233, 1240.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of C. O. Frazer, deceased, wherein Alice A. Tracy filed a contest to final account of Edwin F. Frazer, as administrator with the will annexed. From a decree, entered upon settling of a final account, by which probate court distributed to contestant all property remaining in decedent's estate, and from an order denying a motion for a new trial, Edwin F. Frazer and another appeal.

Order settling final account and decreeing distribution affirmed; attempted appeal from order denying motion for new dismissed.

Charles M. Johnson, of Los Angeles, for appellants.

Lucile Conrey, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal from a decree, entered upon the settling of a final account, by which the probate court distributed to respondent all property remaining in decedent's estate. It is filed by two brothers Jacob M. and Edwin F. Frazer, the only heirs at law of the decedent, C. O. Frazer, also known as Charles O. Frazer. Two

days before his death, Charles had signed his will in the presence of his brothers, in the following form:

"To whoever it may concern I hereby Thursday Sep. 11 1937 I give one Alice A. Tracy my House and lot 4 Block, G. Grider and Hamilton's Vernon park in City of Los Angeles Cal as per map Recorded in Book 4 Page 79-80 For Services Rendered in my late Illness Providing my Funeral expenses are Paid

"C. O. Frazer

"Witness: J. M. Frazer

"Edwin F. Frazer"

Shortly thereafter, on September 23, 1937, Edwin offered this will for probate, was appointed administrator with the will annexed, and has acted as such ever since. In fact, he appears in that capacity upon this appeal. On May 17, 1939, said administrator petitioned the court for an order confirming sale of the real estate mentioned in the will of Charles, reciting "That the main assets of said estate consist of the real property hereinafter described, and that there is not money sufficient to pay the expenses of administration, and that money is necessary for such purposes." The order confirming the sale was made on June 5, 1939. The selling price was $700 and various expenses arising from the sale and amounting to $77.75 brought a net return to the estate of $622.25. The amount distributed to respondent was $25.70 more than that, namely, $647.95. It appears from this that prior to the sale there was on hand for distribution, or should have been, $25.70, with all bills paid. In other words, the effect of the sale was to divest respondent of any possibility of securing possession of this real estate which had been willed to her, and to incur charges in connection with the sale amounting to $77.75. The court, in passing upon a claim for extraordinary services performed in connection with the sale, disallowed fees of $50 each to the administrator and his attorney. We note also that the trial judge found, "that ever since the first day of May, 1938, the said administrator with the will annexed has represented to Alice A. Tracy that the estate needed from $100 to $300 in addition to assets of the estate other than the said real estate in order to pay the expenses of the estate and represented to this court and to Alice A. Tracy that the estate could not be closed unless the said real estate specifically devised to Alice A. Tracy was sold and a part of the proceeds thereof applied to estate expenses; that the said administrator * * * has never accounted to Alice A. Tracy for the money and property received and spent; that relying upon the said representation Alice A. Tracy agreed to the sale of the said real estate and made no objection to the sale thereof in the court herein; that the said representation was false and untrue in that the said estate had sufficient assets which when added to the rental from the said real estate was sufficient to pay all of the proper debts and expenses of the estate; that as a result of said false representations and the said needless sale unnecessary items of expense were incurred and the said sale and the services of said attorney and the administrator of the will herein in connection with the said sale were a disservice to the said estate and that the said extraordinary fees claimed therefor are not proper items of credit."

[1] This terse summary by the court presents a picture which is supported by the evidence. It disposes satisfactorily of all objections raised by the appellants, and explains why the order, instead of passing to respondent the real estate devised by the will, distributed cash to her.

As provided in section 300 of the Probate Code, title to the real estate involved in this case passed to respondent as specific devisee, and since the trial court found "that Alice A. Tracy is not personally obligated to pay the funeral expenses of decedent as a condition of her right to receive the said property, but that she is entitled to receive it or such part of the proceeds thereof as remains after the administrator with the will annexed has paid the funeral expenses from other assets of the estate, * * *" we feel under the circumstances appellants are in no way aggrieved by this decision which bars them from taking such proceeds as heirs at law of decedent to the total exclusion of testator's beneficiary.

[2] A purported appeal was taken in this cause from the order of the trial court denying appellants' motion for a new trial. There is no provision under our law for an appeal from such an order. It is not appealable under section 963, Code of Civil Procedure ("Cases in which appeal may be taken from superior court"), which provides in subdivision 3 that appeals may be taken "From such probate orders and decrees as are made appealable by the provisions of the Probate Code." Section

1240 of the latter code lists the instances in which an appeal may be taken from an order of the probate court and an order denying motion for a new trial is dismissed. tioned therein. By section 1233, Probate Code, the provisions of Part II of the Code of Civil Procedure are applicable to all probate matters relating to new trials except as otherwise provided in the Probate Code. In considering the appeal which was taken in this case from the order settling final account and decreeing distribution we have felt at liberty under section 956 of the Code of Civil Procedure to review and sustain the order by which the motion for a new trial was denied, although in our opinion the trial court would have been justified in dismissing that motion as unauthorized by section 1231 of the Probate Code. On the question of an attempted appeal from an order denying a motion for a new trial, we refer to Gray v. Cotton, 174 Cal. 256, 162 P. 1019, where almost twenty-five years ago the court held such an appeal unauthorized. (See, also, cases cited in McKinney's New Calif.Digest, Appeal and Error, section 74.)

The attempted appeal from the order denying a motion for new trial is not men- The order settling final account and decreeing distribution is affirmed.

We concur: YORK, P. J.; DORAN, J.



43 Cal.App.2d 298

PEOPLE v. CHATHAM.

Cr. 1745.

District Court of Appeal, Third District, California.

March 1, 1941.

Rehearing Denied March 15, 1941.

Hearing Denied March 31, 1941.

1. Automobiles ⇐315

The Legislature may do all it can to discourage menace resulting from one driving under influence of intoxicating liquor, and may entirely forbid use of highway to intoxicated person, and to enforce such prohibition may penalize such person, even to the extent of increasing punishment for unlawful act upon the highway committed by intoxicated driver over one not in such condition. Vehicle Code, § 501, St.1935, p. 174; Const. art. 1, §§ 11, 21.

2. Automobiles ⇐316
Constitutional law ⇐205(1), 235, 292
Statutes ⇐72

The statute making it a felony to drive vehicle while under influence of intoxicating liquor so that his act or neglect proximately causes bodily injury to another, though same act by sober operator would constitute a misdemeanor only, does not deny "equal protection of the law" or "due process of law", nor violate constitutional provisions requiring uniform operation of general laws and prohibiting grant of special privileges or immunities. Vehicle Code, § 501, St.1935, p. 174; Const.Cal. art. 1, §§ 11, 21; U.S.C.A. Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Equal Protection of the Law".

3. Automobiles ⇐316
Constitutional law ⇐205(1)
Statutes ⇐72

An automobile is a "dangerous instrumentality" and in the hands of a drunken man is likely to become a "deadly weapon", as affecting constitutionality of statutes penalizing driving while intoxicated. Vehicle Code, § 501, St.1935, p. 174; Const. art. 1, §§ 11, 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Instrumentality" and "Deadly Weapon".

4. Criminal law ⇐829(1)

An instruction that each side was entitled to independent judgment of every juror, and that no juror is required to surrender his honest convictions for sole purpose of agreeing upon a verdict, sufficiently covered principles contained in refused instructions upon juror's right to adhere to honest convictions and to refuse to surrender conviction for mere purpose of agreeing upon conviction.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Robert Chatham was convicted of driving a vehicle while under influence of intoxicat-

ing liquor and causing bodily harm to another, and he appeals.

Affirmed.

Preston & Gibson, of Ukiah, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PULLEN, Presiding Justice.

Appellant was convicted of a violation of section 501 of the Vehicle Code, St.1935, p. 174 (driving a vehicle while under the influence of intoxicating liquor and causing bodily harm to another), and now prosecutes this appeal.

The facts are not in dispute. As appellant was driving his automobile around a curve in the highway he crossed the center of the highway, marked by a white line, over on to the left side thereof and struck a motorcycle rider coming in the opposite direction, inflicting severe injury. It is not disputed upon this appeal that appellant was intoxicated.

The principal point relied upon for reversal is that section 501 of the Vehicle Code is unconstitutional, being violative of article I, section 11 of the state Constitution, which requires all laws of a general nature shall have a uniform operation, and also of section 21 of the same article, which prohibits any citizen or class of citizens being granted privileges or immunities not accorded all citizens, and of the provisions of the Constitution of the United States, Amend. 14, granting to everyone the equal protection of and due process of the law.

Section 501 of the Vehicle Code reads in part as follows:

"Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony * *."

It seems to be the contention of appellant that to punish, as a felon, an intoxicated driver of an automobile for doing an act forbidden by law, whereby bodily injury is caused to another, while for the same act by a sober operator the penalty would have been a misdemeanor only, is violative of the several constitutional inhibitions above referred to. As an illustration appellant compares two men, one intoxicated, one sober, committing exactly the same act, each causing identical injury to another. What reasonable ground is there, he asks, to find one guilty of a misdemeanor, and the other guilty of a felony? He also contends that the intoxication of the driver need not have anything to do with the injury in order to establish the offense, and therefore contends the distinction which the legislature has endeavored to make results from no natural or constitutional distinction, but is arbitrary and unreasonable.

As pointed out in the dissenting opinion by Mr. Justice Houser in People v. Smith, 14 Cal.App.2d 548, 58 P.2d 684, before section 501 of Vehicle Code may furnish the basis for a valid judgment of conviction it must appear in evidence that the defendant was (1) driving an automobile (2) while under the influence of intoxicating liquor, (3) and while in that condition he committed some act forbidden by law, and (4) that such act or neglect proximately caused bodily injury to some one.

In People v. Levens, 28 Cal.App.2d 455, 82 P.2d 698, it is again indicated that to sustain a conviction under section 501 of the Vehicle Code, a defendant, while driving an automobile and being under the influence of intoxicating liquor, must have committed some forbidden act, which proximately caused bodily injury to another. This offense is distinct from that of driving while intoxicated (sec. 502, Vehicle Code) and is a more serious offense in that so driving in an intoxicated condition proximately caused bodily injury to another.

[1] It is a well-recognized fact that one under the influence of intoxicating liquor is dangerous to others upon the highways, and the legislature is within its rights in doing all it can to discourage such a menace. It may entirely forbid, to one in an intoxicated condition, the use of the highway, and to enforce such prohibition may penalize one, even to the extent of increasing the punishment for an unlawful act upon the highway committed by an intoxicated driver over one not in such a condition.

[2] There is no reason why the state may not add a further penalty where an intoxicated driver, insisting upon driving an automobile in the face of statutes prohibiting such conduct, commits an unlawful act, or neglects to perform some duty imposed by law, and as a result some innocent traveler is injured by such wilful violation of the law. We have a law imposing a greater punishment upon an ex-convict for possessing a concealed weapon than is im-

posed upon another; drug addicts are classified as such and greater punishment imposed upon them in certain instances. The theory of the legislature in imposing additional penalties upon intoxicated persons or drug addicts might well be that such condition sets in motion other causes concurring in the injury to the other person.

Appellant argues it makes no difference to the person injured whether he was hurt by a sober man or an intoxicated man, and contends that the receiving of bodily injuries is the gist of the offense. In this, however, appellant is in error—it is not the receiving of the injury that concerns the state, but the *causing* of such injuries which the state seeks to minimize.

As said in People v. Ekstromer, 71 Cal. App. 239, 235 P. 69, 71, in discussing section 112 of the California Vehicle Act, the predecessor of the present section 502 of the Vehicle Code: "Section 112 of the California Vehicle Act was designed to protect the public from the menace of automobiles operated upon the public highway with inadequate or no efficient control, in a world of traffic difficult of management under normal conditions, and should be liberally construed to effect its purpose. We think that such legislation is well in line with, and motivated by, the same impulses that inspired the enactment of statutes prohibiting railroad employees from drinking intoxicants while on duty; * * *".

[3] An automobile is a dangerous instrumentality, and in the hands of a drunken man is likely to become a deadly weapon.

[4] Appellant also claims the court should have given two proffered instructions, upon the right of a juror to adhere to his honest convictions, and to refuse to surrender such conviction for the mere purpose of agreeing upon a conviction. The court gave the following instruction which fully covered the principles contained in the refused instructions:

"I charge you, members of the jury, that it is your duty to reason together and to try honestly and conscientiously to agree upon a verdict. Each side is entitled to the independent judgment of every juror. No juror is required by law to surrender his or her honest convictions for the sole purpose of agreeing upon a verdict. It is the duty of every juror to carefully consider all the evidence in the case and to attempt to arrive at a true and just verdict based upon the evidence and the instructions of the court, and in arriving at your verdict you and each of you have the right to stand by your own independent judgment as to the weight, sufficiency, and effect of the evidence in the case."

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.



43 Cal.App.2d 270

MAURICE v. STATE.

Civ. No. 6512.

District Court of Appeal, Third District, California.

Feb. 28, 1941.

Hearing Denied April 26, 1941.

1. Master and servant ⇐107(8)

A violation of the Federal Safety Appliance Act constitutes "negligence per se" under the Federal Employers' Liability Act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 1 et seq.; Federal Safety Appliance Act § 1 et seq., 45 U.S.C.A. § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

2. Commerce ⇐27(2)

State, operating "belt railroad" which received and transported cars and freight offered it by interstate rail carriers, steamship companies, and industrial plants along water front of San Francisco Harbor, with wharf and track connections and direct service to industrial plants, was engaged in "interstate commerce" by rail within Federal Safety Appliance Act, though state maintained no freight stations, issued no bills of lading, and was engaged only in moving cars at flat rate. Federal Safety Appliance Act § 1 et seq., 45 U.S.C.A. § 1 et seq.; U.S.C.A. Const. art. 1, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

3. Master and servant ⇐107(8)

Federal Safety Appliance Act was applicable to state operating railroad as common carrier in interstate commerce, not-

withstanding failure of statute specifically to mention state-owned railroad. Federal Safety Appliance Act § 1 et seq., 45 U.S.C.A. § 1 et seq.

4. Statutes ⇐185, 233

Intention of Congress to make regulatory act applicable to states, if fairly inferred from act, should not be disregarded because not explicitly stated, notwithstanding rule of construction that sovereign is presumptively not intended to be bound by its own statutes unless named therein.

5. States ⇐191(1)

State by engaging in interstate commerce by rail thereby waived any right it may have had as a sovereign state to freedom from suit with respect thereto without its consent, and was liable in civil action for injury to employee resulting from violation of Safety Appliance Act, where injured employee had complied with statute requiring presentment of claim to the State Board of Control. Pol. Code, § 688; Federal Employers' Liability Act § 1 et seq. and § 51, 45 U.S.C.A. § 1 et seq. and § 51; Federal Safety Appliance Act § 1 et seq., and § 9, 45 U.S.C.A. § 1 et seq., and § 9; U.S.C.A.Const. art. 1, § 8.

6. Master and servant ⇐111(1)

In determining whether the movement of freight cars constitutes a "train movement" rather than a "switching operation" within provisions of Safety Appliance Act requiring train to be equipped with a certain percentage of power brakes under engineer's control, the decision turns upon the particular facts of the case and the controlling test of statute's application lies in the essential nature of the work being done. Federal Safety Appliance Act § 1 et seq., and § 9, 45 U.S.C.A. § 1 et seq., and § 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Train Movement".

7. Appeal and error ⇐1012(1)

The District Court of Appeal may not set aside a finding of trial court which is supported by substantial evidence, even though the court believes there is more weight to the evidence adduced by opposing party.

8. Master and servant ⇐111(1)

Within provisions of Safety Appliance Act requiring train to be equipped with certain percentage of power brakes under engineer's control, a moving locomotive with cars attached is a "train" except when its operations are those of switching, classifying, and assembling cars within railroad yards for the purpose of making up train. Federal Safety Appliance Act § 1 et seq., and § 9, 45 U.S.C.A. § 1 et seq. and § 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Train".

9. Master and servant ⇐111(1)

Application of Safety Appliance Act requiring trains to be equipped with certain percentage of power brakes under engineer's control, is not limited to operations on main line tracks but applies to all trains used on any railroad engaged in interstate commerce. Federal Safety Appliance Act § 1 et seq., and § 9, 45 U.S.C.A. § 1 et seq., and § 9.

10. Master and servant ⇐278(6)

In action by employee of terminal railroad for injuries sustained while engaged in moving a string of 45 cars drawn by a locomotive across several city streets from one switching yard of terminal railroad to another to be delivered to transcontinental railroad line, evidence was sufficient to sustain trial court's finding that such movement of cars was a regular "train movement", rather than a switching operation, within meaning of the Safety Appliance Act requiring train to be equipped with certain percentage of power brakes under engineer's control. Federal Safety Appliance Act § 1 et seq., and § 9, 45 U.S.C.A. § 1 et seq., and § 9.

11. Master and servant ⇐280

In action by railroad employee for injuries resulting from operation of train in violation of Safety Appliance Act requiring certain percentage of cars to be equipped with power brakes under engineer's control, evidence, that when employee complained of defective condition of air brakes yardmaster directed him to move train regardless of defective condition, sustained trial court's finding that employee did not "assume the risk" of injury. Federal Safety Appliance Act § 1 et seq. and § 9, 45 U.S.C.A. § 1 et seq. and § 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumption of Risk".

12. Master and servant ⇐222(1)

The rule of "assumption of risk" has no application where employee is acting under the orders of his employer.

13. Master and servant ⇐228(1)

In action against railroad company for injuries sustained by employee due to operation of train with defective brakes in violation of Safety Appliance Act, under the express provisions of Federal Employers' Liability Act, contributory negligence of employee, if any, would not defeat recovery. Federal Employers' Liability Act § 3, 45 U.S.C.A. § 53, and Federal Safety Appliance Act § 9, 45 U.S.C.A. § 9.

14. Courts ⇐489(9½)

Under express provisions of Federal Employers' Liability Act, state court had jurisdiction of action against state for injuries sustained by employee of "belt railroad" owned and operated by state, and which was engaged in interstate commerce by rail. Federal Employers' Liability Act §§ 6, 51, 45 U.S.C.A. §§ 51, 56.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Thomas W. Maurice against the State of California for personal injuries allegedly sustained by plaintiff while in the employ of defendant. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Clifton Hildebrand and Charles C. McLeod, both of Oakland, Goodman & Brownstone, of San Francisco, and Sheridan Downey, Jr., of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Lucas E. Kilkenny, Deputy Atty. Gen., for respondent.

TUTTLE, Justice.

This action was brought to recover damages for personal injuries received by respondent while in the employ of defendant. A trial was had before the court. Findings were made in favor of respondent, and judgment in the sum of $15,525 was entered. The appeal is from the judgment.

The complaint sets forth two causes of action. The first is based upon ordinary negligence, while the second is based upon negligence arising out of a failure of appellant to comply with the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. chapter 2, § 51 et seq., Federal Safety Appliance Act, 45 U.S.C.A., chapter 1, § 1 et seq., and orders of the Interstate Commerce Commission promulgated thereunder. The facts alleged are substantially the same as those appearing in the summary which is given later.

The act first above mentioned is hereafter referred to as the "F.E.L.A.", while the second is referred to as the "F.S.A.A." Under the former, section 51, an employee is entitled to recover from the railroad "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

[1] The second act, section 9, provides that "whenever, as provided in this chapter, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train * * *." The Interstate Commerce Commission is given power to increase the minimum percentage of cars to be operated by such brakes. This was done by an order raising the percentage to 85 per centum. A violation of the F.S.A.A. is negligence under the provisions of F.E.L.A. San Antonio & A. P. Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110, affirming, Tex.Civ.App., 166 S.W. 24. Such violation is negligence per se. See numerous authorities under note 331, page 213, 45 U.S.C.A. It is an undisputed fact here that less than 85 per centum of the cars in question were so equipped and operated as to comply with the terms of the F.S.A.A. We thus start with the premise that a cause of action for damages under the second count was made out against appellant, assuming that the court had jurisdiction and that the operation was a train movement.

The facts may be summarized as follows:

The State Belt Railroad is owned and operated by the state of California. It parallels the waterfront of San Francisco harbor and extends onto some forty-five state-owned wharves. It serves directly about 175 industrial plants, has track connection with one interstate railroad, and, by wharf connections with freight car ferries, links that and three other interstate rail carriers with freight yards in San Francisco leased to them by the state. It receives and transports from the one to the other, by its own engines, all freight cars, loaded and empty, and the freight they contain, offered to it by railroads, steamship companies and in-

dustrial plants. The larger part of this traffic has its origin or destination in states other than California. For the transportation service it makes a flat charge per car. It issues no bills of lading and is not a party to through rates. It moves the cars on instructions contained in "switch lists" made out by the delivering or receiving carrier, which pays the charge and absorbs it in its rate. The charge on cars not delivered to or received from another carrier is paid by the industry concerned. The Belt Railroad is thus a terminal railroad for the industries and carriers with which it connects, and it serves as a link in the through transportation of interstate freight shipped to or from points in San Francisco over the connecting carriers. Its service is of a public character, for hire. Excepting for rare occasions when the Southern Pacific Railroad enters upon the Belt Line tracks for the purpose of spotting cars at the southern extremity of the Belt Line tracks, no other railroad ever brings its cars upon the tracks of the Belt Line Railroad; that throughout the extent of the Belt Line tracks the said tracks are crossed at many points by public highways carrying heavy vehicular traffic; that the said tracks are likewise crossed by heavy pedestrian traffic at many points on the said Belt Line system. North of the Ferry building, at the foot of Market street, and south of the Ferry building are numbers of switching tracks upon and over which the Belt Railroad switches and delivers cars that it receives from other railroads. For approximately 2,000 feet along the frontage of the Ferry building, the Belt Railroad consists of a single track, running in front of, and closely paralleling the Ferry building. Operations north of the Ferry building are under the control of a yardmaster, and all movements are made under his orders. Operations south of the Ferry building are under the control of an assistant yardmaster, and he directs all operations south of the Ferry building. Nominally his superior is the yardmaster; but as an operating practice, the assistant yardmaster controls the work done south of the Ferry building. Switching engines located south of the Ferry building handle the switching and make the movements required south of the Ferry building. Switching engines north of the Ferry building do the switching needed north of the Ferry building, and make the required movements at that point. The Belt Line connection with the Southern Pacific is on the south side near Townsend street. At or about 7:25 on every evening, cars which were ready for delivery to the Southern Pacific and which had been switched to the north of the Ferry building, were assembled north of the Ferry building. After these cars had been so assembled, and at or about 7:30, it was the uniform practice for a switch engine to take these cars across and in front of the Ferry building and down to the Southern Pacific transfer tracks at and around Townsend street, south of the Ferry building. When the cars are thus assembled they are known in railroad parlance as a "drag".

The accident happened on October 16, 1937. During the day various cars had been picked up by different engines from the various industries and piers north of the Ferry building and connected to the Belt Railroad by switch tracks; these cars had been assembled in three separate cuts of cars, just north of the Ferry building; and by a series of movements, these cars were finally assembled into one cut, the train consisting of forty-five cars. After these cars had been assembled it was the duty of the crew, of which respondent was a member, to take these cars across town and deliver them to the Southern Pacific transfer tracks. This particular drag, which ran every night, was known as the "Southern Pacific drag", or "the cross town drag". While the Southern Pacific drag was being made up, it was found that the air connection on the twenty-eighth car from the engine of the drag was broken, and that it was impossible, therefore, to connect up the air brakes on the rear seventeen cars, so that they could be controlled by the engineer from the engine. This fact was known to the members of the crew, and the car inspector, whose duty it was to inspect these cars. The testimony shows without dispute that in spite of the fact that the rear seventeen cars could not be connected up, the yardmaster and the foreman, nevertheless, ordered the drag to proceed as it was made up. The air was connected in the first twenty-eight cars behind the engine, but was not connected in the rear seventeen cars. It appears without dispute that it was the uniform custom and practice of the Belt Line to connect the air brakes on all cross-town drags and that the only reason the air brakes were not connected on this drag was because of the defect in the twenty-eighth car. After the drag started up, respondent, who had been standing by the twenty-seventh car, walked to the rear of the drag, and, as was required

by his duties, started to climb upon the rear ladder of the last car. As the locomotive proceeded in front of the Ferry building, at a speed taken by the trial court in its opinion at five miles per hour, and estimated by the witnesses at from two to ten miles per hour, a woman suddenly stepped out on the track with her back to the locomotive. The engine foreman, who was riding on the step of the locomotive, gave an emergency stop signal, the engineer applied the air brakes, and the engine came to an immediate stop. When the engine stopped, the application of the air brakes by the engineer set the brakes on the first twenty-eight cars. By reason of the fact that the brakes on the last seventeen cars were not operated by the engineer, as a result of the stopping, a very violent slack action took place. As the slack ran in, one of respondent's hands was torn loose from the ladder on the side of the rear car, and when it rebounded and ran out, the grip of his other hand was torn loose, and he was thrown to the ground between the forty-fourth and forty-fifth cars. The slack action dislocated his shoulder and he fell head first between the cars, falling a distance of approximately eight feet. As a result of the fall, his right knee cap was completely shattered.

It is contended by appellant that the court erred in overruling the demurrer to the complaint, for the reason that there is no general liability on the part of the State for negligence of its officers and employees, and for the further reason that the State cannot be sued without its express consent. We are of the opinion that under the acts mentioned above, and the facts alleged, the State is liable, upon the theory that, by engaging in interstate commerce by rail, it has subjected itself to the commerce power of the federal government.

Respondent alleged and proved full compliance with the first paragraph of section 688 of the Political Code, which reads as follows: "Any person who has, or shall hereafter have, a claim on express contract or for negligence against the State must present the claim to the State Board of Control in accordance with the provisions of section 667 of this code. Should the claim not be allowed by the State Board of Control, the person having the claim is hereby authorized, subject to the conditions contained in this section, to bring suit against the State on such claim and to prosecute such suit to final judgment."

[2-4] In the case of United States v. California, 297 U.S. 175, 56 S.Ct. 421, 423, 80 L.Ed. 567, an action arising out of the collection of a penalty for failure upon the part of the state to comply with F. S. A. A. in the operation of the railroad here involved, it was definitely held that California, by engaging in interstate commerce by rail, subjected itself to the commerce power, Const.U.S., art. I, sec. 8, and was liable for a violation of the act last mentioned. The opinion states the question before the court, and disposes of it as follows:

"The state urges that it is not subject to the Federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, see Sherman v. United States, [282 U.S. 25, 51 S. Ct. 41, 75 L.Ed. 143], supra, Denning v. State, 123 Cal. 316, 55 P. 1000, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal act. * * * The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection. * * * Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it. * * * We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an Act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule

of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial."

Referring to the plenary power of the national government to regulate interstate commerce, the court says: "The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

[5] It would be a strange situation, indeed, if the state could be held subject to the F. S. A. A. and liable for a violation thereof, and yet could not be sued without its express consent. The state, by engaging in interstate commerce, and thereby subjecting itself to the act, must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued without its consent. The last-mentioned case so holds, and is a complete answer to the contention. The demurrer was properly overruled.

[6, 7] The Safety Appliance Act provides that any "train" must be provided with a certain percentage of power brakes operated by the engineer of the locomotive. The word "train" is not defined in the statute. Appellant contends that it was not operating a train at the time of the accident, but was merely engaged in a switching operation. The trial court found that the movement of the cars was a regular train movement, and not a switching operation. It is contended by appellant that the evidence is insufficient to sustain that finding. There are numerous decisions upon this question in the federal courts. As stated in Illinois Central R. R. Co. v. United States, 8 Cir., 14 F.2d 747, 748, "the decisions turn upon the particular facts of each case." And in United States v. Chicago, B. & Q. R. R. Co., 237 U.S. 410, 35 S.Ct. 634, 636, 59 L.Ed. 1023, it is said: "The controlling test of the statute's application lies in the essential nature of the work done." The foregoing general rule should be borne in mind in disposing of this issue. We are also governed by the general rule that if there is any substantial evidence to support a finding of the trial court, we are not at liberty to set it aside, even though we may believe that there is more weight to the evidence adduced by the losing party.

Perhaps the most succinct definition of a train within the purview of the F. S. A. A. is found in United States v. Northern Pacific Co., 254 U.S. 251, 41 S.Ct. 101, 102, 65 L.Ed. 249. There, two strings of forty and forty-eight cars respectively were moved over a connecting switch track, for a distance of approximately four miles. The movement for approximately two, out of the four, miles was over a single connecting track; and the remainder of the movement was over switch tracks. The speed of the movement was from three to eight miles per hour. No cars were taken out or set out on the trip and the movement was not a main line movement. The company contended that this was a mere switching movement for the reason that no movement over a main line track was included. The movement was not made under time table or train orders, but was made under the yardmaster's orders and no block signals were used. In holding that the movement was a train movement, subject to the provisions of the act, the Supreme Court said:

[8] "The company contended that the provision of the Safety Appliance Act did not control the operation, because this terminal road was not part of a main line; that neither passenger nor freight trains, through or local, moved on it; * * * It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that transfer trains, like those here involved, are 'trains' within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is not a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains."

[9] We are of the opinion that the evidence shows that this action does not come within the exception mentioned. The operation was not that of "switching, classifying and assembling cars within railroad yards for the purpose of making up trains." These acts had all been performed. Forty-five cars, with locomotive attached, were on their way to be delivered to the Southern Pacific yards at the south end of the Belt Line Railroad, over a single tract connecting the two switching areas of said line. There is nothing in F. S. A. A. which limits its application to operations on main line tracts. (So held in case last cited.) In the case of Louisville & J. Bridge Co. v. United States, 249 U.S. 534, 39 S.Ct. 355, 356, 63 L.Ed. 757, an engine and twenty-six cars moved from

the terminal of the Chicago & Ohio to the Ill. Central Company under the control of the defendant company, a terminal railroad. The movement was made over a zigzag course for a distance of 3,700 feet and a portion of the movement was over the main line tracks of the railroad companies. In holding that the movement was a train movement and not a mere switching movement, the court said:

"The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling and the movement of one or a few at a time for short distances, but was a transfer of the 26 cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot therefore with propriety be called a switching movement."

In Great Northern R. R. Co. v. United States, 8 Cir., 288 F. 190, 191, it is said: "The mere fact that the railroad company designates a large stretch or tract as yard does not make every operation therein a switching operation."

[10] We have examined the cases relied upon by appellant. Several of them are discussed above. It is true that the factual structure in each of the cases we have mentioned is not identical with the one here, and a somewhat plausible attempt can be made to distinguish them upon such differences. We believe, however, that the fundamental principles to be adduced from such authorities lead to the conclusion that the evidence is sufficient to support the finding that the operation here was not a switching one, but a train movement within the meaning of the F. S. A. A. The finding, therefore, had sufficient evidentiary support.

[11, 12] It is contended by appellant that respondent assumed the risk of the injury. The trial court found otherwise, and we believe that there is sufficient evidence to support such finding. Respondent testified that when he complained to the yardmaster that the defective car was in the train, the latter told him to take the cars across just as they were. The rule of assumption of risk has no application when the employee is acting under the orders of his employer. Paulsen v. McDuffie, 4 Cal.2d 111-117, 47 P.2d 709.

[13] Appellant pleaded contributory negligence as a defense to the action. While such defense might be set up with reference to the first cause of action, it is expressly provided in the F. E. L. A., 45 U.S.C.A. § 53, that it is not a defense "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[14] Finally, it is contended that the state court had no jurisdiction. F. E. L. A. expressly provides: "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 45 U.S.C.A., § 56.

The contention is without merit.

We do not deem it necessary to pass upon the question as to whether the judgment can be supported by findings based upon the first cause of action.

The record is free from error, and the findings have ample support. The judgment is therefore affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



43 Cal.App.2d 252

KELLIHER v. RAY.

Civ. 6426.

District Court of Appeal, Third District, California.

Feb. 27, 1941.

1. Witnesses ⇐216, 256

In motorist's action for injuries sustained in automobile collision at intersection, wherein a state highway patrol officer, refreshing his memory from memoranda, testified concerning length of skidmarks left on pavement by motorist's automobile, trial court erred in refusing to require officer to produce memoranda for inspection by motorist's attorney on the ground that they were confidential reports of motor vehicle department.

2. Appeal and error ⇐1047(5)

In motorist's action for injuries sustained in collision at intersection with truck

driven by defendant, wherein truck driver admitted negligence, but alleged motorist was contributorily negligent in that he was driving at an excessive rate of speed, court's error in refusing to permit motorist's attorney to examine memoranda from which highway patrolman, called as a witness by truck driver, testified as to length of skidmarks made by motorist's automobile was reversible error where there was sharp conflict as to length of skidmarks which was a fact relied upon to establish speed as bearing on question of motorist's contributory negligence.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by A. E. Kelliher against Paul Ray for injuries sustained in an automobile collision. From a judgment for defendant, plaintiff appeals.

Judgment reversed.

Lafayette J. Smallpage and Forrest E. Macomber, both of Stockton, for appellant.

Honey & Mayall and Len H. Honey, all of Stockton, for respondent.

PULLEN, Presiding Justice.

This litigation grew out of a collision which occurred about 11 o'clock on the night of May 11, 1939, between a Packard coupe, being driven by plaintiff, in an easterly direction, on the Farmington road, and a Chevrolet truck, operated by defendant, in a southerly direction, on the Jack Tone road at the intersection of these two thoroughfares in San Joaquin county.

The Farmington road is a through highway running east and west and is protected on both sides from traffic entering from the Jack Tone road, which crosses the Farmington road at right angles. In the collision between the two vehicles, plaintiff was injured and brought this action against defendant. Defendant admits negligence in that he failed to stop at the intersection as required by the established stop signs, but alleges plaintiff was contributorily negligent in that he failed to properly observe the approach of cross traffic and was, immediately prior to the collision, traveling at an excessive speed.

The evidence of speed is based largely upon the length and characteristics of skid marks on the pavement and the damage to the two vehicles.

A witness, called by plaintiff testified as to measurements taken by him of the skid marks a few hours after the accident. He also took photographs of the surroundings at the intersection, and he testified, which testimony seems to be supported by his photographs, that the skid marks were 44 feet to a point where a second skid mark appeared, which extended 31 feet 5 inches to the point of impact, or a total of 75 feet 5 inches.

A state highway patrol officer was called by the defendant, who testified he paced off the length of the skid marks and found them approximately 38 paces or 114 feet in length. He stated he made his measurements and observations shortly after the accident and reduced them to writing.

In testifying he referred to his notes, stating he based his testimony upon such notes, and that without them he could not recall what measurements he had taken as he had investigated many accidents between the date of that accident and his appearance in court.

When counsel for plaintiff asked permission to examine the notes and demanded that they be placed in evidence the witness refused to produce them upon the ground they were confidential reports of the motor vehicle department. The contention of the witness was upheld by the trial court, and it is because of the refusal of the court to direct the witness to produce these notes that reversible error is here claimed.

In Inouye v. McCall, 35 Cal.App.2d 634, 96 P.2d 386, this point was directly involved, and it was there held to be error to refuse to permit such memoranda to be examined by opposing counsel.

[1, 2] In that case the refusal to produce the notes was held to be error but not prejudicial, for the entire evidence there given by the officer was cumulative and could have been stricken out and the result would have been the same. We cannot find that to be true here. In the instant case there was a clear conflict as to the length of the skid marks, which was a fact relied upon to establish speed, and was therefore an important issue in the case.

Out of fairness to the very able trial judge who presided, it should be noted this case was tried before the opinion in the case of Inouye v. McCall, supra, was written.

The judgment must be reversed. It is so ordered.

We concur: TUTTLE, J.; THOMPSON, J.

43 Cal.App.2d 254

NAUGHTON v. RETIREMENT BOARD OF SAN FRANCISCO et al.

Civ. 11118.

District Court of Appeal, First District, Division 1, California.

Feb. 28, 1941.

Rehearing Denied March 29, 1941.

1. Municipal corporations ⇐187

Under San Francisco charter provisions relating to police pensions, where police officer dies as result of pre-existing disease of heart and it is established that disease has been aggravated and death accelerated by exertion in performing duties of office, widow is entitled to pension.

2. Mandamus ⇐105

Mandamus was available where it was alleged and shown that retirement board acted arbitrarily and clearly in abuse of discretion in denying application of widow of police officer for pension.

3. Mandamus ⇐105

Where evidence showed without contradiction that death of police officer from progressive type of heart disease was accelerated by amount of walking officer was required to do on foot patrol duty after being transferred from an office position, court, in mandamus proceeding, was justified in finding that retirement board of city in denying application to widow for pension acted arbitrarily and abused discretion.

4. Municipal corporations ⇐187

In proceeding by police officer's widow for pension, negative finding of retirement board denying pension that heart failure was precipitated by some strain other than that occasioned by walking beat must be based on something more than mere conjecture.

5. Evidence ⇐574

That death certificate covering death of police officer contained recital "Death due to natural causes" was not sufficient to sustain retirement board's decision denying officer's widow a pension where physician who made entry testified that the walking decedent was required to do in performing foot patrol duties hastened his death.

6. Mandamus ⇐168(4)

In mandamus proceeding to require retirement board to award police officer's widow a pension on ground officer's death from heart disease was accelerated by walking required by foot patrol duty, evidence did not justify denial of relief on ground that death resulted from intoxication.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Petition by Hattie Naughton against Retirement Board of San Francisco and others for writ of mandate directing defendant named to award petitioner a pension as the wife of a retired officer. The petition was granted, and defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for appellants.

James C. Purcell and William E. Ferriter, both of San Francisco, for respondent.

KNIGHT, Justice.

Thomas Naughton, a member of the San Francisco Police Department for twenty-nine years, died June 7, 1937. At the time of his death he held the rank of sergeant. He was survived by his wife, Hattie Naughton, to whom he had been married nearly thirty years. She filed application with the retirement board of San Francisco, city employees' retirement system, for a pension; and after hearing the evidence the board denied her application. Thereafter she petitioned the superior court for and was granted a peremptory writ of mandate directing the board to award the pension. From the judgment entered therein the board has appealed.

[1] Subdivision (c) of section 166 of the present city charter relating to police pensions is a re-enactment of section 4, chapter X, article VIII of the preceding charter, and in construing the latter it has been held in effect that where an officer dies as a result of a pre-existing disease of the heart and it is established that the disease has been aggravated and death accelerated or precipitated by exertion in performing the duties of his office, the case falls within the scope of said charter provision, and his widow is entitled to the benefits granted thereby. Buckley v. Roche, 214 Cal. 241, 4 P.2d 929.

Naughton died from a progressive type of heart disease known as coronary sclerosis and myocardial infarcation, with which he had been afflicted for several

years; and because of his impaired state of health and at his request he had been for more than two and a half years prior to May 24, 1937, assigned to inside duties at district station headquarters. On the date mentioned, however, which it will be noted was two weeks prior to his death, as a result of police reorganization he was transferred to another station and assigned to patrol duty, most of which he was required to do on foot; and he continued to fill that assignment up to the time of his death. After reporting off duty at the station at midnight on June 6, he visited the home of an old friend, where he died; and Mrs. Naughton's application for pension was based upon the claim that the disease from which her husband died was aggravated and that his death was accelerated by over-exertion in attempting to perform the foot patrol duties to which he had been assigned two weeks prior to his death.

[2] The evidence before the board consisted entirely of that produced by Mrs. Naughton, no testimony having been introduced in opposition thereto by the board; and in her petition for the writ she alleged that such evidence was free from conflict. In its answer to the petition the board expressly admitted the truth of that allegation; and at the opening of the trial counsel for the board stated to the court that the question to be determined was whether the denial of the pension by the board constituted an abuse of discretion. Therefore the proceeding was heard and determined on a transcript of the evidence taken before the board; and the court found therefrom that in denying the application for the pension the board acted arbitrarily and clearly in abuse of its discretion. In a supplemental brief the board has raised the point that mandamus is not the proper remedy, and that certiorari only will lie. The following cases are authority for holding, however, that the remedy of mandamus is available where it is alleged and shown that the local board has acted arbitrarily and clearly in abuse of its discretion: Buckley v. Roche, supra; Peters v. Sacramento City E. R. System, 27 Cal.App.2d 10, 80 P.2d 179; McColgan v. Police Commissioners, 130 Cal.App. 66, 19 P.2d 815; Mogan v. Board of Police Commissioners, 100 Cal.App. 270, 279 P. 1080. Appellants cite the case of Nider v. City Commission, 36 Cal.App.2d 14, 97 P.2d 293; however, no reference whatever is made therein to the cases above cited, and it would seem, therefore, that in deciding that particular case the court did not intend to establish any doctrine contrary to that adhered to in the preceding cases.

[3, 4] In the present case the principal facts established before the board, as they are disclosed by the transcript, may be stated as follows: In 1934, after completing an assignment to "strike" duty on the waterfront, Naughton complained of illness. He was short of breath, complained of pains in the chest, and he was subject to violent coughing spells during which he would choke and turn blue in the face. In October, 1934, at his request and on account of his condition of health he was assigned to desk work at the Western Addition station, and later at the Stanyan street station. While filling those assignments his impaired physical condition was clearly noticeable to some of his fellow officers. On May 24, 1937, a police reorganization took place, and he was transferred from inside work to patrol duty, with headquarters at the Golden Gate Park station at Thirty-seventh avenue and Fulton street. The district covered a large area, with many steep hills. With the exception of a small part of the Sunset district, it embraced those portions of the city from the Golden Gate on the north to the south boundary line of the city, lying west from Twenty-ninth avenue to the ocean, including all of Golden Gate Park, the Legion of Honor, the Veterans' Hospital, Fleishhacker Pool and Playground, and all of the beach. As sergeant of the district he was required, during an eight-hour watch, to visit officers patrolling the district, and to ring in from police boxes located in various parts of the district. Eight of the fourteen days he was attached to the Golden Gate Park station he was assigned to the radio car or acted as lieutenant inside the station, but the other six days he served on foot patrol. That is to say, on May 25, 27 and June 6 he served on foot patrol from 4 o'clock in the afternoon until midnight, and on May 31, June 1 and 2 from midnight to 8 a. m. On the 4 o'clock to midnight watches he reported at the station for duty at 4 o'clock, then rang in from six different boxes in the district, located on both sides of and in the park. He rang in from the first box at 5:30, and every hour thereafter from a different box, the last being at 10:30, and at 12 he reported back to the station and went off duty. On the midnight to 8 a. m. watches he followed the same procedure, reporting on

duty at the station at 12, and off duty at 8, and ringing in from various boxes hourly from 1:30 to 6:30, inclusive. It was demonstrated by the location of these various boxes, and the court found, that he crossed the park four times and walked a distance of four to six miles each of the times he was on foot patrol, except the last, June 6, when he crossed the park twice. The rules of the department permitted him to use street cars, but all the evidence was to the effect that because of the poor transportation facilities available to him he made the beat on foot. In this regard it appears that the street car service was inextensive and the cars ran infrequently; that the only means of transportation across the park was a bus line at Tenth avenue which stopped at 12:30 a. m.; furthermore, that there were no transportation facilities along the beach. According to the testimony given by his widow, he made the beat on foot, and testimony was given by other officers that whenever they saw him on the beat he was on foot.

During the two weeks he was stationed at the Golden Gate Park station he complained to his wife and others that his beat was too hard for him—that he could not stand the walking; and in this connection Mrs. Naughton testified that his general health was not at all good during that time; that he was tired all the time, "very bluish in the face whenever he had coughing spells", and was unable to sleep on account of pains in his chest. On June 5 he reported for work at 11 p. m. and worked until 7 a. m. on June 6, as acting lieutenant in the station. At about 3 a. m. he had a violent attack of coughing while walking across the floor of the assembly room. It was witnessed by other officers, one of whom testified that Naughton choked and gasped for breath for nearly a minute. Later that morning (Sunday, June 6) at his home he rubbed his chest with some medication, and he complained to his wife of severe pains in his chest, around his heart, stating he had nearly "passed out" while on duty. She asked him if he wanted a doctor, but he said he thought he would be all right. She also suggested that he ask to be assigned to inside work, but he said he was going on his vacation soon and would do so when he came back. He went to bed and remained there until about 1 o'clock in the afternoon, when he got up, had a little tea, and was driven back to the station at 4 o'clock by his brother-in-law, to report for foot patrol duty. On his arrival at the station he complained to several officers about not feeling well, and about 5 o'clock two of the officers, who had witnessed the coughing seizure the night before, drove him in a radio car to a drug store, where the druggist gave him some medicine to relieve the pain in his chest. He then continued on foot patrol duty, and at 5:30 rang in from the box at the Museum in the Park—about Tenth avenue; at 6:30 he rang in from Thirtieth avenue and Balboa; at 7:30 from Balboa and La Playa (the beach); at 8:30 he was at the police station; at 9:30 he rang in from Thirty-seventh avenue and Geary; at 10:30 from Forty-eighth avenue and Judah (across the park); and about 11:15 he went back to the station. One of the officers asked him if he felt any better, but he said not very much; that the medicine he had taken at the drug store had relieved him somewhat, but not to any great extent. At midnight he reported off duty, and went to the home of a friend named Lansfield, on Eddy street between Buchanan and Webster, as he had done before on frequent occasions after having reported off duty at midnight. He had known Lansfield for some twenty-five years; and when he arrived at Lansfield's home he complained of distress from gas. To relieve him Lansfield and his wife gave him some soda, and a hot "toddy" consisting of lemon, whiskey and water. Soon afterwards Lansfield went to bed, leaving Naughton sitting in a chair near the radio. Mrs. Lansfield remained up to see that Naughton caught a street car at 2:10 to go home, but she went into another room to lie down on the couch and fell asleep. The next morning when Lansfield arose he found Naughton lying on the floor, dead.

An autopsy was performed by Dr. Sherman Leland, the chief surgeon to the coroner, and the death certificate signed by him gave the cause of death as "coronary sclerosis, myocardial infarcation and failure"; and the only medical testimony given before the board was that of Dr. Leland, to the effect that the decedent's heart had been in bad condition for some time—that it was "just enough to carry him along", and that the extra load put on it by the walking he was required to do when put on foot patrol after having done inside work for some time was obviously harmful; and when asked the question as to whether that would result in shortening a man's life, he answered "Certainly".

We are of the opinion that in view of the foregoing uncontradicted evidence, the case was brought within the doctrine of such cases as Buckley v. Roche, supra, and Peters v. Sacramento City E. R. System, supra, and that therefore the trial court was justified in finding that the board in denying the application for pension acted arbitrarily and clearly in an abuse of its discretion. Two of the principal cases upon which the court rested its decision in the Buckley case arose under the Workmen's Compensation Act. One was George L. Eastman Co. v. Industrial Acc. Comm., 186 Cal. 587, 200 P. 17, and the other Fogarty v. Dept. of Industrial Relations, 206 Cal. 102, 273 P. 791, which in turn stresses the case of Singlaub v. Industrial Acc. Comm., 87 Cal.App. 324, 262 P. 411, 412. In the Singlaub case the court said: "It is unquestioned law that, where the death of an employee may be traced to two causes, first, to that of a primary disease and, secondly, to overexertion in the work in behalf of his employer in which the employee is engaged, at the time of his death, the employer or his insurer is liable. In other words, notwithstanding the previous diseased condition of the employee and in the natural consequence of which the inevitable death of the employee will ensue, if satisfactorily established that the demise of the employee, though primarily caused by his idiopathic condition, nevertheless was superinduced by overexertion of the employee arising out of his employment, the liability of the employer is fixed." And in the Eastman case the language of the court was [186 Cal. 587, 200 P. 20]: "If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration." Another case holding to the same effect, and which is also emphasized by the court in the Buckley case, is Knock v. Industrial Acc.Comm., 200 Cal. 456, 253 P. 712.

The board contends that in the exercise of its discretion it was warranted in finding that the heart failure was precipitated by some strain other than that occasioned by walking the beat. But there is no evidence upon which such a finding could be based. To the contrary, it shows without contradiction that death was accelerated by the amount of walking the decedent was required to do on foot patrol duty, after being transferred to the Golden Gate Park station. As held in Peters v. Sacramento City E. R. System, supra [27 Cal.App.2d 10, 80 P.2d 182], in dealing with a similar situation, wherein the same contention was made, "* * * there being no substantial evidence to support the conclusion reached by the retirement board, it had no facts upon which to base the conclusion reached, hence it exercised no discretion, and having acted contrary to the undisputed facts its act is treated and considered as arbitrary." See, also Buckley v. Roche, supra. Stated another way, the board's negative finding must be based on something more than mere conjecture.

[5] The board points out that the death certificate contains the recital: "Death due to natural causes"; and it contends that therefore the certificate alone is sufficient to sustain its decision, citing Bennett v. Brady, 17 Cal.App.2d 114, 61 P.2d 530. But in the light of the testimony given by Dr. Leland, by whom the entry was made, from which it appears that the walking the decedent was required to do in performing his foot patrol duties hastened his death, the only significance that can be attached to the recital above quoted is that the decedent's demise was not brought about by violence or accidental means. The case of Bennett v. Brady, supra, is not in point, for there a sharp conflict was presented between the testimony of two medical experts as to whether the exertion to which the officer had been subjected hastened his death; whereas here there was but one medical expert, from whose uncontradicted testimony it appears that the officer's life was shortened by over-exertion in performing his duties. Nor can it be successfully maintained that the doctor was misled by or that any prejudice resulted from any inaccuracies in the hypothetical question put to him. Before he answered the question he asked, "* * * that is of course considering all the facts I have brought out here", showing that he had well in mind all the circumstances when he gave his answer.

[6] In the board's reply brief, much is said about the circumstances under which the decedent died. In this connection our attention has been called to the admission of Lansfield that he "used to bootleg", and while so engaged assumed the name of Baker; also to the fact that an analysis was made of the decedent's stomach which disclosed the presence of "two-tenths of

one per cent" ethyl alcohol; and it is intimated, although there is no testimony whatever so showing, that when Lansfield retired he left a bottle of whiskey at the decedent's disposal; and it seems to be contended that those were the factors which precipitated Naughton's death, rather than overexertion in the performance of his duties. It is obvious, however, that Lansfield's former activities can have no bearing on the question at issue; nor can it be said that there was anything unusual about Naughton's visit that night, because, as the evidence shows, they had been friends for many years, and frequently, after reporting off police duty, he visited Lansfield before going home. With respect to the presence of alcohol in the decedent's stomach, Dr. Leland testified that "You certainly would not be intoxicated" by the amount there found. In fact there is no testimony whatever from which it may be inferred that the decedent indulged freely in liquor, or even that he was an habitual user thereof. It will be seen, therefore, that there is nothing in the circumstances surrounding the death of Naughton which can serve as ground for denying his widow's claim for pension.

The judgment is affirmed.

I concur: WARD, J.

PETERS, Presiding Justice.

I concur in the judgment.

So far as the question of remedy is concerned, I believe that either mandamus or certiorari will lie to "review" for determinations of local boards exercising judicial or quasi judicial powers. If certiorari is used, the extent of the review would be to inquire into the "jurisdiction" of the local board. So far as the evidence is concerned, that would mean that the superior court's power is limited to determining whether there is any substantial evidence to support the findings of the board. If mandamus is used, the extent of the "review" is to determine, as pointed out in the main opinion, whether "the local board has acted arbitrarily and clearly in abuse of its discretion". So far as the evidence is concerned, that means the superior court's power is limited to determining whether there is any substantial evidence to support the findings of the board. There is no doubt that the cases hold, as stated in the main opinion, that mandamus may be used by the aggrieved party. Whichever remedy is used, so far as the evidence is concerned, the extent of the "review" is exactly the same. The only practical difference between the two remedies is that in certiorari the court may annul the order of the board, while in mandamus the court issues a peremptory writ. Whichever remedy is used, the superior court should be limited to the record produced before the board.

It is my opinion that under the cases the aggrieved party has an election of remedies—he may proceed either by mandamus or certiorari, but, so far as the evidence is concerned, whichever remedy is used the power of the superior court is exactly the same—to determine whether there is any substantial evidence to support the order of the local board, if that board exercises judicial or quasi judicial power.



43 Cal.App.2d 319

In re RUSSELL'S ESTATE.

SEARS v. RUSSELL et al.

Civ. 12958.

District Court of Appeal, Second District, Division 1, California.

March 3, 1941.

1. Executors and administrators ⇐14
Wills ⇐195

A testator marrying after execution of will, thereby revoking it as to wife, did not die intestate, so that probate court should have issued letters testamentary to executor named in will, instead of granting letters of administration with will annexed to nominee of testator's widow, in absence of valid objection to such executor's appointment. Probate Code, §§ 70, 72, 407, 422, 443.

2. Executors and administrators ⇐14

It is broad general policy of law to give effect to testator's desires and see that his intentions are carried out so far as ascertainable, as by issuing letters testamentary to executor named in will. Probate Code, § 407.

3. Executors and administrators ⇐14

In naming of executor, testator's desire will be respected, though not expressed directly, if reasonably deducible from language of will. Probate Code, §§ 402, 407.

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge.

In the matter of the estate of Norman Russell, deceased. From an order, denying a petition by George M. Sears, named as executor in deceased's will, for letters testamentary, and granting letters of administration with the will annexed to Leslie B. Hanson, the nominee of Lillian S. Russell, deceased's widow, the named executor appeals.

Reversed and remanded.

Philip Storer Thacher, of El Cajon, Lester J. Penry, of San Diego, and Wright & Millikan and Hershel B. Green, all of Los Angeles, for appellant.

Frank G. Falloon, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

In the case before us, the probate court made an order admitting the will of the deceased to probate, but revoking it as to his surviving spouse, respondent herein.

Section 70 of the Probate Code reads as follows: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

The record indicates that decedent's will was executed on May 1, 1934; that he married Mrs. Russell on October 7, 1937; that he died on January 5, 1940. The will was offered for probate by appellant, George M. Sears, who asked that letters testamentary be issued to him, as executor named in the will. The court, however, at the time the will was admitted made its further order denying appellant's petition for letters and ordering letters of administration with the will annexed to issue to Leslie B. Hanson, the widow's nominee.

From this further order the named executor appeals, contending that no objection was made to his appointment, and that therefore he should have received letters testamentary under section 407 of the Probate Code, which provides, "If no objection is made, the court when admitting a will to probate must direct the issuance of letters thereon to the persons named therein as executors who are competent to discharge the trust, unless they or either of them have renounced their right."

Prior to 1931 the effect of marriage upon a will previously executed by a man was governed by section 1299 of the Civil Code, which provided for the revocation of a will in its entirety if a testator married after execution of the will without making some provision for the woman he married, either by will, by contract, or by mentioning in the will his intention not to make provision for her. Section 1300 of the Civil Code made the same provision for total revocation in the case of a woman marrying after the execution of her will. Section 70 of the Probate Code, enacted when sections 1299 and 1300 of the Civil Code were repealed, includes husband and wife in the one section, and provides that "the will is revoked as to the spouse". There is nothing in this language, of course, to indicate that the balance of the will is ineffective, and as a matter of fact, in the instant case the will has been admitted to probate, subject to the widow's share, as we have seen, but the nomination by the deceased of his executor has not been given effect. It does not appear that objections were filed to the appointment of appellant, but respondent in her brief presents her reasons why, nevertheless, the action of the probate court in deciding in her favor between the two conflicting claims for letters should not be disturbed. Appellant's contention that section 407 of the Probate Code makes it mandatory upon the court to appoint the executor named in the will, respondent answers by saying: "Section 422 is just as mandatory in its terms. It provides that 'administration of the estate of a person dying intestate *must* be granted to one or more of the following persons * * * in the following order * * * (1) The surviving spouse, or some competent person, whom he or she may request to have appointed'." She then argues that

the revocation is total as to the wife, and that the paragraph of the will naming the executor cannot in any particular "detract from the surviving wife's legal rights—in this case, the right to have her nominee administer the estate which she has inherited."

For this argument respondent relies upon In re Estate of Haselbud, 26 Cal.App. 2d 375, 79 P.2d 443, a case decided in 1938, in which a revocation in behalf of the widow was declared. The court in its opinion was considering the question as to how estate charges were to be borne as between the widow on the one hand, and the beneficiaries under the will on the other, and in its discussion of this question used the following language (page 379 of 26 Cal.App.2d, page 446 of 79 P.2d): "In so far as it affects Mrs. Haselbud's property rights the decedent's will is, by the express provision of section 70 of the Probate Code, no will at all, but is as to her revoked and eliminated from the situation."

In that case there was no claim by the widow that the right to administer was a property right; and the executor named in the will acted as such. To us the quoted excerpt from the opinion merely means that the surviving wife shall be entitled to her share of her deceased husband's estate as fully and completely as though he had died intestate. The quotation is appropriate as to property rights of the widow in the instant case, but we are still confronted with a situation where factually this is only a partial revocation, the will has been admitted to probate and except for the widow's share is otherwise valid as to its dispositions. Is the naming of an executor in such a case to be given effect? Apparently this appeal propounds that question for the first time in the courts of California. In considering it we have examined statutes, decisions and declared policies in regard to wills both within and without the state of California.

New York has a statute, section 35, Decedent Estate Law, Consol.Laws N.Y. c. 13, similar to section 70 of our Probate Code, providing for partial revocation in favor of a surviving spouse, and any issue of the marriage, as well. Prior to the enactment of section 35 in 1919 a will was revoked in toto by a subsequent marriage. Mr. Surrogate Foley, in commenting on the new section, says, "Previously the revocation of the will was complete. Thereafter it became partial only to permit the surviving spouse to participate. The terms of the will stand except as modified by the withdrawal of the intestate share." In re Bent's Estate, 1932, 142 Misc. 811, 255 N.Y. S. 538, 543.

In 1930 the same Surrogate had said "* * * under the provisions of section 35 of the Decedent Estate Law (since the amendment of 1919), where a marriage of a testator takes place after the execution of a will, unless provision is made in the will for the widow, she is entitled to her intestate share, but the remaining terms of the will, including the appointment of the executors, otherwise remain effective. * * * The courts have always respected the right which a testator enjoys to determine who is most suitable to settle his testamentary affairs, and his solemn selection should not lightly be disregarded. After the admission of a will to probate, the courts will not name a better executor for the testator nor disqualify, by a judicial veto, the widow or friend or other person selected in the will, except upon strict proof of the statutory grounds of incompetency." In re Erlanger's Estate. 136 Misc. 793, 242 N.Y.S. 249, at pages 252 and 254; see, also, Schultz v. Schultz, 10 Grat., Va., 358, 60 Am.Dec. 335, 344.

[1-3] The reasoning under this New York statute seems sound and applicable to cases falling within section 70 of our Probate Code. Section 72 of the same code reads as follows: "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will; *but the mere naming of an executor in the prior will need not be given effect by the court when the subsequent will is otherwise wholly inconsistent with the terms of the prior will, the intention of the testator in this respect being left to the determination of the court.*" (Emphasis added.) This is a re-enactment of section 1296 of the Civil Code (repealed in 1931), with the italicized language added by the legislature. A mere reading of this section governing a partial revocation, as it does, and applying it so far as that may be done to the facts of the instant case, would indicate, in our opinion, that naming of this executor should be given effect,

for in this case the result after the partial revocation in behalf of the widow is not wholly inconsistent with the terms of the will as drawn. The clear implication is that in such a case the nominee of the testator should be appointed.

Section 443 of the Probate Code, relating to issuance of letters of administration, provides: "Before letters are granted, the fact of death and that the decedent died intestate * * * must be proved * * *." Letters of administration with the will annexed, however, are issued, as the title of the office indicates, only when decedent died intestate; that is, leaving a will. Originally, in this case, respondent applied for letters of administration, but in her petition mentioned the will which has now been probated. In his contest of that petition appellant called attention to the fact that it did not state that decedent died intestate. Later respondent filed her opposition to the probate of the will, praying that it be denied admission to probate, and still later nominated Mr. Hanson as administrator and special administrator. The court, however, did not appoint him to either office, but named him as administrator with the will annexed. Under these circumstances, we cannot accept the view that decedent died intestate, notwithstanding respondent's reliance upon the quotation from the Haselbud case, and since no valid objection to appellant's appointment as executor was filed, it is our opinion that letters testamentary should have been issued to him. Such action would accord with the broad and general policy of the law which gives effect to the desires of a testator and sees that his intentions are carried out so far as they may be ascertained. In regard to the naming of an executor, a testator's desire will be respected, even though not expressed with directness, but reasonably deducible from the language of the will. In re Estate of Henderson, 196 Cal. 623, 639, 238 P. 938; and also section 402, Probate Code.

Under the reasoning of the authorities cited, we believe those portions of the order and decree appealed from should be reversed, and the cause remanded to the lower court for appropriate action in accordance with the views herein expressed. So ordered.

We concur: YORK, P. J.; DORAN, J.

43 Cal.App.2d 313

In re McCOLLUM'S ESTATE.

McCOLLUM v. SARLES.
Civ. 11640.

District Court of Appeal, First District, Division 2, California.

March 3, 1941.

Hearing Denied May 1, 1941.

1. Perpetuities ⇐6(1)

Under statute, phrased in the alternative, prohibiting suspension of power of alienation for longer period than continuance of lives in being or a period not to exceed 25 years from time of creation of the suspension, the period of years is applicable only when power of alienation is suspended as to one not in being at time of its creation, not if the suspension runs only during life of a person in being at time of creation of the limitation. Civ.Code, §§ 715, 716.

2. Perpetuities ⇐6(1)

A will leaving all property of testatrix to grandmother of testatrix, if grandmother should survive testatrix and live on to receive the property on distribution, but otherwise providing for specific bequests, was not invalid as suspending power of alienation for a longer time than continuance of lives in being or a period not to exceed 25 years from time of creation of the suspension, since contingency was expressly tied into life of devisee, and if devisee were alive at time of death of testatrix she took a contingent interest dependent upon her living until distribution. Civ.Code, §§ 715, 716.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Proceeding in the matter of the estate of Wilma Sarles McCollum, deceased, to determine heirship under section 1080 of the Probate Code. From an adverse decree, Floyd A. McCollum appeals, opposed by Jane Sarles.

Affirmed.

Bardin, Harrington & Bardin, of Salinas (Hubert Wyckoff, Jr., of San Francisco, of counsel), for appellant.

John Milton Thompson, of Monterey, for respondent.

NOURSE, Presiding Justice.

An appeal is taken from a decree determining heirship under section 1080 of the

Probate Code. Wilma Sarles McCollum died testate February 22, 1939. The portions of her will pertinent to this inquiry read:

"First: Provided Jane Sarles, my Grandmother by reason of the adoption of her and William Sarles, her husband, the latter now deceased, of my Mother, Myrtle Sarles McCollum, now deceased, survives me and lives on to receive on distribution of my estate the property hereby bequeathed and devised to her, I give, devise, and bequeath to the said Jane Sarles all property of every kind and nature whatsoever and wheresoever situate of which I may die possessed.

"Second: In the event that the said Jane Sarles predeceases me or does not live on to receive on distribution the property herein bequeathed and devised to her, I direct my Executor hereinafter named to convert so much of my property except as herein otherwise provided as may be necessary to pay my funeral expenses, the expenses of my last illness, all just debts which may be proved against my estate, and all legacies herein bequeathed, into cash as soon as the same can be done without unreasonable sacrifice of any of said property, and out of the proceeds thereof after my funeral expenses, the expenses of my last illness, all just debts which may have been proven against my estate, and the expenses of administration thereon have been paid, I give and bequeath as follows:" (Here follow five specific bequests and the declaration that the testatrix expressly refrains from leaving anything to her father because the entire estate had come to her through inheritance from her grandfather because of an error in the latter's will.) The decedent left no heir other than her father, the appellant herein, and her grandmother, to whom the estate was devised.

The question raised on this appeal is correctly stated by respondent as follows: "Is the rule against perpetuities violated by a provision in a will which suspends the vesting of title not possibly longer than the period of a life in being at the date of death of the testratrix?"

The pertinent provisions of the statutes controlling read: (Civil Code, sections 715 and 716) *"Restraints upon alienation.* Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows:

"1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or

"2. For a period not to exceed twenty-five years from the time of the creation of the suspension."

"Future interests void, which suspend power of alienation. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

[1] Appellant argues that the provisions of the will quoted are void because they attempt to create a future interest contrary to the limitations of these code sections. If this is so it would be because the future interest suspended the absolute power of alienation "for a longer period than is prescribed in this chapter." But the limit of the period prescribed in the chapter is found in section 715 as either during the continuance of the lives of persons in being, or for a period not to exceed twenty-five years. It will be noted that these limitations are in the alternative. The period of years has no application if the suspension runs only during the life of a person in being at the time of the creation of the limitation. It is only when the power of alienation is suspended as to one not in being at the time of its creation that the period of years comes into play.

[2] Here the devisee under the will was eighty-two years of age when the interest was created. She survived the testatrix and would have taken the full estate under the decree of distribution which was ordered. Her rights have been suspended only by this appeal. The intention of the testatrix is plain, and her attempt to dispose of her estate is fully within the law.

Appellant places much stress upon In re Estate of Campbell, 28 Cal.App.2d 102, 82 P.2d 22. In that matter the will attempted to leave the residue of the estate "to the four chair officers of San Diego Lodge No. 168 Benevolent and Protective Order of Elks, being the four chair officers in office at the time of distribution of my estate." It was there held that because distribution might not take place for more than twenty-five years after the testator's death, this provision of the will was void under the code sections. The distinction

between the two wills is plain. In the Campbell will there was no tie of the time within which the contingency must occur to any life in being at the testator's death. This being so the second alternative in section 715 became applicable. Here the contingency was expressly tied into the life of the devisee. If she were alive at the time of the death of the testatrix then she took a contingent interest dependent upon her living until distribution. If she had died before the death of the testatrix the whole clause fell by its own terms, and no questions of future interests or suspension would arise to defeat the special bequests under the will.

The decree is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



43 Cal.App.2d 280

BLACKMORE et al. v. BRENNAN et al.

Civ. 6467.

District Court of Appeal, Third District, California.

March 1, 1941.

Hearing Denied April 26, 1941.

1. Automobiles ⇐245(80)

In action for death of motorist killed in intersectional collision, the jury had the sole right to determine the credibility of witnesses and the weight and sufficiency of the evidence on motorist's contributory negligence to overcome the presumption of due care on his part for his own safety. Code Civ.Proc. § 1963, subd. 4.

2. Trial ⇐296(4)

In action for death of motorist killed in intersectional collision, the giving of an instruction that, if the presumption that motorist exercised due care for his own safety was not overcome by evidence, it must be assumed that motorist exercised ordinary care in operating automobile, under which circumstances he would not be guilty of contributory negligence, did not constitute reversible error, particularly where the jury was elsewhere fully instructed on the subject of contributory negligence. Code Civ. Proc. § 1963, subd. 4.

3. Trial ⇐296(4)

In action for death of motorist killed in intersectional collision, instruction that motorist as he drove his automobile into intersection had a right to assume, until the contrary appeared, that he was not exposed to danger which would come to him only by violation of law by another, and that, if he acted on such assumption, he was not contributorily negligent merely because he did so, was not prejudicial as omitting the element of contributory negligence, where it was immediately followed by other instructions supplying that element, nor was instruction inconsistent with others on that subject.

4. Trial ⇐295(1)

The entire charge to the jury should be read as a whole in determining whether the jury was fully and fairly instructed.

5. Trial ⇐296(3, 4)

The omission from an instruction on a certain subject of proper separate conditions or legal principles involved in the issues of a case, such as contributory negligence and proximate cause of injury, does not constitute cause for reversal where the jury is elsewhere adequately instructed in the charge on those omitted principles.

6. Jury ⇐28(5)

Overruling of plaintiffs' motion for a new trial conditioned on defendants' consent in writing to an increase in damages of $1,000 over and above amount awarded by the jury did not result in a denial of defendants' constitutional right to a jury trial where defendants signed and filed a written consent to the increase in manner required by law, since defendants thereby voluntarily "waived" their right to have the case again submitted to jury. Code Civ.Proc. § 631; Const. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

7. New trial ⇐161(1), 162(1)

Trial judges under proper circumstances have authority to modify judgments on motions for new trials by either reducing or increasing the judgments to conform to the evidence conditioned on the written consent of the parties unfavorably affected thereby. Code Civ.Proc. § 631.

8. New trial ⇐75(1)

A new trial may be granted in the sound discretion of a trial judge for insufficiency of the evidence to support a verdict or because it appears to have been rendered through passion or prejudice when the amount of damages awarded is inadequate as well as when it is excessive.

9. New trial ⇐161(1), 162(1)

The trial court has no power to compel a party to consent to an increase of the amount of damages awarded by a jury, but the trial court may grant or deny a motion for new trial on grounds otherwise warranted by the record conditioned on the written consent of the party unfavorably affected to an acceptance of a specified increase or reduction of amount of damages awarded by the jury. Code Civ.Proc. § 631.

10. Jury ⇐28(5)

New trial ⇐161(1)

The trial court is authorized to prescribe an alternative condition on which the granting or denial of a motion for new trial may depend, provided the judgment which is rendered is supported by the evidence, and the acceptance of the condition constitutes a "waiver" by the aggrieved party of his constitutional right to resubmit his cause to a jury. Code Civ.Proc. § 631; Const. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by B. L. Blackmore and another against Mervyn Brennan and others, for the death of Harold Blackmore, plaintiffs' son. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Honey & Mayall, of Stockton, for appellants.

Gumpert & Mazzera, of Stockton, for respondents.

THOMPSON, Justice.

The defendants have appealed from a judgment of $3,500 damages for the death of Harold Blackmore, son of the plaintiffs, which occurred as the result of an automobile casualty.

At six o'clock on the evening of July 15, 1938, Mervyn Brennan, who was then 19 years of age, was driving his father's automobile southerly along Van Allen road near Escalon in San Joaquin county, toward his home three miles south of the intersection of that road with Lone Tree road. The last-mentioned highway extends east and west, intersecting Van Allen road at a right angle. Each of these roadways, which are about fifty feet in width, is paved along the central portion for a width of only about twelve feet. A fence encloses a ranch at the northwest corner of the intersection of those roads. On that corner there is a large barn which extends southerly to a point within about thirty feet of the northerly line of Lone Tree road.

At the time mentioned, Harold Blackmore, the son of plaintiffs who was 27 years of age, was engaged in driving his cut-down Chevrolet roadster easterly along Lone Tree road. As he reached a point about 135 feet westerly from the intersection of the two roads, Mr. Gottleib Mayer, the owner of the ranch on the north side of the road, opened a gate and drove a band of some thirty cows out upon the highway on the way to a corral. The cattle separated and scattered along the highway in the vicinity of the gate. Mr. Mayer said that when Harold Blackmore approached the cattle he reduced the speed of his car to about ten or fifteen miles an hour, and slowly made his way along the extreme southerly side of the road. It is evident that he did not greatly accelerate the speed of his machine before reaching the intersection of the roads, for the distance was short and he was hindered by the presence of the cattle. At that point his view of the Van Allen road was obstructed by the intervening barn.

As Mervyn Brennan approached the intersection of the roads, traveling south, he was driving his machine at a rate of forty miles an hour. He claimed to have reduced his speed, before reaching the intersection, to a rate of twenty or twenty-five miles an hour. His view of Lone Tree road, westerly of the intersection, was obscured by the barn until he reached a point about twenty-five or thirty feet from the northern line of that roadway. He asserted that he did not see the machine of Harold Blackmore until the Chevrolet car entered the intersection running at about the rate of forty miles an hour. He claimed to have immediately applied his brakes with full force. He admitted that he could stop

his machine within a distance of twelve or fifteen feet when it was running twenty or twenty-five miles an hour. His automobile struck the Chevrolet roadster at the southeasterly portion of the intersection, overturning it and killing Harold Blackmore. It is evident that the defendant, Mervyn Brennan, must have been driving his machine faster than twenty-five miles an hour, for he applied his brakes with full force and failed to stop. The Chevrolet car was violently shoved a considerable distance and practically demolished. A highway patrolman who arrived at the scene within two hours after the accident occurred, observed and measured skid-marks made by the defendants' machine, extending northerly thirty-nine feet from the place of the accident. The appellants do not contend that the evidence is insufficient to support the finding of negligence or the amount of the judgment.

The cause was tried by the court sitting with a jury. The jury returned a verdict in favor of the plaintiffs for the sum of $2,500. The defendants moved for a new trial on all statutory grounds. The court made an order that a new trial would be granted on the grounds of insufficiency of the evidence, and inadequacy of the judgment, unless the defendants consented in writing within ten days therefrom to increasing the judgment to the sum of $3,500. The defendants consented in writing to that increase of judgment. The motion for new trial was thereupon formally denied. From the judgment as modified and increased the defendants appealed.

The appellants contend that the court committed reversible error in giving to the jury and refusing to give certain instructions, and that the court was without authority to determine the motion for new trial conditioned upon the defendants consenting to an increase of the amount of damages awarded by the jury, since that procedure amounted to a denial of their constitutional right to a trial by jury as provided in article I, section 7, of the Constitution of California.

The appellants assert that the court erred in giving to the jury plaintiffs' instruction number 2, which appears to be a fair statement of the principle that it may be presumed "a person takes ordinary care of his own concerns", as the statute declares in subdivision 4 of section 1963 of the Code of Civil Procedure. That challenged instruction stated that the law presumes Harold Blackmore, in driving his automobile at the time of the accident, exercised due care for his own safety, and unless that presumption was overcome by competent evidence it should be considered in determining whether the deceased was guilty of contributory negligence. The instruction concluded with the further statement that if the presumption was not overcome by evidence it must be assumed the deceased exercised ordinary care in his operation of the machine at that time, under which circumstances he would not be guilty of contributory negligence.

[1] It is true that Mervyn Brennan testified that the deceased drove into the intersection at a rate of forty miles an hour. That is substantially the only evidence of contributory negligence adduced at the trial to overcome the presumption of due care on the part of the deceased for his own safety. Evidently the jury did not believe that statement. The testimony of Mr. Mayer, and other circumstances, seem to refute that statement. But the jury had the sole right to determine the credibility of witnesses and the weight and sufficiency of the evidence on that subject. It is said in 10 California Jurisprudence, at page 747, regarding the determination of a disputable presumption that: "Where, however, it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven."

[2] The jury was not told in this case that it must assume from the presumption of due care that the deceased was free from contributory negligence. All that the court said in that instruction was that *in the absence of evidence overcoming the presumption,* it should prevail and the deceased, in that event, would be deemed to be free from contributory negligence. In other words, the jury was told, in effect, that it must determine whether sufficient evidence had been adduced to overcome that presumption. That is a correct statement of the law as we understand it. Numerous cases sustain that construction of section 1963, subdivision 4, of the Code of Civil Procedure. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 91, 239 P. 709, 41 A.L.R. 1027; Barrett v. Harman, 115 Cal.App. 283, 286, 1 P.2d 458; Woodman v. Hemet Union High School Dist., 136 Cal.App. 544, 29 P.2d 257; Killough v

Lee, 4 Cal.App.2d 309, 40 P.2d 897; Lahey v. Southern Pac. Co., 16 Cal.App.2d 652, 61 P.2d 461.

The jury was elsewhere fully instructed on the subject of contributory negligence. It was emphatically told that if the deceased was guilty of negligence which contributed in the slightest degree to the accident, the plaintiffs could not recover judgment regardless of how serious the negligence of the defendant Mervyn Brennan might be. In plaintiffs' instruction number 1, the term "contributory negligence" was defined. In defendants' instruction number 3, the jury was told that the same duties, responsibilities and necessity of exercising ordinary care in operating their machines at the time of the accident were imposed by the law equally upon both parties involved in the casualty. The terms "negligence", "ordinary care" and "proximate cause of injury" were explicitly defined. In connection with the foregoing challenged instruction the court also charged the jury that: "Contributory negligence is a defense. If such negligence is proved to have proximately contributed to plaintiff's injuries in the slightest degree, it will defeat a recovery on the part of plaintiff. Contributory negligence presupposes that the plaintiff did not exercise ordinary care for his own safety, and that his failure so to do proximately contributed to his own injuries. It is an affirmative defense and must be proved by a preponderance of the evidence, unless it can be shown or inferred from the evidence given in support of plaintiff's case."

We are of the opinion the foregoing "due care" instruction was neither erroneous nor prejudicial. Certainly it does not constitute reversible error.

[3] The following instruction which was given to the jury at the request of the plaintiff is assigned as error for the reason that it fails to include the condition that the rule announced therein depends on the plaintiff's freedom from contributory negligence. That challenged instruction reads: "You are instructed that the deceased, Harold Blackmore, as he drove his automobile into the intersection where the accident occurred, had a right under the law to assume until the contrary appeared, that he was not exposed to danger *which could come to him only by and through the violation of law on the part of another,* and if he acted upon such assumption, he was not guilty of contributory negligence *merely by reason of the fact that he did so.*"

The jury was also charged in the very next instruction that: "It was the duty of Harold Blackmore, while driving on Lone Tree Road, to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such a lookout, or failure to see what may be readily seen if the driver is looking, would constitute negligence as a matter of law."

The jury was further instructed, as we have previously said, that proof of negligence of the deceased which "contributed to plaintiff's injuries in the slightest degree" would defeat his right to recover damages. In that same instruction it was further said that contributory negligence consisted of any failure on the part of the deceased to exercise ordinary care for his own safety.

We are of the opinion the instruction previously criticised is not prejudicial because it omits the element of contributory negligence on the part of the deceased. It was immediately followed by other instructions which supply that element. The jury could, therefore, not have been misled in that regard. The instruction is not inconsistent with others on that subject. It is entirely consistent with them. It should be read in connection with the other instructions on that subject. It clearly informed the jury that the deceased had a right to assume he could cross that intersection without anticipating danger *caused solely by violation of the law* on the part of some other motorist. Certainly, if the death of Harold Blackmore was *caused solely and only* as a result of the violation of law by Mervyn Brennan, it absolutely excludes the possibility of any negligence of the deceased contributing to his death. That instruction is therefore not inconsistent with the other ones which were given on that subject. We are of the opinion the jury could not have been misled thereby.

In the case of Schatte v. Maurice, 116 Cal.App. 161, 2 P.2d 489, it was held that the use of the word "sole" with relation to the cause of injuries which were sustained by the plaintiff was clear and explicit enough so that it could not be misunderstood to refer to something else not included in the charge. The court there said that the use of the term "sole * * * cause of injury" necessarily excluded the possibility

of the presence of contributory negligence on the part of the plaintiff.

The instruction merely states that the deceased had a right to assume that the defendant would not place him in danger by violating the law of the highway, and that the deceased would not be guilty of contributory negligence solely because he assumed the defendant would obey the law. Clearly that instruction does not infer that the deceased might not be guilty of contributory negligence for some other reason which might appear in evidence. All that the case of McPherson v. Walling, 58 Cal. App. 563, 209 P. 209, relied upon by appellant herein, determines is found at page 568 of the opinion in 58 Cal.App., at page 211 of 209 P., to the effect that an instruction is erroneous which infers that "conduct of the plaintiff *which amounts to contributory negligence* may become free from negligence because of any act of neglect on the part of defendant". Applying that statement to the present case, it may not be said that one is guilty of negligence merely because he assumes, as every man has a right to assume, that others will obey the law. It is true that in spite of that particular assumption one might nevertheless be guilty of contributory negligence in doing or failing to perform other acts which a reasonably prudent person would do or omit under similar circumstances. But the jury was elsewhere fully instructed on that phase of the case. It was not necessary for the plaintiffs to include in that particular instruction all of the conditions under which the deceased might rely on the assumption that the defendant would obey the law. The condition of his freedom from negligence was properly included in other instructions. That declaration was elsewhere fully covered.

[4, 5] It is a well-established principle that the entire charge to a jury is to be read as a whole in determining whether the jury has been fully and fairly instructed. A myriad of authorities support that doctrine. It has been frequently held that the omission from an instruction on a certain subject of proper separate conditions or legal principles involved in the issues of a case, such as contributory negligence, proximate cause of injury, etc., does not constitute cause for reversal of the judgment, where the jury is elsewhere adequately instructed in the charge upon those omitted principles. Douglas v. Southern Pac. Co., 203 Cal. 390, 264 P. 237; American Marine Paint Co. v. Nyno Line, Inc., 70 Cal.App. 415, 233 P. 366; Burr v. Damarel, 24 Cal.App.2d 622, 75 P.2d 621; 24 Cal. Jur. 857, sec. 113; 10 Cal.Jur. Ten-Year Supp. 710, sec. 113.

The cases of White v. Davis, 103 Cal. App. 531, 284 P. 1086, and Watkins v. Nutting, Cal.App., 104 P.2d 413, upon which the appellants rely in support of their foregoing contention, may readily be distinguished from our conclusion that the challenged instruction does not constitute reversible error. In the White case [103 Cal. App. 531, 284 P. 1092], it was said that an instruction containing somewhat similar language to that which is criticised in this case was in accordance with the generally-acknowledged rule of law, but that "under the circumstances of this particular case" it should have contained the further condition that the plaintiff must be found to be free from negligence. In that case it does not appear the jury was elsewhere instructed, as it was in the present case, upon the subject of contributory negligence.

In the Watkins case, supra, it was also held to be error to give to the jury a similar instruction which omitted the element of plaintiff's freedom from negligence. In that case, however, it does not appear the jury was instructed upon the principle of contributory negligence anywhere in the charge. The opinion fails to mention what the general charge to the jury contained upon that subject.

We have carefully examined each of the rejected instructions. We feel confident they were fully covered by other instructions which were given to the jury. There was, therefore, no error in rejecting any of the instructions offered by the appellants.

[6] The appellants contend that the overruling of plaintiffs' motion for a new trial, conditioned on the defendants' consent in writing to an increase in damages of one thousand dollars over and above the amount awarded by the jury resulted in a denial of his constitutional right to a jury trial as provided by article I, section 7, of the Constitution of California. We think not, under the circumstances of this case. The defendants voluntarily waived their right to have the case again submitted to a jury, by signing and filing a written consent, as required by the Constitution and by section 631 of the Code of Civ-

il Procedure, to an increase in the amount of the judgment. They were not compelled to sign that written consent. They had the option of standing on their constitutional right to a jury trial and appealing from the order of the court granting plaintiffs' motion for a new trial. They failed to exercise that privilege.

The facts upon which the amount of the judgment was conditionally increased are as follows: The plaintiffs demanded a jury trial. The jury rendered judgment against the defendants and awarded the plaintiffs damages in the sum of $2,500. Plaintiffs moved for a new trial on the ground, among others, that the evidence was insufficient to justify the verdict or the judgment. The court made an order that the motion for new trial would be granted on the grounds of insufficiency of the evidence and inadequacy of the judgment, unless the defendants filed their written consent to a modification of the judgment by increasing the amount thereof to the sum of $3,500 within ten days thereafter. That written consent was duly filed. The motion for new trial was then formally overruled. From the order increasing the amount of the judgment the defendants have appealed.

[7] It is the established rule of the courts of this state and of other jurisdictions to uphold the authority of trial judges, under property circumstances, to modify judgments on motions for new trials by either reducing or increasing the judgments to conform to the evidence, conditioned upon the written consent of the parties unfavorably affected thereby. 95 A.L.R. 1164, note; 53 A.L.R. 779, note. We perceive no essential difference between allowing a trial judge to decrease the amount of damages awarded by a jury, to conform to the evidence, and increasing that amount, even though the case may involve unliquidated damages which appear to have been awarded through passion and prejudice or when it is clearly in conflict with the evidence. In either event the judgment must accord with the evidence adduced. It is true that either party who is prejudiced by such an order, so as to deprive him of the constitutional privilege of submitting his cause to a jury, may object to that procedure. But there are many decisions which hold that, when a person who is unfavorably affected by such a conditional order with respect to a motion for new trial, consents in writing thereto, he is not deprived of his constitutional right to have the amount of damages which are assessed against him submitted to a jury, for he has thereby waived that right. In the present case the appellants consented to the increase of damages in the manner required by law, and they may therefore not complain.

[8] There is no doubt that a new trial may be granted, in the sound discretion of a trial judge, for insufficiency of the evidence to support a verdict or because it appears to have been rendered through passion or prejudice, when the amount of damages awarded is inadequate as well as when it is excessive. Secreto v. Carlander, 35 Cal.App.2d 361, 95 P.2d 476; Reilley v. McIntire, 29 Cal.App.2d 559, 85 P.2d 169; 20 Cal.Jur. 104, sec. 67; 20 R.C.L. 283, sec. 67; 46 C.J. 207, sec. 152. In the Secreto case, supra, which is similar on principle to the present case, a motion granting a new trial was affirmed on appeal. A hearing by Supreme Court was denied. It was there contended the trial court was without authority to grant or deny a new trial conditioned on the defendant accepting an increase by the trial judge of the amount of damages awarded by the jury. The opinion in that case contains the following statement: "The law is established in this state that as a condition for denying a motion for a new trial the trial court has the power to require the opposing party to consent to an increase of the amount of the jury's verdict to bring the amount of the verdict in conformity with the evidence." [35 Cal.App.2d 361, 95 P.2d 477.]

[9, 10] It is true that the trial court has no power *to compel* a party to consent to an increase of the amount of damages awarded by a jury. That would deny him his constitutional right to a jury trial. But the trial court has a right to grant or deny a motion for new trial upon grounds otherwise warranted by the record, conditioned upon the party unfavorably affected thereby consenting in writing to an acceptance of a specified increase or reduction of the amount of damages awarded by the jury. That is undoubtedly what the court meant by the foregoing language quoted from the Secreto case. The court is authorized to prescribe an alternative condition upon which the granting or denial of a motion for new trial may depend, provided the judgment which is rendered is supported

by the evidence. The acceptance of the condition constitutes a waiver by the aggrieved party of his constitutional right to resubmit his cause to a jury. In the present case the appellants accepted in writing the suggested increase of damages and thereby waived their right to a jury.

The judgment is affirmed.

I concur: PULLEN, P. J.

TUTTLE, Justice (concurring).

I concur. In respect to the question of the power of the trial court to increase the amount of the verdict upon proceedings for new trial, I am in accord with the conclusions reached thereon, but base my approval upon the sole ground that defendant, by consenting to such increase, waived his right to thereafter raise the question. In the case of Secreto v. Carlander, 35 Cal.App.2d 361, 95 P.2d 476 (cited in the opinion), such a conditional order was made. Defendant failed to file a written consent and the new trial was granted. The latter, upon appeal, attacked the order upon the ground that the trial court was without power to make it. The court, in holding that such power existed, laid down a rule which, in my opinion, is directly opposed to the holding of the United States Supreme Court, in the late (1935) case of Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 301, 79 L.Ed. 603, 95 A.L.R. 1150. There, defendant accepted the terms of the conditional order for an increase in the amount of the verdict, but plaintiff did not. The latter then appealed, and attacked the order upon the ground that it infringed upon and violated his constitutional right to trial by jury. The court there said: "Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence. *But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.* When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'"

From the wording of the above quotation, I believe that it is fairly susceptible of the construction that if the party who attacks the order has consented thereto, he is thereafter precluded from raising the question. It would seem that in this state we should adhere to the federal rule. It is true that the seventh amendment to the federal Constitution, guaranteeing trial by jury in civil cases, is not a limitation upon the states and does not affect state courts (11 Am. Jur., p. 1107, sec. 317), but our state Constitution contains a similar guarantee. (Art. I, sec. 7).



43 Cal.App.2d Supp. 868

CALIFORNIA EMPLOYMENT COMMISSION v. BLACK-FOXE MILITARY INSTITUTE.

C. A. 4816.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 27, 1941.

1. Appeal and error ⇐544(2)

On appeal presented on the judgment roll without bill of exceptions or transcript, the reviewing court cannot consider references made by appellant to testimony or to stipulation of defendant or to other asserted facts of case not appearing in findings or from admissions of pleadings.

2. Master and servant ⇐78

As applied to contributions required to be made by employer to unemployment fund on basis of "wages" of employees of military institute who receive meals and lodging, there is no substantial difference between definition of "wages" in the Unemployment Reserves Act as first enacted in 1935 as being the amount of money received as compensation for services rendered, including commissions and bonuses and the reasonable value of board, rent, housing, lodging, or similar advantage received from employer, and the 1937 amendment to the act defining wages to mean all remuneration payable for personal services, including commissions and bonuses and cash value of all remuneration payable in any medium other than cash. Gen.Laws 1937, Act 8780d, §§ 11, 37 et seq., 44; St.1935, p. 1229, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Wages".

3. Master and servant ⇐78

The Unemployment Reserves Act, though requiring a "contribution" which in itself might be regarded as a tax, is not merely for purpose of raising revenue but sets up a scheme for ameliorating the hardships of unemployment and undertakes, in conjunction with the federal government, to pay unemployment benefits to those who, without fault, are out of work and to impose financial burden of doing this upon both employers and employees, measuring both burdens and benefits by amount of compensation paid to employees when they are working, hence the definition of "wages" should not be as strictly construed as in income tax law, which is a purely revenue measure. Gen. Laws 1937, Act 8780d, §§ 37 et seq., 44, 58.

See Words and Phrases, Permanent Edition, for all other definitions of "Contribution".

4. Master and servant ⇐78

In view of the purpose of Unemployment Reserves Act of 1937, to ameliorate the hardships of unemployment, provisions thereof should not be whittled down by narrow construction nor should exceptions not clearly justified by their language be engrafted on them by judicial interpretation. Gen. Laws 1937, Act 8780d, §§ 37 et seq., 44, 58.

5. Master and servant ⇐78

Board, lodging, or other facility furnished to certain employees of a military school who, by their contracts, were required to accept them and who were on duty while eating meals and subject to call while receiving their lodging were a part of their "wages" within law requiring contributions from employers and employees based on amount of "wages" for payment into unemployment fund, no matter how greatly the employer might be convenienced by acceptance of such board and lodging by employee under the so-called "convenience rule". Gen.Laws 1937, Act 8780d, §§ 37 et seq., 44, 58.

See Words and Phrases, Permanent Edition, for all other definitions of "Convenience Rule".

6. Master and servant ⇐78

Where certain employees of military school were required under their employment contracts to accept board and lodging and in interests of supervision and discipline were required to eat meals and lodge with cadets, the board and lodging were "wages" within Unemployment Reserves Act for purpose of determining employer's contribution to unemployment fund, notwithstanding these employees received same cash wages as other employees who were not required to dine and lodge with cadets, and fact that employment contracts did not declare that board and lodgings were to be regarded as compensation was immaterial. Gen.Laws 1937, Act 8780d, §§ 37 et seq., 44, 58.

7. Master and servant ⇐78

A rule of the Unemployment Reserves Commission that value of living quarters and meals furnished employees for convenience of employer should not be considered a part of "wages" in determining contributions to unemployment fund, and an "interpretive opinion" of the California Employment Commission, the successor to the Reserves Commission, having the same effect, were not inconsistent with action brought by the Employment Commission against employer military school to recover additional contributions from employer on theory that meals and lodging furnished certain employees by school who, for reasons of supervision and discipline, were required to eat meals and lodge with cadets and who were on duty and subject to call during such meals and lodging, in view of trial court's finding that board and lodging were not furnished solely for employer's convenience under the "convenience rule", but were the only compensation employees received for their services during meal and lodging periods. Gen.Laws 1937, Act 8780d, §§ 37 et seq., 44, 45, 58.

8. Master and servant ⇐78

Any rules of the California Employment Commission, formerly Unemployment Reserves Commission, which conflict with the clear meaning of the Unemployment Insurance Act, formerly the Unemployment Reserves Act, are void. Gen.Laws 1937, Act 8780d, § 37 et seq.

9. Estoppel ⇐62(2)

Even if action brought by California Employment Commission, formerly Unemployment Reserves Commission, against an employer military school to recover contributions to unemployment fund for board and lodging furnished certain employees required to accept them for reasons of supervision and discipline of cadets, and who during meal and lodging periods were on duty and subject to call, was inconsistent with rule of plaintiff's predecessor directing that value of living quarters and meals furnished for convenience of employer should not be considered a part of wages, and to a subsequent interpretive opinion of the commission having same effect, the commission would not thereby be "estopped"; there being no rule of statute or Constitution preventing an administrative board from occupying inconsistent positions, and neither knowledge of nor reliance on previous declaration of commission by defendant nor resulting action taken by it appearing in record to create an "estoppel". Gen.Laws 1937, Act 8780d, §§ 37 et seq., 44, 45, 58.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

Appeal from Municipal Court of City of Los Angeles; Oda Faulconer, Judge.

Action by California Employment Commission, formerly Unemployment Reserves Commission, against Black-Foxe Military Institute, a corporation, to recover contributions based on wages paid by defendant to its employees under the Unemployment Reserves Act enacted in 1937 and subsequently amended and renamed "Unemployment Insurance Act". From a judgment for plaintiff, defendant appeals.

Affirmed.

John Marvin Dean, of Los Angeles, for appellant.

Samuel L. Gold, of Sacramento, for respondent.

SHAW, Presiding Judge.

[1] This appeal is presented to us upon the judgment roll, without either bill of exceptions or transcript. Hence we cannot consider, in deciding it, the references made by appellant to the testimony or to a "stipulation" of defendant, or to other asserted facts of the case not appearing in the findings or from the admissions of the pleadings. Thus the frequently mentioned fact, if it be a fact, that the employees in question here are instructors is not before us. Statements of the facts of the case in this opinion are taken from the findings.

The case arises under a statute adopted in 1935 (Stats.1935, page 1226). This statute was amended and named "Unemployment Reserves Act" in 1937 (Stats.1937, page 2052 et seq). In 1939 it was renamed "Unemployment Insurance Act" (Stats. 1939, pages, 1967, 1969) and further amended; but as this case arose before the 1939 amendments they do not require consideration here. The act appears in Deering's Gen.Laws, 1937 Ed., and in the 1938 and 1939 supplements to that compilation, as Act 8780d. By the terms of this statute certain "contributions", as they are denominated, are levied upon employers, the amounts of which are based upon the amounts of "wages" paid by such employers (Section 37 et seq.), and similar contributions, likewise computed upon the amount of "wages", are required of employees, which the employers must deduct from wages paid (Sec. 44), and the employers are required to pay all these contributions into an unemployment fund. This fund is under the control of the commission which is plaintiff herein and is to be used to pay to unemployed persons certain "benefits" which are likewise computed upon the amount of "wages" they have received. Section 58. If any employer fails to pay his own contributions, or to deduct and pay those of his employees, this commission may bring action against him therefor. Sec. 45.

This is such an action, and it appears from the findings that the defendant is an educational institution emphasizing military instruction, with 150 cadets ranging in age from 6 to 18 years, and (inferentially, though it is not expressly so stated) that they board and lodge upon defendant's premises. Defendant "requires certain of its employees, for reasons of supervision and discipline", to eat meals and lodge with the cadets, the meals and lodging being fur-

nished by defendant. Some of the board and lodging so furnished during the time covered by the action was not considered or reported by the defendant in deducting and paying contributions under the statute above mentioned. In support of this action the plaintiff now claims that such unreported board and lodging were in fact wages and hence the defendant is liable to make the payments sued for in respect to the value thereof. The trial court found that board and lodging were furnished as above stated during 1937 and parts of 1936 and 1938, that $684.72 became due from defendant thereon and that it had paid all but $491.75, for which judgment was rendered. We hold that this judgment was based on correct legal principles and must be affirmed.

There was no express agreement that the board and lodging were to be a part of the employees' compensation, but these employees were required by their contracts to "accept" them and were "on duty while eating the meals" and "subject to call at all times while receiving the lodging". Defendant had other employees who did not receive board or lodging and the cash wages were the same in both cases "for the same kind and amount of work performed", but these other employees were not on duty or on call for supervision and discipline as were those who did receive board and lodging.

[2] Section 11 of the act above mentioned defines the term "wages". As first enacted in 1935, the definition was: "the amount of money received as compensation for the service rendered, including commissions and bonuses and the reasonable value of board, rent, housing, lodging or similar advantage received from the employer." The 1937 amendment defined "wages" to mean "all remuneration payable for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash". We cannot ascertain from the findings when the contributions for which judgment was rendered accrued and hence cannot determine whether both or only one of the above-quoted definitions must be applied to them. This, however, does not affect our decision, for as far as these definitions affect the present case, we see no substantial difference between them. Either is entirely adequate to include without any doubt meals and lodging furnished by the employer to the employee in return for services rendered.

[3, 4] Defendant's claim is that the meals and lodging were furnished and consumed merely for the convenience of the employer and hence are not to be reckoned as part of the wages paid. Judicial decisions and administrative rulings are cited to us by the defendant in which this so-called "convenience rule" is followed in applying income tax laws. In some of these cases the facts are not so far from those here as to indicate any certain ground for distinguishing them; but, nevertheless, we prefer not to follow them. The income tax law is purely a revenue measure, and upon the rule of strict construction applied to such laws, its scope may well be restrained to such matters as are clearly covered by it. Here we have a statute which, while it requires a "contribution" that in itself may possibly be regarded as a tax, has a much broader object than the mere raising of revenue. It sets up a scheme for ameliorating the hardships of unemployment, and undertakes, in conjunction with the United States Government, to pay unemployment benefits to those who, without fault of their own, are out of work, to impose the financial burden of doing this upon both employers and employees, and to measure both burden and benefits by the amount of compensation paid to employees when they are working. It is important to the attainment of the last-mentioned purpose that the real compensation be not minimized or concealed by embodying it in other forms than money payments. Hence the insertion, in the statutory definitions of "wages" above quoted, of words obviously intended to include therein every benefit or advantage which an employee receives from his employer by reason of the service he renders. In view of the purpose of these provisions they should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation.

More nearly analogous than the income tax laws to the statute now under consideration are the workmen's compensation laws. A similar question has arisen in determining what are wages under the laws last mentioned, and the decisions upon it have, in the main, taken a more liberal view than those upon income tax

laws. In Bernstein v. Beth Israel Hospital, 1923, 236 N.Y. 268, 140 N.E. 694, 30 A.L.R. 598, the court had under consideration the New York Workmen's Compensation Law, Consol.Laws, c. 67, which contained a definition of wages substantially the same (except that it did not include the words "commissions and bonuses") as the definition contained in our statute now under consideration when it was first adopted in 1935. Applying this law to an interne in a hospital, who received no pay other than board, lodging and hospital uniforms, and who was under duty to spend his days and nights at the hospital and to render any service exacted by the hospital, within the range prescribed by propriety and custom, the court, speaking through Cardozo, J., held that such interne was an employee and that his right to an award was not defeated by the fact that he received no money for his services, but only lodging, board and uniforms. Since an award under the statute could be made only for a percentage of the compensation (wages, as defined in the statute) received by an employee (a fact not mentioned in the opinion, but appearing on inspection of the statute), this decision necessarily held that the board and lodging there involved were wages, although undoubtedly as clear a case of convenience of the employer from their furnishing appeared as in any decision where the "convenience rule" has been applied.

In O'Callahan v. Dermedy, 1923, 197 Iowa 632, 196 N.W. 10, 13, 197 N.W. 456, where workmen's compensation was to be computed on the basis of the employee's "salary, wages or earnings in the employment", Code Supp.1913, § 2477m15(a), the court held this provision "is sufficiently broad and comprehensive to include board and lodging that are furnished to the employé under the contract of hiring as a part of the compensation", and therefore the cash value of board and lodging furnished to a hotel clerk should be taken into account in making an award to him.

In American Surety Co. v. Underwood, Tex.Civ.App., 1934, 74 S.W.2d 551, the workmen's compensation law defined wages as including the market value of board and lodging which the employee receives as part of his remuneration, and it was held that this included amounts paid to a travelling salesman to reimburse him for his expenditures for board and lodging while travelling, although he maintained a home at which he resided when not travelling.

In Maryland Casualty Co. v. Geary, 1932, 123 Neb. 851, 244 N.W. 797, 798, it appeared that a travelling truck driver received $10 a week plus the cost of his meals and lodging, and the court held that such cost of meals and lodging should be included in his wages in making an award to him under the workmen's compensation law, in the face of a provision in that law that board and lodging should not be included unless the money value thereof was fixed at the time of hiring. The court said: "Were it not for the statutory limitation above quoted, there would be no doubt that the meals and lodging furnished by the employer would constitute a part of the employee's weekly wage", and further held that, on a liberal construction of the law, the same result could be reached notwithstanding the provision referred to.

Other decisions applying the same rule to workmen's compensation cases are reviewed in a note at 84 A.L.R. 188; see also Copeland v. Martin Metal Mfg. Co., 1935, 141 Kan. 725, 42 P.2d 982, 985, to same effect.

Social security laws are so recent that apparently there are no judicial decisions construing them on the point here involved; at least none are cited to us and we have found none. Two administrative rulings which appear to result from the same view of the matter held by us have been called to our attention. Internal Revenue Cumulative Bulletin 1937-1 at page 380 sets forth an opinion that under the Federal Social Security Act, 42 U.S.C.A. § 301 et seq., the value of board and lodging, uniforms and laundry furnished to student nurses in a hospital, who receive no salary, is to be regarded as wages.

Another such opinion, published in Internal Revenue Cumulative Bulletin 1938-2, p. 323, dealt with board and lodging furnished to employees of a sanatorium located in an isolated mountainous region, who were hired with the understanding that they were to remain available for duty on call and were to "accept" the board and lodging provided. The definition of wages in the Federal statute, 42 U.S.C.A. § 1107, was substantially the same (except that it omitted "commissions and bonuses") as that contained in the 1937 version of our statute, above quoted. This opinion held that such board and lodging were wages,

for the purposes of the Federal Statute, although there was a regulation excluding from that category "facilities or privileges * * * furnished by the employer merely as a convenience to the employer", saying, of this regulation, that "The provisions do not ordinarily have application to such items as board and lodging." Reference was also made to the fact that many of the employees who did not receive board and lodging received larger cash remuneration than those who did. This, of course, tended to show that the board and lodging were substituted for a part of the money otherwise payable to the employee and were therefore regarded by the parties as compensation.

[5, 6] This suggests, and we think it is true, that the real question arising under the so-called "convenience rule" is whether the board, lodging or other facility furnished to the employee is in fact a part of his compensation for services rendered. If it is, it must be included as a part of his wages, at least under the law now in question, no matter how greatly the employer may be convenienced by the acceptance of such board, lodging or other facility by the employee. Defendant points to the facts found that the employees here who received board and lodging also received the same cash wages as other employees "for the same kind and amount of work performed", and that the furnishing of board and lodging to the employees who received them "was not treated as a part of the compensation" in the contracts of hiring, or held out as such by the defendant. But neither does it appear that there was any agreement that the board and lodging were not compensation, or that they were furnished solely for the defendant's convenience. Since the employees "were compelled by the defendant by virtue of their oral contracts of employment to accept said board and lodging", the contracts must have provided for the board and lodging without declaring whether they were to be regarded as compensation or not. This leaves the question open for consideration by the court, even if we concede that an express contract on the matter would be conclusive. Since the cash pay of those who received board and lodging was for the same kind and amount of services as were performed by the other employees who did not receive board and lodging and those other employees were not on duty or on call for purposes of discipline during meal and lodging times, it is obvious that the employees who did receive board and lodging rendered services not paid for by the cash wages, and that they received no pay at all therefor unless the board and lodging be so regarded. Under such circumstances, the trial court's conclusion that the board and lodging were wages is a reasonable one and must be affirmed.

[7-9] Appellant points to a rule made by the predecessor of plaintiff in 1936 (rescinded in 1937), directing that the value of living quarters and meals furnished for the convenience of the employer be not considered a part of wages, and to a more recent "Interpretive Opinion" of the present commission which, it is claimed, has the same effect, and argues that the plaintiff is in some way barred from abandoning the position thus taken and from now claiming that the board and lodging here in question were wages. We do not find the positions inconsistent, for the finding of the trial court here is, in effect, that the board and lodging were not furnished solely for the convenience of the employer; and they would therefore not be excluded from consideration by either the rule or the "Interpretive Opinion". But even were the plaintiff guilty of occupying inconsistent positions, we know of no rule of statute or constitution which prevents such an administrative board from doing so. Of course if in either position it undertakes to make rules which conflict with the clear meaning of the statute "they are simply void". Hodge v. McCall, 1921, 185 Cal. 330, 334, 197 P. 86, 88. If an estoppel can arise in such matters the ingredients of it are lacking here, for neither knowledge of nor reliance on the previous declarations of the commission by defendant, nor resulting action taken by it, appears in the record.

The judgment is affirmed, respondent to recover its costs of appeal.

BISHOP, J., concurs.

17 Cal.2d 576

CITY OF PASADENA v. CALIFORNIA–MICHIGAN LAND & WATER CO.

L. A. 16759.

Supreme Court of California.

March 8, 1941.

1. Waters and water courses ⇐191

Easements for the purpose of installing and maintaining water mains and connections thereto were not exclusive easements. Civ.Code, § 806.

2. Easements ⇐38

An "exclusive easement" is an unusual interest in land and amounts almost to a conveyance of the fee.

See Words and Phrases, Permanent Edition, for all other definitions of "Exclusive Easement".

3. Easements ⇐38

The intention to convey an exclusive easement cannot be imputed to the owner of the servient tenement, in absence of a clear indication of such an intention.

4. Waters and water courses ⇐191

The right to lay underground pipes over the land of another is an "easement" and is governed generally by the rules of law which govern ordinary easements of way.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

5. Easements ⇐42

Where an easement is founded on a grant, only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee.

6. Easements ⇐38

Generally, despite the granting of an easement, the owner of a servient tenement may make any use of the land that does not interfere unreasonably with the easement.

7. Easements ⇐38

The owner of the servient tenement is not required to make any reservation to protect his interests in the land, for what he does not convey, he still retains.

8. Easements ⇐52

Since the owner of a servient tenement retains the right to use land reasonably himself, he retains also the power to transfer those rights to third persons.

9. Waters and water courses ⇐191

Where owners of realty granted an easement to city to install and maintain water mains and connections thereto, and thereafter gave corporation a similar easement, right of corporation, and whether it was a permissive use, were to be determined by whether the owners of the servient tenements could have used the realty in that manner.

10. Easements ⇐38

Whether a particular use of realty by the servient owner or by someone acting under his authority is an unreasonable interference with an easement is a fact question for the jury.

11. Appeal and error ⇐1011(1)

Where trial court, in action by city for injunction and for damages based on defendant's alleged past and threatened future invasion of easements owned by city, found that there was no unreasonable interference between defendant's easement and city's prior easement, and the finding was based on conflicting evidence, it would ordinarily be conclusive.

12. Easements ⇐44(2)

A specification of width and location of surface rights of way does not always determine the extent of the burden imposed on the servient land.

13. Waters and water courses ⇐191

The fact that owners of realty granted city easements "five feet in width" for the purpose of installing and maintaining water mains and connections, did not, as a matter of law, make the subsequent granting of similar easement by owners of realty to corporation at same place an interference with the city's easement.

14. Easements ⇐51

The grant of an unrestricted easement, not specifically defined as to the burden imposed on the servient land, entitles the easement holder to a use limited only by the requirement that it be reasonably necessary and consistent with the purposes for which the easement was granted.

15. Waters and water courses ⇐191

The grant by owners of realty to city of easements five feet in width for the purpose of installing and maintaining water mains and connections thereto granted to the city the right to make the fullest necessary use of the five-foot strip for the purpose named. Civ.Code, § 806.

16. Waters and water courses ⇐191

If city which was given first easement for purpose of installing and maintaining water mains and connections thereto should in the reasonable use of its prior easement require space occupied by pipes of water company having subsequent easement, the city's paramount right would prevail.

17. Waters and water courses ⇐191

Until a point of unreconcilable conflict between easement of city for installing and maintaining water mains and connections thereto and easement of a water company was reached, such a concurrent use of the easements for similar purposes should be governed by principles permitting an equitable adjustment of the conflicting interests, since the respective rights of the two parties were not absolute, but were required to be construed to permit a due and reasonable enjoyment of both interests so long as that was possible.

SHENK and CARTER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collins, Judge.

Action by the City of Pasadena against the California-Michigan Land & Water Company for an injunction and for damages based on the defendant's alleged past and future invasion of certain easements owned by the plaintiff. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Harold P. Huls, City Atty., and Thomas W. LeSage, Deputy City Atty., both of Pasadena, for appellant.

Goodspeed, McGuire, Harris & Pfaff, of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is an action for injunction and damages based on the defendant's alleged past and threatened future invasion of certain easements owned by the plaintiff. The case was tried by the court sitting without a jury, and from a judgment entered for the defendant the plaintiff prosecutes this appeal.

The parties are competing vendors of water service in an unincorporated area situated between the cities of Arcadia and Pasadena. The defendant, under claim of right and with the admitted permission of the servient owners, installed water mains and service connections in certain five-foot easements theretofore granted to the plaintiff and partly occupied by its water mains and connections. This action was commenced by the plaintiff on the theory that the owners of the servient tenements had no power to grant easements similar to plaintiff's in the same five-foot strip of land to the defendant company, a competing distributor of water service. Plaintiff's contention was that it had a right to occupy the five-foot strip completely if the necessity arose, and that the defendant's installation substantially interfered both with plaintiff's present partial occupation of the land and with its possible future use of the land for its pipes and connections. The trial court found against the plaintiff and for the defendant upon conflicting evidence. In this appeal plaintiff contends primarily that the easement granted to the defendant was an unreasonable interference with its prior easement as a matter of law. It is asserted that there was no need to resort to evidence of the surrounding facts and circumstances, and that the court should have found for the plaintiff upon the ground that the defendant's mains interfere in law with the easement previously granted to the city, entirely apart from the question of physical interference upon which the trial court found against plaintiff. There is also a contention that the findings of the trial court are not supported by the evidence. We find ample evidence, however, to sustain the findings. We shall confine our opinion, therefore, to a consideration of the appellant's primary contention, that the easements granted to the defendant interfered with its prior easements as a matter of law.

[1-3] The easements involved in the present case are described as follows in the instrument creating them: "Easements for the purpose of installing and maintaining water mains and connections thereto * * * all of said easements being five feet in width, to-wit: a. In lots 1 to 12, both inclusive, along the south line thereof. * * *" This language eliminates at once the suggestion that appellant's easement was a so-called "exclusive easement". Under section 806 of the Civil Code "the extent of a servitude is determined by the terms of the grant * * *", and there is no language in this grant which indicates any intention to make the easement held by the City of Pasadena an exclusive one. Indeed, appellant does not make a serious

claim that there was an intention to make this an exclusive easement; and any such intention would seem clearly contrary to the admitted facts, since prior easements in the same land were in effect at the time when appellant's easements were granted. Furthermore, an "exclusive easement" is an unusual interest in land; it has been said to amount almost to a conveyance of the fee. 2 Thompson, Real Property, 1939, § 578; Jones, Easements, § 378, p. 302. No intention to convey such a complete interest can be imputed to the owner of the servient tenement in the absence of a clear indication of such an intention. See Reiver v. Voshell, 18 Del.Ch. 260, 264, 158 A. 366; Jones, supra, § 379, p. 303.

[4-9] The determination of this appeal turns upon the rights which the owner of the servient tenement retains in the land over which he has granted an easement for the laying of water pipes. It is established that the right to lay underground pipes over the land of another is an easement and is governed generally by the rules of law which govern ordinary easements of way. Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A.,N.S., 851, 113 Am. St.Rep. 349, 7 Ann.Cas. 851; Patterson v. Chambers' Power Co., 81 Or. 328, 348, 159 P. 568; Weil, Water Rights in the Western States, 3d Ed., § 458 et seq.; 17 Am.Jur. 983, 1002. Where the easement is founded upon a grant, as here, only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee. The general rule is clearly established that, despite the granting of an easement, the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement. Hoyt v. Hart, 149 Cal. 722, 87 P. 569; Durfee v. Garvey, 78 Cal. 546, 21 P. 302; Dierssen v. McCormack, 28 Cal. App.2d 164, 82 P.2d 212; Perley v. Cambridge, 220 Mass. 507, 513, 108 N.E. 494, L.R.A. 1915E, 432; 3 Tiffany, Real Property, 3d Ed., 1939, § 811. It is not necessary for him to make any reservation to protect his interests in the land, for what he does not convey, he still retains. Jones, Easements, § 391 et seq., p. 313. Furthermore, since he retains the right to use the land reasonably himself, he retains also the power to transfer these rights to third persons. Galletly v. Bockius, 1 Cal.App. 724, 727, 82 P. 1109; Hoyt v. Hart, supra, 149 Cal. page 728, 87 P. 569; 3 Tiffany, supra, § 811; 17 Am.Jur. 994, 995. Thus, in the instant case, the right of the defendant to use the particular land in controversy is derived from the owner of the servient tenements, and whether it is a permissible use is to be determined by whether the owner of the servient tenements could have used the land in that manner.

[10, 11] Whether a particular use of the land by the servient owner, or by someone acting with his authorization, is an unreasonable interference is a question of fact for the jury. See Frank v. Benesch, 74 Md. 58, 61, 21 A. 550, 28 Am.St.Rep. 237; Rowell v. Doggett, 143 Mass. 483, 488, 10 N.E. 182; Bakeman v. Talbot, 31 N.Y. 366, 370, 88 Am.Dec. 275; Jones, supra, § 394, p. 315; 2 Thompson, supra, § 584; 17 Am.Jur., 994, 995, 1008; Chapman v. Newmarket Mfg. Co., 74 N.H. 424, 68 A. 868, 15 L.R.A.,N.S., 293. In the present case, the trial court found that there was no such unreasonable interference, and this finding based upon conflicting evidence would ordinarily be conclusive.

Appellant urges the application of a different rule to the instant case upon the following grounds: That these easements are created by grant, and the language of the grant is so clear and definite that a court as a matter of law can define the relative rights of the parties from the instrument alone, without resorting to an examination of the surrounding facts and circumstances. This is said to be so because this is an easement of defined width and location, the theory being that where the easement has a defined width, the easement holder has the right to occupy it to the full width if it ever desires to do so. Therefore, it is asserted, any use of the strip of land for laying other water pipes should be held to be unreasonable interference as a matter of law.

[12] Appellant relies upon cases which hold that a surface right of way of defined width gives the easement holder the absolute right to occupy the surface to that width whenever he chooses. These cases depend upon the theory that the easement granted is completely and clearly defined because the width and location of the right of way is specified in the grant. See, for example, Ballard v. Titus, 157 Cal. 673, 110 P. 118; Herman v. Roberts, 119 N.Y. 37, 23 N.E. 442, 7 L.R.A. 226, 16 Am.St.Rep. 800. They do not necessarily require a similar conclusion where the easement is for the limited purpose of laying underground water pipes to serve the surround-

ing property with water for domestic purposes. There is a clear distinction in purpose between a right of way over the surface of the land to be used by moving vehicles and an easement for the laying of water mains in a relatively fixed and permanent position. In the case of an easement for laying underground water pipes there are important factors to be considered in addition to the width and location of the easement. These include, for example, the number and size of the pipes, the right to shift the pipes around at will, and the depth at which the pipes are to be laid. To state the point more generally, with such an easement the extent of the burden which the parties intend to impose upon the servient tenement is not definitely fixed merely by a specification of width and location. Indeed, even with surface rights of way, a specification of width and location does not always determine the extent of the burden imposed upon the servient land. See Johnson v. Kinnicutt, 2 Cush. 153, 56 Mass. 153, 157; Smith & Sons Carpet Co. v. Ball, 143 App.Div. 83, 127 N.Y.S. 974.

[13] Appellant's position does not take into consideration the difference between the burden which the easement imposes upon the servient land and the location at which the burden is to be imposed. In Winslow v. Vallejo, supra, a case which is strongly relied upon by appellant, the court holds that where the grant is indefinite the court may consider additional factors in determining the extent of the burden intended to be imposed upon the land. At page 725 of 148 Cal., at page 192 of 84 P., 5 L.R.A.,N.S., 851, 113 Am.St. Rep. 349, 7 Ann.Cas. 851, the court says: "But the conveyance is general in its terms and affords no basis for determining the number of pipes, their size, or their exact location." It is here recognized that there are factors other than mere location to be considered, and that the extent of the burden is not determined merely by fixing the location of such an easement. It is, of course, possible to draft an instrument which would fully define both the location and the burden of the easement, or which would make the easement exclusive. But the very general language used in the instrument under consideration here cannot be given any such effect. Considering the fact that these easements were granted for the limited purpose of securing domestic water service for the individual owners in this real estate subdivision and that no indication appears that the parties intended to protect the city against competition, we are unable to find any intent, either expressed or implied, that the owners were never to grant similar easements to anyone else. Hence, the mere granting of the second easement to the defendant did not interfere with appellant's prior easement as a matter of law. Whether the particular use under a second easement amounts to an unreasonable interference is, as we have heretofore pointed out, a question of fact, and the finding, made upon conflicting evidence, that defendant's use of its easement was not such an unreasonable interference is conclusive upon the question so far as this appeal is concerned.

[14, 15] We do not wish to be understood, however, as limiting the rights granted to the City of Pasadena under its easements which were properly found to be prior and paramount to those of the defendant. The rule is established that the grant of an unrestricted easement, not specifically defined as to the burden imposed upon the servient land, entitles the easement holder to a use limited only by the requirement that it be reasonably necessary and consistent with the purposes for which the easement was granted. Murphy Chair Co. v. Radiator Co., 172 Mich. 14, 28, 137 N.W. 791; Chapman v. Newmarket Mfg. Co., 74 N.H. 424, 425, 68 A. 868; Dalton v. Levy, 258 N.Y. 161, 167, 179 N.E. 371; Fendall v. Miller, 99 Or. 610, 615, 196 P. 381; see 15 L.R.A.,N.S., 292; 2 Thompson, supra, § 572, p. 175; 3 Tiffany, supra, § 803, p. 323; 17 Am.Jur. 994, 996. The language of the easements here involved does not sufficiently define the burden intended to be imposed so that defendant's easement can be termed an unreasonable interference as a matter of law, but neither does it restrict the right granted to the City of Pasadena to make the fullest necessary use of the five-foot strip.

[16, 17] It is possible that the city may, at some future time, be faced with the necessity of expanding or changing its present system, and on its behalf it is asserted that the presence of defendant's pipes may seriously hamper the reasonable use of the city's prior easement under such circumstances. But if, in the reasonable use of its prior easement, the city requires the space occupied by the pipes of the defendant, its paramount right must prevail. In Colegrove Water Co. v. Hollywood, 151 Cal. 425, 90 P. 1053, 13 L.R.A., N.S., 904, plaintiff sought to make use of

the servient tenement for laying water pipes despite the fact that an easement for highway purposes had already been granted to the defendant municipality. The court permitted this after a finding that the water pipes would not interfere with the use then being made of the highway easement by the city and added (151 Cal. page 429, 90 P. page 1055, 13 L.R.A.,N.S., 904): "* * * but the municipality may, and frequently does, occupy the soil beneath the surface for the accommodation of sewers, gas and water pipes, electric wires, and conduits for railroads. Where the city undertakes to occupy the space above or below the surface of the street for any purpose within the scope of the public uses to which highways may be put, the use by the owner of the fee must yield to the public use." Until a point of unreconcilable conflict is reached, however, such a concurrent use of the land for similar purposes as is illustrated here should be governed by principles permitting an equitable adjustment of the conflicting interests. The respective rights of the two parties are not absolute, but must be construed to permit a due and reasonable enjoyment of both interests so long as that is possible. Murphy Chair Co. v. Radiator Co., supra; Bakeman v. Talbot, 31 N.Y. 366, 369, 88 Am.Dec. 275; Pomeroy v. Salt Co., 37 Ohio St. 520, 524; Minto v. Salem Water, etc., Co., 120 Or. 202, 212, 250 P. 722; 3 Tiffany, supra, § 811, p. 355; 17 Am.Jur. 993.

In Murphy Chair Co. v. Radiator Co., supra, successive rights of way in the same land were involved and the court held that both easements could be used simultaneously under the existing facts, but indicated that the subsequent grant must be considered subordinate if it should ever interfere with the reasonable use of the prior easement. In Pomeroy v. Salt Co., supra, 37 Ohio St. page 524, the court held that the holder of an underground easement for the purpose of mining coal could not object to the placing of a second tunnel which would intersect his and would cross it at the same level. The court was clearly of the opinion that the prior easement was paramount but said that the second tunnel would not interfere substantially with the first easement under the existing facts. The proper rule is indicated by the language of the court in Bakeman v. Talbot, supra, 31 N.Y. page 369, 88 Am.Dec. 275, in which a conflict arose between the use by the holder of the easement and the use by the landowner. The court said: "The defendant [landowner] certainly has no right to preclude the plaintiff [easement holder] from availing himself of the right of passage, or to render the exercise of that right unusually or unreasonably difficult or burthensome. I think he is not shown to have done so. * * * There is nothing inconsistent in holding, that the present arrangements are suitable and sufficient under existing circumstances; and after these circumstances have changed, and the question shall arise as to what shall then be proper, to determine that a passage perpetually open or a system of gates better adapted to such increased use * * * shall be required of the defendant. It would not be right at this time * * * to furnish facilities for a state of affairs which may never arise, or which may not arise until some remote period."

Under the present facts no basis is shown for the relief sought. Whether a different conclusion may be required by changed circumstances in the future cannot now be determined with certainty, and need not therefore be decided.

The judgment is affirmed.

We concur: TRAYNOR, J.; CURTIS, J.; EDMONDS, J.

SHENK, Justice (dissenting).

I dissent.

Plaintiff City of Pasadena and defendant California-Michigan Land & Water Company are rival vendors of water service in an unincorporated area situated between the cities of Arcadia and Pasadena. A controversy arose between them about April, 1937, when defendant, acting under a claim of right, installed water mains and service connections in certain five-foot easements already occupied by the water mains and connections of plaintiff. In the month of June plaintiff filed the present action for injunction and damages, seeking relief from the alleged past and threatened future invasion of its easement rights by defendant. Trial of the cause resulted in entry of a judgment for defendant, from which plaintiff has appealed.

The easements involved are four in number, one paralleling the north side and one the south side of Arcadia avenue, and one the north and one the south side of Fairview avenue. These avenues lie within tract 3747 in the unincorporated territory, and are bounded on the west by Rosemead

boulevard and on the east by the Arcadia city limits. The A. B. Chapman estate was the original owner of the entire territory and had its own irrigation system. During the years 1920-1922, it subdivided tract 3747, and put water mains and service connections along the length of Arcadia and Fairview avenues for distances of 1581 and 1666 feet, respectively. On June 30, 1931, it conveyed a number of parcels of property to the city, together with its water system. Easement rights in the area traversed by the water pipes running parallel to the two avenues were expressly granted to the city by language in the deed as follows: "Easements for the purpose of installing and maintaining water mains and connections thereto in the lots hereinafter described in tract No. 3747 * * * and located on such lots as hereinafter set out (the 51 lots bordering the two avenues); all of said easements being five feet in width, to wit: (description of property). * * *"

The deed further recited that the properties were conveyed subject to certain prior easements, one of which was an easement to defendant "for pipe line purposes over the east six feet" of the property adjacent to its junction with the Arcadia city limits.

The city continued, after its purchase, to maintain and use the mains, meters and service connections installed by its grantor, and at the time the present controversy arose it was serving about 24 consumers on Arcadia avenue. Its charter empowered it to engage in this activity without the city limits. Pasadena Charter, Art. I, sec. 2, sub. 20, Stats.1933, p. 2757; see, also, Constitution, Art. XI, sec. 19.

Defendant company was also in the business of selling water and since 1913 had operated under supervision of the railroad commission in the general area of the unincorporated territory wherein the property here involved is located. As a part of its distribution system defendant maintained a water main along Rosemead boulevard and also one bordering the westerly boundary of the Arcadia city limits. The latter main, at points of intersection at right angles with the city's Fairview and Arcadia avenue mains, traversed the six-foot prior easement of defendant described in the city's deed as aforesaid. It is conceded that for many years prior to the city's grant, defendant was in a position to serve consumers along Fairview and Arcadia avenues, but that it made no effort to reach them until about the year 1937, when growth of the area was sufficient to invite competition.

In December, 1936, defendant procured from each lot owner along Arcadia avenue between Rosemead boulevard and the Arcadia city limits a written license or grant for water service which purported to convey to it an easement practically identical with the easement already owned by the city, to wit: "Forever, subject and in subordination to any prior right of any other public utility, the right to lay, maintain, repair, renew and enlarge, as necessary or convenient, such water mains, gates, service connections, meters and water distribution equipment as may hereafter from time to time be found necessary or convenient, in connection with said water utility service, along and across the five feet of the said respective parcels of the undersigned grantors, and each of them, next adjoining any public highway as may exist from time to time. * * *"

During the week of April 13th to 20th, 1937, defendant installed mains in the north and south five-foot strips paralleling Arcadia avenue, together with meter boxes and service pipes. It then commenced to supply water to all of the twenty-four consumers on the avenue except two who continued to use the city's service.

This situation precipitated the filing of the present action. The amended complaint contained three counts. The first count alleged that defendant's installation of mains in the property strips along Arcadia avenue was without right and interfered with the city's present and planned future enjoyment of its easements; and that, if not enjoined, the presence and continued use of said mains by defendant would ripen into a right under the doctrine of intervening public interest, to the city's irreparable injury. The second count alleged similar facts as to the Fairview avenue easements, except that the injury there was of a threatened nature, as defendant had not actually installed mains in those easements. According to the third count, defendant's acts had caused a $3,000 depreciation in the value of the city's easements. The prayer of the pleading was that defendant be enjoined from installing or maintaining water mains and connections in plaintiff's easements, that it be compelled by mandatory order to remove those already installed, and that it pay $3,000 damages, together

with costs of suit. Defendant joined issue by answer, denying among other things that the city had ever possessed or enjoyed any right to exclusive use of the easements.

It was undisputed on the trial that at numerous points along Arcadia avenue, defendant's main approached to within about one foot of the city's main, and that such proximity could not fail to inconvenience the city to some degree in its maintenance, use, repair, replacement or future enlargement or relocation of main and pipes. Defendant claimed, however, that its interference was not so substantial or unreasonable as to entitle the city to relief, and there was evidence both for and against this claim. The conflict of proof was resolved by the trial court in favor of defendant. It found that neither the terms of the city's grant, nor the manner of its use, established any exclusive right in the easements; that defendant's installation of mains along Arcadia avenue did not substantially or unreasonably interfere with any present or projected future enjoyment of the easements by the city, nor would the city be injured by a similar use along Fairview avenue; and that it would be inequitable to defendant and detrimental to the public good and welfare to compel it to remove its installation.

The judgment entered on these findings determined that the city is the owner of the easements claimed by it; that said easements are not exclusive but that the city's rights therein (other than to the aforementioned easterly six feet) are prior and paramount to the rights of defendant. It also decreed that defendant has the right, subject to permission of the fee owners of the servient lots, to install and maintain water mains and connections in the portions of the easements in which the city owns superior rights, provided such use does not unreasonably or substantially interfere with the city's proper use; and that defendant's present use of the easements along Arcadia avenue is with permission of the fee owners of the servient lots, and does not unreasonably or substantially interfere with the city's proper superior use thereof.

On this appeal from the judgment, the major contention is that the trial court erred in failing to conclude as a matter of law that defendant's invasion of the city's easements was without right. As the point appears to me to be well taken, it will be unnecessary to discuss the city's secondary contention, that the trial court likewise erred in failing to find as a matter of fact that defendant's acts interfered unreasonably with the city's present and future use and occupancy of the easements.

According to the terms of the grant to the city of June 30, 1931, easements in the property described were conveyed to it "for the purpose of installing and maintaining water mains and connections thereto * * * all of said easements being five feet in width. * * *" The Civil Code, section 806, provides that "the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." This is in accord with the general rule that the extent of an easement by grant is determinable by a true construction of the conveyance. Doubtful language therein is to be construed in favor of the grantee, and the entire instrument is to be considered in the light of surrounding circumstances which have a legitimate tendency to show the intention of the parties. If the grant is specific in its terms, it is decisive of the limits of the easement. 17 Am.Juris. § 97, p. 995; Thompson on Real Property, Perm. Ed., vol. 1, § 368, p. 595; 9 Cal.Jur. p. 950, § 6.

The language of the present grant is specific in conveying to the city easements five feet in width for water mains and connections, but it contains no express statement that the easements are "exclusive". It is defendant's position that the absence of this word from the grant renders it doubtful in meaning, and requires application of the equally well-settled rule that "where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right, and limits it to the particular course or manner in which it has been enjoyed." Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L.R.A., N.S., 851, 113 Am.St.Rep. 349, 7 Ann.Cas. 851, and authorities above cited. Defendant argues that as the easements were conveyed to the city subject to certain prior easements, such as defendant's own prior right to the use of six feet, and as the evidence adduced on the trial showed that the property undoubtedly is also traversed or crossed at right angles by gas pipes, the manner of user by the city has established the nature of its easements as nonexclusive; that therefore the right remained in the city's grantor as fee owner,

and passed from it on subdivision of the tract to purchasers of lots therein, to make any use or disposition of the property not inconsistent with interests already conveyed away, including the right to create any number of further easements so long as they were not such as would interfere unreasonably with the enjoyment of the non-exclusive easements already granted to the city and others.

This argument is not convincing. From the fact that it is settled as a general proposition that the owner of a servient estate retains a right to use his property for any purposes consistent with the enjoyment of the easement. (Hoyt v. Hart, 149 Cal. 722, 728, 87 P. 569; Dierssen v. McCormack, 28 Cal.App.2d 164, 82 P.2d 212), it does not follow that where an easement of definite width and specified location has been granted for a particular purpose, the omission of the word "exclusive" from the grant, or the failure of the grantee to presently occupy the property to the full width, will under all circumstances leave the servient owner with the right to create any number of concurrent easements for identical use of the same land. Under some circumstances, as in the case of an easement for a way over the surface of the ground, or for the conveyance of a specified amount of water in an open ditch, a grant may be correctly construed as non-exclusive and permitting concurrent identical uses. Hoyt v. Hart, supra. But even in cases of this type, where the way over the surface of the ground is one of expressly defined width, it is held that the owner of the easement has the right, free of interference by the owner of the servient estate, to use to the limits of the defined width even if the result is to give him a wider way than necessary. Ballard v. Titus, 157 Cal. 673, 681, 110 P. 118. The circumstances which attend the use of an easement for the installation, maintenance, and use of pipes underground are different from those which attend the use of a surface easement, and frequently require a different construction of the grant. In the leading case of Winslow v. City of Vallejo, supra, a grant was made in general terms to defendant city of a right of way over described land "for any water pipes or mains" which it might lay. The city originally installed a 10-inch main, but years later when that main had become inadequate, undertook to lay an additional 14-inch main within three feet of it. Applying the general rule previously quoted herein, this court held that as the grant was general in its terms, the limit and extent of the city's right had become fixed by the manner of its original user and could not be enlarged to include the right to lay additional pipes. But the court also indicated that if the terms of the grant had not been so general, a different result might have followed, saying: "It is, of course, true, that for the purpose of ascertaining the extent and limits of the right granted the entire instrument is to be considered, in view of the circumstances surrounding its execution, and the situation of the parties. Herman v. Roberts, 119 N.Y. 37, 23 N.E. 442, 7 L.R.A. 226, 16 Am.St.Rep. 800. And if the language of the grant in question, viewed in the light of all the conditions existing when it was executed, clearly gave to the defendant a right in excess of the one actually used, such right would still exist, notwithstanding the exercise for a time of a lesser privilege. Quigley v. Baker, 169 Mass. 303, 47 N.E. 1007."

From the rule of construction declared and applied in the above case, to wit: that "where a grant of an easement is general * * * an exercise of the right * * * limits it to the particular course or manner in which it has been enjoyed", it appears that the converse is likewise true, and where a grant of an easement is specific as to the extent of the burden to be imposed on the servient tenement and as to the width of a way to be occupied by pipes or mains, the terms of the grant and not the extent of the user define the rights of the grantee.

The grant of an easement of defined width to be used for pipes and mains will, in the absence of exceptional circumstances, convey a right in excess of a mere general easement of unspecified location such as that considered in the Winslow case; that is, it will convey a right to use the property to the full extent of the width stated in the grant. This is illustrated by the case of Hamaker v. Pacific Gas & Electric Co., 59 Cal.App. 642, 211 P. 265, 266, which involved an easement acquired by condemnation instead of by grant, but presented a question of application of the same rules of construction. The suit was one to quiet title, brought by plaintiff for the purpose of preventing defendant from enlarging its aqueduct traversing her property. The court upheld defendant's right to proceed with enlargement of the aqueduct, saying: "The prin-

cipal ground urged for a reversal is that, since the defendant had constructed an aqueduct along the right of way acquired by condemnation, and had used the same for several years, the limit of the land occupied by such aqueduct is the limit of defendant's rights in the plaintiff's land citing Winslow v. City of Vallejo. * * * The right of way given the defendant by the judgment of condemnation, however, was a definitely described parcel of land, with no limit upon the character of improvement to be constructed, except that it was to be an aqueduct for the conveyance of water. * * * In Western Union Telegraph Co. v. Polhemus [3 Cir.], 178 F. 904, 29 L.R.A. (N.S.) 465, 102 C.C.A. 105, where the trial court had held that the company was without the right to erect additional poles between those originally erected, it is said: 'We are clearly of opinion that the use of such additional poles as from time to time may be required to support the line is an incident to the old easement, and not a new one. It would be intolerable and at variance with salutary principles of law * * If an easement could be taken piecemeal, so to speak, and for a lesser purpose than for the entire use, for the full enjoyment of which the right of condemnation is alone conferred.' * * * It would be idle to condemn lands sufficient for prospective necessities if, when the necessity arose, the land could not be used without an additional condemnation."

By the same reasoning it would be idle to purchase easement rights in definitely described property sufficient to cover prospective necessities if, when the necessity arose, the additional use could be defeated by a lawful occupancy of the property by identical works of one or more subsequent grantees. In construing the present grant, effect must be given to the phrase, "all of said easements being five feet in width". This language is obviously not surplusage but serves to distinguish the grant from one of easements of undefined width, such as that considered in the Winslow case. The terms of the grant must be deemed to have contemplated the city's use of the property to the defined width for the installation, maintenance, repair, replacements, enlargement, or increase in number of water mains and connections, subject only to designated prior rights and consistent uses and free from danger of obstruction by incompatible competing uses. At the time of the grant there existed the possibility that the city might desire in the future to replace the mains with those of a larger size, or to relocate them within the five feet, or to lay additional mains. The language of the grant embraces these factors and indicates that the width of the easements may have been defined for the express purpose of protecting the city in the conduct of its present and future operations. Under the grant the city is entitled to protection not only in the exercise of its primary right but also in the exercise of its so-called "secondary easement" rights. "Secondary easements" are included in every easement and consist of the right, which must be exercised in such reasonable manner as not to increase injuriously the burden upon the servient tenement, to do such things as are necessary for the full enjoyment of the easement. Anderson v. Southern California Edison Co., 77 Cal.App. 328, 246 P. 559; North Fork Water Co. v. Edwards, 121 Cal. 662, 54 P. 69; McKinney's Cal. Digest, Vol. 9, p. 560, § 36.

The emphasis placed by defendant upon the quality of exclusiveness is a false quantity. A grant does not have to be specifically designated as "exclusive" in order to transfer to the grantee the entire right conveyed. The present grant conveyed the entire right to the use of the five feet for water mains and connections and left in the servient owner no right of identical use of the property which could pass through him to subsequent grantees or licensees, including the defendant. There remained in the servient owner, it is true, a right to use the property in any manner and for any purpose consistent and compatible with the city's enjoyment of its easements (Hoyt v. Hart, supra), but it may not be said that a grant to a third party by the servient owner, or his successor, of the identical right given the city would be consistent or compatible with the city's enjoyment. Even if it be conceded that the servient owner himself might have maintained a water main across the property for his own purposes without interfering unreasonably with the city's right, it would not follow that the servient owner could grant a like right to a third party to use the easement for conducting operations in direct competition with the city without unreasonably invading and interfering with the city's right. That such a competing use constitutes an unreasonable interference is

brought out by the facts of the present case which show that it enabled the defendant to gain the patronage of 22 of the 24 consumers who had theretofore used the city's water service.

Defendant seeks to classify the easement as one of a particular type which it denominates a "public utility strip", intended to be reserved by the original owner for the common use of all public utilities desiring to traverse the property with their pipes and mains. There is nothing in the wording of the grant to sustain this view nor are we cited to any authority which gives to any interest in real property or easement the legal classification of a "public utility strip." No question is presented on this appeal as to the right of the servient owner, or his grantee or licensee, to make additional use of the easement for purposes not in competition with the city's operations, such as for gas or sewage mains.

The fact that the city has not yet used the easement to the full extent of the right of way and defined width described in the grant is immaterial, for it is well settled that an easement created by grant is not lost by mere nonuser. City of Vallejo v. Scally, 192 Cal. 175, 219 P. 63, and cases cited; Currier v. Howes, 103 Cal. 431, 37 P. 521; Parker v. Swett, 40 Cal.App. 68, 180 P. 351.

The record shows that the commencement of this suit by the city was timely. Defendant's invasion of the Arcadia avenue easement occurred during the week of April 13-20, 1937, and installation of its works was completed in that period. On what date the city first received notice of the trespass, the record does not show, but even if it received immediate notice, the construction was completed too quickly to charge the city with laches or estoppel for failure to attempt to halt its progress by legal proceedings. The city's original complaint herein was seasonably filed on June 22, 1937.

The city is faced with irreparable injury in that continued actual and threatened occupancy of its easements by defendant might result in impairment or loss of its right through operation of the doctrines of prescription, adverse possession, estoppel, or intervention of the public use. The city is therefore entitled, irrespective of the issue of damages, to full protection of its rights. Danielson v. Sykes, 157 Cal. 686, 109 P. 87; Mendelson v. McCabe, 144 Cal. 230, 77 P. 915, 103 Am.St.Rep. 78; Tiffany, Real Property, 3d Ed., vol. 3, p. 364, § 815; 14 Cal.Jur. p. 221, § 34. It is also entitled to recover damages, if any, which it may have suffered by reason of defendant's acts.

The judgment should be reversed.

I concur: CARTER, J.



17 Cal.2d 534

WEBSTER v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA.

L. A. 17634.

Supreme Court of California.

March 6, 1941.

Dissenting Opinion March 11, 1941.

Rehearing Denied April 3, 1941.

1. Physicians and surgeons ⇐11(3)

Where the Legislature has created a professional board such as the Board of Dental Examiners and has conferred on it power to administer the provisions of a general regulatory plan governing the members of the profession, such a board is not required to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law on matters of evidence. St.1937, pp. 1247-1249, §§ 1670-1680.

2. Appeal and error ⇐989

Where an appellant contends that there was no evidence to support a judgment, the Supreme Court need inquire only whether there was evidence of a substantial nature to support the judgment of the court below.

3. Appeal and error ⇐996

Where reasonable minds might differ on the inferences to be drawn from a particular set of facts, the appellate court will not substitute its own conclusions for those reached by the trial court.

4. Physicians and surgeons ⇐10

The statute prohibiting any advertising to guarantee any dental service does not merely forbid a contractual guarantee of a particular dental service, but it was designed to prohibit advertising inducing the reader to believe that the dentist proposed to guar-

antee a particular result. St.1937, p. 1249, § 1680(17).

5. Physicians and surgeons ⇐10

Where dentist advertised that new material from which dental plates were made would not change in color and would not stain, shrink, or warp and that plates were faithful reproductions of natural gums and teeth in true color, size, and form and were made to defy detection, the Board of Dental Examiners and the trial court properly found that dentist had violated statute prohibiting any advertising to "guarantee" any dental service. St.1937, p. 1249, § 1680(17).

See Words and Phrases, Permanent Edition, for all other definitions of "Guarantee".

6. Physicians and surgeons ⇐10

Where dentist advertised that material used for dental plates was made from a secret formula and referred to his plates as "immediate restoration plates", and he testified that he had no secret material not available to the entire profession and that his methods were no different from those in general use, the Board of Dental Examiners and the trial court properly determined that advertising had a character tending to deceive or mislead the public within statutory prohibition. St.1937, p. 1249, § 1680(11).

7. Trade-marks and trade-names and unfair competition ⇐68(1)

The provision of the Business and Professions Code prohibiting the making use of any advertising statements of a character tending to deceive or mislead the public does not prohibit only statements which are untrue. St.1937, p. 1249, § 1680(11).

8. Trade-marks and trade-names and unfair competition ⇐68(1)

Legislation intended to reach the evils of deceptive advertising should not be interpreted to require proof of actual reliance on a false statement knowingly made as in a common-law action in deceit.

9. Physicians and surgeons ⇐10

The statutes regulating the practice of dentistry particularly with respect to advertising should not be accorded a more stringent construction than similar statutes regulating ordinary commercial advertising. St. 1937, p. 1249, § 1680(11, 12, 17).

10. Appeal and error ⇐761

Where a certain point was not developed in the briefs of either party and no cases were cited to sustain appellant's position, the Supreme Court could with propriety affirm the judgment below with respect to that contention without further discussion.

11. Trial ⇐395(1)

General findings in the words of a complaint are a sufficient compliance with the requirement of making findings of fact.

12. Physicians and surgeons ⇐11(3)

The statute stating that a dentist's license may be revoked or suspended for specified causes requires that the Board of Dental Examiners find the existence of at least one of the grounds specified as a basis for its order revoking or suspending a license. St.1937, pp. 1247–1249, §§ 1670–1680.

13. Physicians and surgeons ⇐11(3)

In absence of a statutory requirement, the reviewing court may not imply the necessity of a completely detailed statement of grounds for the determination of the Board of Dental Examiners revoking or suspending a license. St.1937, pp. 1247–1249, §§ 1670–1680.

14. Physicians and surgeons ⇐11(3)

Where the finding of the Board of Dental Examiners, either by a restatement of the charge made or by reference to the language of the accusation, sufficiently points out the specific ground on which it has determined that a cause for suspension or revocation of a license exists, an order so based cannot be said to be void, however much the reviewing court might prefer a more detailed statement of the grounds for the order. St. 1937, pp. 1247–1249, §§ 1670–1680.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Petition by William L. Webster for a writ of mandate to compel the Board of Dental Examiners of California to reinstate petitioner's license to practice dentistry. From a judgment denying the petition, petitioner appeals.

Affirmed.

Prior opinion, 103 P.2d 442.

Rehearing denied; CARTER, J., dissenting.

Charles E. Burch, Jr., and Irwin R. Hazen, both of San Diego, for appellant.

Robert W. Kenny and Morris E. Cohn, both of Los Angeles, amici curiæ for ap-

pellant; for California Progressive Dentists Ass'n.

H. E. Lindersmith, of Los Angeles, for respondent.

Anthony J. Kennedy, of Sacramento, amici curiæ for respondent; for Southern California State Dental Ass'n and California State Dental Ass'n.

GIBSON, Chief Justice.

This is an appeal from the decision of the Superior Court of San Diego county which denied appellant's petition for a writ of mandate to compel the respondent Board of Dental Examiners to reinstate his license to practice dentistry. In accordance with the provisions of the Business and Professions Code, secs. 1670–1680, St.1937, pp. 1247–1249, appellant's license was suspended by the Board for a period of six months for unprofessional conduct. Appellant sought to review the Board's order by this proceeding in mandamus. It was alleged in the petition that the statute was unconstitutional; that there was no evidence to support the findings of the Board; that if there was any evidence, it was wholly insufficient because the proceeding was quasi criminal in character; that the Board acted beyond its jurisdiction; that the Board was biased; and that the Board considered matters not properly before it. Each of these allegations was denied in the return to the alternative writ, and after a hearing on the record of the proceedings before the Board, the Superior Court rendered its judgment denying the relief sought. Findings of fact were expressly waived by the parties in open court.

Upon this appeal only three of these asserted errors are urged: (1) that there was no evidence before either the superior court or the Board to justify the order made; (2) that in view of the quasi criminal nature of the proceeding the evidence was insufficient to justify the order made; and (3) that the Board exceeded its jurisdiction by failing to make proper findings upon which to base its order of suspension.

The Board of Dental Examiners is a statutory body, consisting of seven members of the profession and charged with the duty of administering the provisions of the Dental Practice Act. Business and Professions Code, secs. 1600–1752. A similar board has existed in California since 1885 (Stats. 1885, p. 110) for the purpose of examining applicants and granting licenses to practice dentistry to properly qualified persons. Since 1909 the Board has had the power to revoke or suspend licenses for specified causes. Stats. 1909, p. 806. The revocation and suspension of professional licenses to practice dentistry by such an administrative board is sanctioned by long practice in this state and by the decisions of this court. Jacobs v. Board of Dental Examiners, 189 Cal. 709, 209 P. 1006; Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P. 324; Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67. In 1937 the legislature revised the Dental Practice Act and sought to specify with more particularity the kind of activity which comprises "unprofessional conduct" and thus constitutes grounds for the revocation or suspension of a license by the Board. Stats. 1937, p. 1248, Business and Professions Code, sec. 1680. In the present case appellant was charged with unprofessional conduct within three of the statutory definitions: (1) "The advertising of professional superiority or the performance of professional services in a superior manner" (sec. 1680 (12); (2) "The making use of any advertising statements of a character tending to deceive or mislead the public" (sec. 1680 (11); and (3) "The advertising to guarantee any dental service * * *" (sec. 1680 (17).

Appellant first challenges the order of suspension on the theory that administrative proceedings to revoke a professional license are quasi criminal in nature. It is suggested that the rules governing burden of proof, and quantum of proof must be those which apply in criminal trials, and that in consequence the Board used an improper standard in weighing the evidence. This analogy between a proceeding to revoke a license and a criminal trial is found in a number of the earlier cases. In some of the decisions, however, language describing the revocation of a license as penal in nature is entirely inapplicable to an administrative proceeding brought for that purpose, because in the particular case the legislature had provided for forfeiture of the professional license as an extra penalty to be added by the criminal court after a conviction for violation of the statute. See Cavassa v. Off, 206 Cal. 307, 312, 274 P. 523. In some states such a criminal proceeding is the ordinary way of accomplishing the revocation of a professional license. See Commonwealth v. Brown, 302 Mass. 523, 20 N. E.2d 478.

[1] Where, on the other hand, the legislature has created a professional board and has conferred upon it power to administer the provisions of a general regulatory plan governing the members of the profession, the overwhelming weight of authority has rejected any analogy which would require such a board to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law. Suckow v. Alderson, 182 Cal. 247, 187 P. 965; Lanterman v. Anderson, 36 Cal.App. 472, 172 P. 625; Ramsey v. Shelton, 329 Ill. 432, 160 N.E. 769; Spurgeon v. Rhodes, 167 Ind. 1, 78 N.E. 228; Meffert v. State Board, 66 Kan. 710, 72 P. 247, 1 L.R.A.,N.S., 811, affirmed per curiam Meffert v. Packer, 195 U.S. 625, 25 S.Ct. 790, 49 L.Ed. 350; In re Smith, 10 Wend., N.Y. 449; State ex rel. Hagen v. Superior Court, 139 Wash. 454, 247 P. 942; State v. Schaeffer, 129 Wis. 459, 109 N.W. 522; Reetz v. Michigan, 188 U.S. 505, 509, 23 S.Ct. 390, 47 L. Ed. 563; Butcher v. Maybury, D.C., 8 F. 2d 155. See 9 Wigmore, Evidence, 3d Ed., sec. 2498, pp. 327, 328; 48 C.J. 1101, sec. 73; 11 Calif.L.Rev. 273, 275. Many California cases have expressly rejected the contention that administrative proceedings for the revocation of a professional license are to be governed by criminal law theories on matters of evidence. Suckow v. Alderson, supra, 182 Cal. page 251, 187 P. 965; In re Vaughn, 189 Cal. 491, 496, 209 P. 353, 24 A.L.R. 858; Lanterman v. Anderson, supra, 36 Cal.App. at page 478, 172 P. 625; Thrasher v. Board of Medical Examiners, 44 Cal.App. 26, 29, 185 P. 1006; Winning v. Board of Dental Examiners, 114 Cal.App. 658, 664, 300 P. 866; Anderson v. Board of Medical Examiners, 117 Cal.App. 113, 117, 3 P.2d 344; Jameson v. Board of Dental Examiners, 118 Cal.App. 105, 5 P.2d 47; Bold v. Board of Medical Examiners, 135 Cal.App. 29, 34, 26 P.2d 707; Traxler v. Board of Medical Examiners, 135 Cal.App. 37, 39, 26 P.2d 710; cf. Gipner v. State Civil Service Comm., 13 Cal.App.2d 100, 106, 56 P.2d 535. The same rule is applied in administrative proceedings preliminary to orders of disbarment or suspension of attorneys. Despite early cases which speak in general terms of the analogy to a criminal prosecution (see Matter of Haymond, 121 Cal. 385, 53 P. 899), the rule that criminal law theories on matters of evidence are inapplicable to such proceedings was established at a time when disciplinary proceedings were still a matter for the courts alone (In re Vaughn, supra), and it has been followed since the adoption of the administrative procedure upon which orders of disbarment or suspension are at present based. In re Winne, 208 Cal. 35, 41, 280 P. 113; McIntosh v. State Bar, 211 Cal. 261, 263, 294 P. 1067; Fish v. State Bar, 214 Cal. 215, 222, 4 P.2d 937; Marsh v. State Bar, 2 Cal.2d 75, 78, 39 P.2d 403; Johnson v. State Bar, 4 Cal.2d 744, 758, 52 P.2d 928; Waterman v. State Bar, 14 Cal.2d 224, 227, 93 P.2d 95; 9 Cal.Jur.Ten Year Supp. 429 et seq.

Some of the cases relied upon by appellant are clearly distinguishable. Thus, Cavassa v. Off, supra, is not in point because there the legislature actually contemplated a criminal prosecution. The statement in Messner v. Board of Dental Examiners, 87 Cal.App. 199, 205, 262 P. 58, that such a proceeding is quasi criminal, is dictum. In that case the court held that a reasonable construction of the statute required that where one was charged with aiding and abetting an unlicensed person to practice dentistry, it must be shown that the unlicensed person had some control over the rendering of professional services. The court said that there was an *entire absence of evidence* to show any such management of the office by an unlicensed person as the statute contemplated. 87 Cal.App. at page 204, 262 P. 58. This lack of evidence upon a material issue required the annulment of the Board's order. The further statement that the proceedings were quasi criminal in nature is dictum which is contradicted so far as it relates to matters of evidence by the long line of cases cited above. Randall v. Board of Medical Examiners, 110 Cal.App. 61, 64, 293 P. 790, does not apply theories of criminal law to matters of evidence. The few remaining decisions which contain language tending to support petitioner's view are contrary to the great weight of authority in California and elsewhere, as pointed out above.

[2, 3] The second contention of appellant is that there was "no evidence whatsoever" before either the Board or the superior court to support the order of suspension. It should be observed here that this is an appeal from a judgment of the superior court denying relief to the appellant, and upon familiar principles this court need inquire only whether there was evidence of a substantial nature to support the judgment of the court below. Tupman v.

Haberkern, 208 Cal. 256, 262, 280 P. 970; Thom v. Stewart, 162 Cal. 413, 420, 122 P. 1069; 2 Cal.Jur. 912 et seq. Similarly, where reasonable minds might differ on the inferences to be drawn from a particular set of facts, the appellate court will not substitute its own conclusions for those reached by the trial court. Hamilton v. Pac. Elec. Ry. Co., 12 Cal.2d 598, 603, 86 P.2d 829; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; Hughes v. Quackenbush, 1 Cal.App.2d 349, 354, 37 P.2d 99; Hales v. Snowden, 19 Cal.App.2d 366, 372, 65 P.2d 847.

The evidence in the instant case included the advertisement itself and the testimony of appellant. If either the advertisement or the testimony offers any substantial support for the conclusion of the court below, the judgment must be affirmed. Appellant's argument is, in substance, that the advertising statements admittedly made by him do not constitute a violation of the terms of the statute. The language used by the appellant and the circumstances under which it was used are admitted. The application of the legal standard prescribed by the statute to the admitted facts requires a construction of the statutory provisions upon which both the Board and the court below were in agreement.

[4, 5] We need consider only two of the Board's determinations: first, that the statements in the advertisement constituted "advertising to guarantee" dental service; second, that they were "of a character tending to deceive or mislead the public". As to the first, the advertisement contained the following statements: "This new material * * * will absolutely not change in color. Does not stain from smoking, alcohol or alkaloids, will not shrink or warp", and also, "These new dental plates are so ably designed that Dr. Webster challenges you to detect any false appearance. * * * Each tooth is set so that it appears to be growing there. * * *" It also said, "Dr. Webster's Immediate Restoration Dentures or plates are faithful reproductions of your own natural gums and teeth, in their true color, size and form. These plates are made to defy detection * * * most intimate friends need not know that you are wearing artificial teeth."

Appellant's defense to this part of the charge, as nearly as can be discerned from his brief, is that the statements do not amount to a binding guarantee, and are too general to come within the statutory prohibition. It is plain that if his view were accepted, and the rules of contract thus imported into the statute, the purpose of the law would be defeated. The legislative intention is clearly seen in this and other portions of the statute. It was designed to prohibit advertising which induced the reader to believe that the dentist proposed to guarantee a particular result. The statute does not merely forbid a contractual guarantee of a particular dental service, but instead prohibits *any* "advertising to guarantee any dental service", that is, advertising which represents that a guarantee may be forthcoming. Under this interpretation, the conclusion of the Board and the trial court that the statements constitute a violation of the statute must be sustained.

[6] The Board further determined that the advertisement had a character tending to deceive or mislead the public. A few statements quoted therefrom will demonstrate the reasonableness of this conclusion. Appellant said, among other things, "Dr. Webster's Immediate Restoration Plate Material Weighs Less Than 1 Oz. This beautiful plate material * * * made from a secret formula, is a development of dental science which many plate wearers have been thankful for." and also, "Have Your Dental Plates Made 'The Webster Way' of Immediate Restoration." The ordinary reader is given the unmistakable impression by this language that appellant used a secret type of plate material not generally available, and that his plates were made according to a unique method called "'The Webster Way' of Immediate Restoration". Appellant testified, however, that he had no secret material not available to the entire profession, and that his methods were no different from those in general use.

[7, 8] On this phase of the case appellant advances the contention that only statements which are untrue are within the prohibition of the statute, and that these particular statements in the advertisement were not proven to be untrue. This contention wholly overlooks both the language and the purpose of the statute. The act refers to statements "of a character *tending* to deceive *or mislead* the public". (Business and Professions Code, sec. 1680 (11). It has been recognized in recent years that the evils of deceptive advertising cannot be reached effectively if legislation to that end is interpreted to require proof of actual reliance

upon a false statement knowingly made, as in a common-law action in deceit. See Handler, "False and Misleading Advertising," (1929) 39 Yale L. Jour. 22; 53 Harv.L.Rev. 828; 31 Mich.L.Rev. 804. Even in criminal statutes using such words as "false *or misleading*", some courts have recognized and upheld the intention of the legislature to prohibit something more than merely those advertisements which are untrue. Taylor v. United States, 5 Cir., 80 F.2d 604, 605; People v. Wahl, 39 Cal.App. 2d Supp. 771, 773, 100 P.2d 550; cf. Commonwealth v. Ferris, 305 Mass. 233, 25 N. E.2d 378, 380; Jasnowski v. Judge of Recorder's Court, 192 Mich. 139, 158 N.W. 229; McCreary v. Cohen, 108 Fla. 421, 149 So. 208, 211, 89 A.L.R. 1004. In the field of ordinary commercial advertising, regulatory agencies which are charged with the duty of combatting false or misleading advertising are not required to prove that the particular deceptive statements are actually false. United States v. 95 Barrels of Vinegar, 265 U.S. 438, 442, 44 S.Ct. 529, 68 L.Ed. 1094; Caldwell v. Federal Trade Comm., 7 Cir., 111 F.2d 889, 890; General Motors Corp. v. Federal Trade Comm., 2 Cir., 114 F.2d 33, 36; cf. Belmont Laboratories, Inc., v. Federal Trade Comm., 3 Cir., 103 F.2d 538, 541; 31 Mich.L.Rev. 804, 815.

[9] In view of the conclusion reached under similar statutes regulating ordinary commercial advertising, it would be unthinkable to accord a more stringent construction to a statute regulating one of the learned professions so intimately connected with public health and safety. In discussing an identical statute Chief Justice Hughes said, "The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. * * * the community is concerned in providing safeguards * * * against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 612, 55 S.Ct. 570, 572, 79 L.Ed. 1086. This interpretation finds an abundance of support elsewhere in cases dealing with similar statutes. State Board of Dental Examiners v. Miller, 90 Colo. 193, 8 P.2d 699, appeal dismissed 287 U.S. 563, 53 S.Ct. 6, 77 L. Ed. 496; Commonwealth v. Brown, 302 Mass. 523, 20 N.E.2d 478; cf. Sherman v. State Board of Dental Examiners, Tex. Civ.App. 116 S.W.2d 843, 847, hearing denied 130 Tex. 657; Craven v. Bierring, 222 Iowa 613, 269 N.W. 801; Donahue v. Andrews, 150 Or. 652, 47 P.2d 940; Modern System Dentists, Inc., v. State Board of Dental Examiners, 216 Wis. 190, 256 N.W. 922. See, also, Dr. Bloom Dentist, Inc., v. Cruise, 259 N.Y. 358, 182 N.E. 16; Semler v. Oregon State Board of Dental Examiners, 148 Or. 50, 34 P.2d 311.

[10-14] The third contention of appellant is that the order was void because the Board failed to make proper findings to support it, and that the judgment of the superior court upholding the order was therefore erroneous. This point was not developed in the briefs of either party and no cases are cited to sustain appellant's position. Because of this omission alone we could, with propriety, affirm the judgment below as to this contention without further discussion. Title G. and T. Co. v. Fraternal Finance Co., 220 Cal. 362, 363, 30 P.2d 515; Bradley v. Butchart, 217 Cal. 731, 747, 20 P.2d 693; Duncan v. Ramish, 142 Cal. 686, 690, 76 P. 661. But if we consider the proposition on the merits, appellant is in no better position. The Board did make its findings, and what appellant complains of is not that there was an absence of findings, but that they were defective. The actual findings incorporated by reference the language of the accusation which initiated the proceeding against petitioner. It is well settled that general findings in the words of the complaint are a sufficient compliance with the requirement of making findings of fact. Dam v. Zink, 112 Cal. 91, 93, 44 P. 331; Turner v. Turner, 187 Cal. 632, 636, 203 P. 109; California Canning Peach Growers v. Williams, 11 Cal.2d 221, 232, 78 P.2d 1154; Scarborough Co. v. Colver, 73 Cal.App. 435, 439, 238 P. 1102; 24 Cal.Jur. 984 et seq. The findings here were clearly sufficient under this rule, and the statute imposes no additional or more specific requirement as to the form in which the finding of the Board must be put. It states only that a license may be revoked or suspended for specified causes. This is, of course, a requirement that the Board find the existence of at least one of the

grounds specified as a basis for its order. Cf. Elite Dairy Prod., Inc., v. Ten Eyck, 271 N.Y. 488, 498, 3 N.E.2d 606; Douglas v. Noble, 261 U.S. 165, 169, 43 S.Ct. 303, 67 L.Ed. 590. Though the reviewing court might prefer to have the grounds for the Board's determination stated in complete detail, including findings as to specific portions of the questioned advertisement, we cannot imply the necessity for such detailed findings in the absence of a statutory requirement. See United States v. Baltimore & O. R. R. Co., 293 U.S. 454, 464, 55 S.Ct. 268, 79 L.Ed. 587; Southern Pac. v. Railroad Comm., 13 Cal.2d 89, 107, 112, 87 P.2d 1055; Cf. Homan v. Board of Dental Examiners, 202 Cal. 593, 594, 595, 262 P. 324; Bold v. Board of Medical Examiners, 135 Cal.App. 29, 32, 26 P.2d 707. Where the finding of the Board, either by a restatement of the charge made or by reference to the language of the accusation, sufficiently points out the specific ground upon which it has determined that a cause for suspension or revocation exists, it cannot be said that an order so based is void, however much the court might prefer a more detailed statement of the grounds for the order. Cf. Elite Dairy Prod., Inc., v. Ten Eyck, supra.

The judgment of the court below denying a peremptory writ of mandate is affirmed.

We concur: SHENK, J; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.

I dissent: CARTER, J.

CARTER, Justice.

I dissent.

The effect of the majority decision is to prohibit members of the dental profession from advertising in any manner whatsoever the character or quality of service performed by them or which they are offering to the public. This is contrary to the legislative enactment upon which the decision is based. The decision however, concedes that it is within the province of the legislature to prescribe the acts which constitute unprofessional conduct by a dentist, including the subject of advertising.

The legislature has not seen fit to prohibit a dentist from advertising except in the following respects:

(1) "The making use of any advertising statements of a character tending to deceive or mislead the public";

(2) "The advertising of professional superiority or the performance of professional services in a superior manner";

(3) "The advertising to guarantee any dental service * * *." Sec. 1680, Dental Practice Act of California, subds. 11, 12 and 17.

By restricting the prohibition against advertising to the above-quoted provisions, it necessarily follows that in all other respects a dentist may advertise the character or quality of service which he offers to the public.

It is a matter of common knowledge that there are many methods employed by members of the various professions to obtain patrons, customers, patients or clients. Probably the most effective method is to publish advertisements in newspapers which are read by thousands of people and to which many people refer for information to guide them in their daily walks of life. No reason has been suggested, and none has occurred to me, why an advertisement in a newspaper depicting in a fair and truthful manner the character or quality of service which a member of a profession offers to the public should be prohibited. In any event, it must be conceded that it is a matter of public policy to be determined by the legislature as to whether or not members of a profession should be prohibited from advertising the character or quality of professional service they offer to the public, and if so, to what extent such advertising may be prohibited.

In the case at bar no attempt was made to prove that any statement contained in the advertisement published by appellant was in any respect untrue, and in the absence of evidence to the contrary, it must be assumed that the statements contained therein were true.

The majority opinion devotes much space to a discussion of whether or not a proceeding for the revocation of the license of a member of a profession is quasi criminal. Such discussion is wholly beside the point and immaterial. Matters such as the burden of proof, presumption of innocence, reasonable doubt and the like are of no particular concern here. However, it is well to point out and keep in mind the gravity of the consequences flowing from the revocation of a license of a professional man. He usually spends years of his life and incurs large expense in pursuit of the knowledge requisite to the successful practice of his chosen vocation. If his li-

cense is revoked he loses all of that effort and investment. He is deprived of the right to obtain the necessities of life by the only method for which he is qualified. He suffers not only economically but socially as well; his station in life is lowered and the dignity and pride naturally a part of his professional standing is forever gone.

Under these circumstances, I do not think it can be seriously questioned that the administrative board should be required to act strictly within the terms of the statute, and a review of its determination and also of that of the superior court should be made, and the evidence carefully examined to ascertain whether a violation of the law has been perpetrated by the accused. Both the findings of the board and the superior court against the accused must be supported by substantial evidence and the conclusions drawn therefrom must be reasonable. In the case at bar, as pointed out in the majority decision, there is no conflict in the evidence. The only evidence offered was the testimony of appellant and the advertisement itself. That being the case the question presented to this court is purely one of law, and this court is fully as capable of arriving at a conclusion of whether appellant has violated the law as the dental board or the superior court. On questions of law this court is not bound by the findings or conclusions of the board or the trial court; it is legally competent to pass on the issues without regard to such findings or conclusions. It is not a case of determining an issue on conflicting evidence, or of passing on the weight of the evidence, or the credibility of witnesses. San Diego Trust & Savings Bank v. County of San Diego, Cal.Sup., 105 P.2d 94.

A review of the record in this case convinces me that there is no substantial evidence to support the conclusion that appellant was guilty of unprofessional conduct. It must be borne in mind that the statute does not forbid any and all advertising, and for that reason care should be taken to avoid so interpreting it. It is not a question of whether one is in favor of professional men advertising. Indeed, our only concern here is with what the legislature has done in that respect. It is not the function of this court to make the law. This is purely a legislative function.

The advertisement upon which the charge against appellant was based is as follows:

"Dr. Webster offers his finest dental plates. Natural expression. The newest plate material in dentistry. This new material, although having the most delicately shaded natural gum color, will absolutely not change in color. Does not stain from smoking, alcohol or alkaloids, will not shrink or warp. Be sure your new dentures are made of this wonderful new material. Seeing is Believing. Dr. Webster invites you to See and Talk to former patients who will be in his office all of this week to show you These Beautiful Plates. Only by Seeing them can you actually Appreciate their Natural Beauty. Note how they Mold the Features back to that Youthful appearance by adding charm and Beauty to the Profile. Talk to these patients and let them tell you they Eat Corn Off the Cob, Eat Steaks and Taste their foods as well as they ever did. A Natural Expression. These new dental plates are so ably designed that Dr. Webster challenges you to detect any false appearance in either the beautifully shaded porcelain teeth or artistically blended natural looking pink gums. Each tooth is set so that it appears to be growing there, yet these beautiful plates cost you very little money.

"Dr. Webster's Immediate Restoration Plate Material Weighs Less Than 1 oz.

"This beautiful plate material which forms the gums and the main body of Dr. Webster's Natural Appearing Dental Plates has a new natural Gum-Pink color which looks just like real healthy gums. Made from a secret formula, is a development of dental science which many plate wearers have been thankful for. Is particularly adaptable to difficult cases, since it weighs Less Than One Ounce, enabling Dr. Webster to fashion a plate which will fill out the cheeks, and fit properly without being heavy or bulky.

"Have your dental plates made 'The Webster Way' of immediate restoration. You need not be without your teeth for even one hour, or lose a single day's employment. Dr. Webster's immediate restoration dentures or plates are faithful reproductions of your own natural gums and teeth, in their true color, size and form. These plates are made to defy detection—so much so that members of your immediate family or most intimate friends need not know that you are wearing artificial teeth. Why suffer the embarrassment of being without your teeth even one hour.

"Is your mouth difficult to fit? No matter how little you pay for your dental plates at Dr. Webster's an individual study of your case is always made. There is no limit to the care used in fitting difficult cases. Great care is taken not to cause wrinkles, drooping mouth, unnecessary lines, unnatural expression, etc., when making these new beautiful plates. * * * 'See Dr. Webster today' and have your dental needs cared for the 'Webster Way'."

In my opinion there is nothing in the above-quoted advertisement tending to mislead the public. It cannot be doubted that the phrases "Dr. Webster's Immediate Restoration Plate Material Weighs Less Than 1 Oz. This beautiful plate material. * * * Made from a secret formula, is a development of dental science which many plate wearers have been thankful for. * * * Have your dental plates made 'The Webster Way' of immediate restoration", are neither deceptive or misleading or tending to mislead. It is established that it is common practice among dentists to use the same material used by appellant. The material is made by a manufacturer having a secret formula. When one advertises that he uses the *same material as other dentists* use, and that such material is beautiful and is a development of dental science that people using plates appreciate, and that the material is light, he is not deceiving or misleading the public. To determine that such advertising is misleading would be to condemn the entire dental profession for using such material because if they all use it they are misleading the public by so doing. There is nothing untrue about those statements. There is no reasonable implication that appellant followed a unique procedure or used unique materials for his plates. The contrary inference flows from the statement that it is "a development of dental science". If it is a development of dental science generally the natural inference is that all practitioners of dental science are aware of it and follow it. It is a matter of common knowledge that each dentist has some methods and procedure which are different in varying degrees than those used by other dentists. How can the public be misled even if we assume that there is an intimation that appellant has a certain way of doing things different than other members of his profession? At the most appellant merely advises the public that dental science has available a good plate material and that he is using that material. If anything, the advertisement might be termed generally educational, in that it broadcasts the information that persons requiring plates are able to obtain ones which are satisfactory, light and beautiful.

There is no evidence to support the conclusion that appellant was "advertising to guarantee dental service". The majority opinion refers to the following phrases in this advertisement as containing an advertisement to guarantee dental service: "'This * * * material * * * will absolutely not change in color. Does not stain from smoking, alcohol or alkaloids, will not shrink or warp.' * * * 'These new dental plates are so ably designed that Dr. Webster challenges you to detect any false appearance. * * * Each tooth is set so that it appears to be growing there. * * * 'Dr. Webster's Immediate Restoration Dentures or plates are faithful reproductions of your own natural gums and teeth, in their true color, size and form. These plates are made to defy detection * * * most intimate friends need not know that you are wearing artificial teeth.'" The most that can be said of those statements is that the plates and material are satisfactory. If that is a guarantee, then every advertisement is one. A dentist merely stating that he did good or satisfactory work would be advertising a guarantee of his services. An advertisement consisting of merely the dentist's name and the college from which he graduated or how long he had practiced would carry the implication that if you became his patient you would obtain satisfactory service. This is contrary to the legislative intent. As above stated the legislature carefully refrained from forbidding all advertising. By stating that the material, which is used by the dental profession generally, will not stain, etc., there is no guarantee of "dental service" mentioned in the law. The most that could be said is that such *material* will not stain. Material is not services. Services are personal, mental or physical acts. The remainder of the phrases are merely expressions of an opinion and could in no sense be considered a guarantee. In order to constitute a guarantee there must be a positive assurance that a definite fact will obtain, or that a definite result will be accomplished.

Although the majority opinion does not discuss the charge of advertising professional superiority, there is likewise no evidence supporting that charge. The board and trial court found appellant guilty of

that charge also. In regard to that charge it would appear that the most that could be said of the advertisement is that appellant states that he makes good dental plates. That is clearly not sufficient to support a charge of professional misconduct, for it must be remembered that the legislature carefully refrained from prohibiting a dentist from all manner of advertising. He must, however, restrict his advertising. And to say such advertising as is here involved, is a claim of professional superiority, would amount in practically all instances, to prohibiting all advertising except possibly such as is of a strictly educational nature, and even such advertising would necessarily have to be disassociated with the dentist doing the advertising. That would manifestly be an unwarranted extension of the dental practice act. It is quite clear that it may be plausibly asserted that statements by a dentist in his advertisements, suggesting that he be patronized, that he does certain work, or that his work is of a certain quality and the like, are all pregnant with the inference that he is to be chosen in preference to other dentists, and therefore has professional superiority. When he asks you to patronize him, the inference is that you should not go elsewhere; when he describes the quality of his work, he implies that elsewhere the work will be inferior. There must therefore be a convincing showing of a direct claim of professional superiority of the advertising dentist as compared with other dentists to justify disciplinary action.

The majority opinion makes the following statement:

"The evidence in the instant case included the advertisement itself and the testimony of appellant. If either the advertisement or the testimony offers any substantial support for the conclusion of the court below, the judgment must be affirmed. Appellant's argument is, in substance, that the advertising statements admittedly made by him do not constitute a violation of the terms of the statute. The language used by the appellant and the circumstances under which it was used are admitted. *The application of the legal standard prescribed by the statute to the admitted facts requires a construction of the statutory provisions upon which both the Board and the court below were in agreement.*" I may be obtuse, but it is not clear to my mind what the author of the majority opinion meant by the italicized portion of the above-quoted statement. The fact is, that the majority opinion accepted the conclusion reached by the dental board and the trial court that the above-quoted advertisement violated subdivisions 11 and 17 of section 1680 of the Dental Practice Act prohibiting advertising statements of a character tending to deceive or mislead the public and advertising to guarantee dental service, but the majority opinion apparently does not agree with the conclusion reached by the dental board and the trial court that said advertisement violated subdivision 12 of said section which prohibits advertising of professional superiority or the performance of professional service in a superior manner. It would seem to me that if this court is bound by the conclusion reached by the dental board and the trial court upon any of the issues, it should be bound by their conclusion as to all of the issues. I make this observation merely for the purpose of demonstrating the unsoundness of the premise upon which the conclusion reached in the majority opinion is based.

The appeal of this case was first presented to the District Court of Appeal of the Fourth Appellate District and was decided by that court. 103 P.2d 442. In a very able opinion prepared by Mr. Justice Marks of that court, the same conclusion was reached which I have announced in this opinion, but a hearing was granted by this court for the purpose of giving further consideration to the problems involved. To my mind there can be no doubt of the soundness of the reasoning upon which the conclusion of the District Court of Appeal was based, and for the reason stated therein and in the foregoing opinion, the judgment of the trial court should be reversed with directions that it issue a writ of mandate requiring the respondent Board of Dental Examiners of California to reinstate appellant's license as prayed for in his petition.

PEOPLE v. GAERTNER et al.

Cr. 3369.

District Court of Appeal, Second District, Division 1, California.

March 10, 1941.

Hearing Denied April 5, 1941.

1. Conspiracy ⇐47

Evidence that defendants formed corporation for avowed purpose of carrying on campaign of education and publicity with view to betterment of conditions caused by motor traffic, and sold seals bearing a slogan, the suggested use of which was well calculated to create beneficial psychological effect in a campaign to reduce traffic accidents, that defendants represented that proceeds from such sales were to be used in plan of publicity and education relating to traffic problems, and that although the money was so used, the expense entailed proved disproportionate to the amount taken in, failed to show commission of "theft", attempted theft or any overt act in furtherance of a conspiracy, so as to sustain conviction of conspiracy to commit petty thefts. Pen. Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Theft".

2. Criminal law ⇐419(11)

In prosecution for conspiracy to commit petty thefts through sale to the public of seals bearing careful driving slogan, which was based on alleged misrepresentations made by defendants' salesmen in soliciting funds and fact that great proportion of such funds was applied to overhead, salaries and commissions, testimony that witness received telephone call from someone who stated that he was a certain judge and who solicited the witness to purchase seals on representation that another judge had suggested that the call be made was not objectionable as "hearsay", regardless of fact that the identity of the person making the call was not established. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

3. Conspiracy ⇐45
Criminal law ⇐1169(1)

In prosecution for conspiracy to commit petty thefts through sale to the public of seals bearing careful driving slogan, which was based on alleged misrepresentations made by defendants' salesmen in soliciting funds and fact that great proportion of such funds was applied to overhead, salaries and commissions, the only material representations could be those concerning nature and purpose of the organization through which the seals were sold and the use to which the funds obtained would be put, and testimony of judges to the effect that they had not authorized the use of their names in telephone conversations by the defendants' salesmen was inadmissible and its admission was prejudicial. Pen.Code, § 484.

4. Conspiracy ⇐48

In prosecution for conspiracy to commit petty thefts through sale to the public of seals bearing careful driving slogan which was based on alleged misrepresentations made by defendants' salesmen in soliciting funds and fact that great proportion of such funds was applied to overhead, salaries and commissions, wherein some evidence concerning alleged misrepresentations made on telephone by defendants' salesmen was submitted to jury notwithstanding the apparent immateriality thereof, requested instruction to effect that the rule in civil cases of responsibility of a principal for acts of his agent is not applicable to criminal cases might properly have been given. Pen.Code, § 484.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Carl John Gaertner and others were convicted of criminal conspiracy to commit petty thefts and they appeal.

Reversed.

Cantillon & Glover, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellants herein appeal from an order denying their motion for a new trial made after a jury had found each of them guilty of a criminal conspiracy to commit petty thefts as charged in an indictment accusing appellants and other named defendants of the crime. After the verdict appellants applied for probation and the court ordered that proceedings in the case be suspended and granted appellants probation for a period of two years upon condition that appellant Gaertner serve the first six months

of his probationary period in the county jail and pay a fine of $500 and that appellants Klavans and Gerde serve the first three months of their probationary periods in the county jail and each pay a fine of $200, and at the same time denied appellants' motion for a new trial as above stated.

Appellants, together with defendants Frank W. Barrett and William Davis, were arraigned on the indictment, and all entered pleas of "Not Guilty". During the course of the People's case the prosecution asked and was granted permission to dismiss as to defendant Barrett for the purpose of calling him as a witness on behalf of the People. The jury found defendant Davis not guilty of the crime charged.

The evidence offered in support of the charge reveals the following facts. Appellants Gaertner, with defendant Barrett and one other, organized and incorporated in California a corporation known as the American Safety First Association, which appears to have had for its general purposes the dissemination of information to the public as to the dangers inherent in the reckless operation of motor vehicles and the disregard of traffic signals and the violation of state, county and city ordinances enacted for the protection of the public, the establishment of classes for safety first education and the production of motion pictures dealing with safety first subjects, as well as dramatic and radio skits of the same nature, radio broadcasts, and such other measures as might from time to time be determined by the association suited to the protection of the public. In short, the corporation was formed for the avowed purpose of carrying on a campaign of education and publicity with a view to betterment of conditions caused by motor traffic. A few local judges became interested in the organization, undoubtedly because of the nature of its proposed work, and some of them permitted the use of their names upon a letterhead of the association, as members of committees or in similar capacities. The funds of the organization were raised through sale to the public of seals, similar in character to those sold at Christmas time by the associations engaged in combating tuberculosis. The seals were sold in sheets of 100 at $1 per sheet and bore the slogan "Drive Carefully and Avoid Accidents". The seals were sold by solicitation over the telephone and the solicitation was made through salesmen hired for the purpose. These salesmen were largely obtained through help wanted advertisements in the newspapers, and worked in crews located in various hotel rooms from which the phone solicitations would be made. The salesmen were given specimen sales talks as a guide to use in soliciting. Seals were delivered and collections made by messengers. Over a period of approximately two years the organization obtained in excess of $19,000 by this method. During the same period a little over $900 was spent for radio broadcasts and in conducting a traffic school. The balance of the funds appears to have been applied to salesmen's and collectors' commissions and commissions of others in the organization, salaries and general overhead. Appellant Gaertner appears to have received the total sum of about $3,492.73 out of the fund during this period. Appellant Gaertner was a salesman by profession and had engaged in selling advertising and tickets for various organizations. It may reasonably be inferred from the evidence that in organizing and carrying on the work of the American Safety First Association appellants were not inspired by purely altruistic motives. Some thought was clearly given to the possibility of personal profit, or at least a means of livelihood.

In carrying on their phone solicitations there is evidence that the salesmen had misrepresented themselves, sometimes posing as judges or prominent citizens; and it appears that occasionally salesmen had represented that their services and the services of others in the association were being donated. The use of his name in such solicitations appears to have caused one of the judges to withdraw from the organization.

The theory of the prosecution was clearly that of obtaining money under false pretenses. It is stated in respondent's brief that the gist of the offenses charged against these three appellants was the conspiracy to take and the taking from the public at large of money in varying small amounts. Evidence was introduced at the trial in an effort to connect the defendants with the improper representations made by phone solicitors. It should be noted, however, that testimony to this end consisted largely of reported conversations had by the witnesses with various defendants and in each case was admitted only against the particular defendant with whom the conversation was had, subject to a motion to strike the testimony in the event the prosecution failed to establish a conspiracy. At the close of

the People's case defendants' motion to strike this testimony was denied.

There is no evidence that any of the defendants deliberately pocketed any of the funds of the association and the prosecution appears to have rested the case entirely upon misrepresentations made in soliciting funds and on the fact that so great a proportion of the funds was applied to overhead, salaries and commissions.

As to the representations made by the salesmen in soliciting funds, the only evidence tending to show that the representations were made as the result of any concerted effort on the part of appellants appears in the specimen talks or outlines furnished the salesmen as a guide for their phone conversations, which outlines were received in evidence on behalf of the People. However, the only statement contained in these outlines which could be construed as a misrepresentation of fact is one directing the salesman to state that he was serving on a committee with three superior court judges and the chairman of the American Safety First Association, who was a well-known attorney. While it is true that the judges and the attorney named had all consented to act on committees of the association or to lend their names to such committees, a representation that the person making the phone call was working on such a committee would obviously tend to give the recipient of the call the impression that the person calling was one of some prominence in the organization and not merely a hired salesman working on a commission. From this it might be reasoned that the salesmen impliedly represented themselves to be donating their services to the cause and that by so holding themselves out to the public they in turn represented that all or the greater part of the funds received on the sale of the seals would be applied directly to the work for which the association had been organized, without reduction through payment of commissions. It is readily seen, however, that the evidence allows considerable room for a reasonable doubt that appellants intended to convey such an impression to the public. Moreover, it would be stretching the powers of deduction too far to infer from such evidence that there had been a misrepresentation of the use to which the funds were to be put or a misrepresentation of the nature and purpose of the association; and it should here be pointed out that in order to prove these appellants guilty of the offense charged, under a theory of false pretenses, it would be necessary to show the commission of overt acts tending to misrepresent either the nature and purposes of the association in question or the use to which the funds of the association were to be put. Representations as to the identity of the salesmen and their connections, if any, with committees of the organization do not in themselves have such a tendency and, standing alone, are merely collateral and not material.

It is significant that the evidence most strongly tended to place responsibility for the salesmen's misrepresentations upon defendant Davis since it appears that the outlines in question were given out by him and that some of the improper statements were made by salesmen within his hearing, and the jury might have properly inferred that such statements were made with Davis' tacit consent and approval. Yet the jury exonerated defendant Davis of any complicity in the crime of which the defendants were accused. Appellants' connection, if any, with any such statements was considerably more remote than that of Davis. It should be noted that Davis appears to have been an employee in the organization in charge of telephone salesmen. However, no direct connection was shown between appellants and the misrepresentations made by the salesmen, other than that contained in the outline mentioned above, and no connection whatsoever was shown in this respect as to any representation that salesmen's services were donated.

[1] But it is unnecessary to consider the evidence of a conspiracy in greater detail since the record fails in the first instance to show the commission of a theft, an attempted theft, or any overt act in furtherance of a conspiracy to commit theft. Appellants sold seals to the public at a penny apiece. These seals bore a salutary slogan and their suggested use was well-calculated to create a beneficial psychological effect in a campaign to reduce traffic accidents. Furthermore, appellants represented that the proceeds from such sales were to be used in a plan of publicity and education relating to traffic problems. The money was so used, though the expense entailed proved disproportionate to the amount taken in, a common failing of many charitable and civic enterprises. There is no evidence that appellants made any representation as to the percentage of the funds to be applied to expenses of the undertaking. It should also be pointed out

that the persons buying the seals obviously must have intended to part with their money in exchange for the seals and that the price of the seals fairly represented their value in relation to the purpose for which they were sold. The organization appears to have kept a record of receipts and expenditures of funds, to have held meetings and kept minutes thereof. If there were any basis at all for an inference that there was a misappropriation of funds it would have to be found in the evidence of the expenditures made. However, this evidence fails to show that any of appellants received an exorbitant share of the funds from the standpoint of actual services rendered. The only fact established in this connection is that the expenses in general were too high for the amount received. Some $3,000 shown to have been paid to appellant Gaertner could not be held an unreasonable amount of compensation for his services over the period of two to two and a half years covered by the charge. It appears, therefore, that the money received on the sale of the seals was used as represented and that the misstatements and misrepresentations of the salesmen were at the most collateral and immaterial upon the question of a theft or overt acts in furtherance of a theft. There is no basis in the evidence for any inference that appellants were guilty of a theft, or even an attempt at theft of the money, as theft is now defined in the Penal Code [§ 484], nor have appellants been shown to have committed any overt acts leading to the commission of a theft. As contended by appellants on their motion for a new trial, and on appeal herein, the court should have granted the motion of appellants for a new trial upon the ground of the insufficiency of the evidence to support the verdicts. People v. Cesena, 18 Cal.App.2d 727, 729, 64 P.2d 732; People v. Bacos, 14 Cal.App.2d 338, 349, 58 P.2d 221. And see People v. Rodriguez, 37 Cal.App.2d 290, 99 P.2d 363.

[2] Appellants also assign as error the admission, over objection that it was hearsay, of testimony of a witness to the effect that on a certain date he received a phone call from a voice which stated that it was a certain judge, and that the witness was thereby solicited to purchase seals of the American Safety First Association upon the representation that another judge, whose name was given, had suggested that the call be made; that the witness in response to the call purchased the seals in question through a messenger who delivered the seals and to whom the witness gave his check in payment. The witness then testified that when the check was later returned it bore the rubber stamp endorsement, "The American Safety First Association". Counsel then stipulated that the endorsement on the check was authentic. The objection in question was directed to the relation by the witness of the conversation had over the phone. From the resumé above given it may be seen that such testimony was not objectionable as hearsay and, if otherwise material, was admissible. Appellants base their argument as to this point on the ground that the identity of the person making the call was not established. However, the witness stated that the voice had represented itself to be that of a certain judge. Under the circumstances, it was no more necessary to establish the actual identity of the voice than it would have been for the witness to have established that of an unknown person who had accosted the witness on the street, held himself out to be a certain individual, and sold the witness the seals. The testimony given by the witness showed the circumstances under which he had purchased seals of the association and such testimony derived its value solely from the credit to be given the witness upon the stand. (See the definition of hearsay, 20 Am.Jur. 400, § 451; idem at page 403, § 454.) It was not claimed that the phone call was made by one of the appellants or any particular individual.

[3] Testimony, admission of which is assigned as error, given by three judges of the superior court to the effect that they had not authorized the use of their names in telephone solicitations, was immaterial and improperly admitted. It has already been pointed out that such representations made by the salesmen in this case had no bearing upon the charge. It should be borne in mind that under the charge the only material representations could be those as to the nature and purpose of the organization and the use to which funds would be put. Whether or not a judge authorized the use of his name could have no possible bearing on the case, and admission of the testimony here complained of was necessarily prejudicial to appellants.

[4] Appellants also complain of the trial court's refusal to give a requested instruction to the effect that the rule in civil cases of the responsibility of a principal for the acts of his agent is not ap-

plicable to criminal cases. Some evidence, aside from that connected with defendant Davis, was allowed to stand as to misrepresentations made on the telephone by telephone salesmen. In view of the fact that this evidence was submitted to the jury, notwithstanding the apparent immateriality thereof, an instruction such as that requested might properly have been given (People v. Doble, 203 Cal. 510, 265 P. 184), but since the court gave an instruction to the effect that in determining whether the respective defendants were parties to the conspiracy the jury had no right to consider against a defendant any declarations or acts made or done by any other person in the absence of that defendant, it is doubtful whether the failure to give the requested instruction constituted prejudicial error.

The order denying the motion for a new trial is hereby reversed.

We concur: YORK, P. J., WHITE, J.



43 Cal.App.2d 370

CRESCENT CANAL CO. v. KINGS COUNTY DEVELOPMENT CO. et al.

KINGS COUNTY DEVELOPMENT CO. v. CRESCENT CANAL CO.

Civ. 2597.

District Court of Appeal, Fourth District, California.

March 7, 1941.

1. Waters and water courses ⇐249

The statute relating to rights of purchasers of land from corporation which furnishes water for irrigation of the land, to use of water for irrigating, was not applicable to canal company which did not sell the land for which it furnished water for irrigating purposes. Civ.Code, § 552.

2. Waters and water courses ⇐252

Where canal company had not complied with the statute relating to mutual water companies, the statute was not applicable in determining right of purchaser of stock in the company to proportionate share of water for irrigating purposes. Civ.Code, § 330.24.

3. Waters and water courses ⇐252

The right to use water may be confined to a particular area by contract mutually entered into by water company and its stockholders when properly expressed through company's articles, by-laws, and certificates.

4. Waters and water courses ⇐252

Water may not be dedicated to land within a certain area, in absence of any contract between water company and its stockholders to that effect and without compliance with any statutory provision.

5. Waters and water courses ⇐252

Fact that stockholders in water company, who are entitled to water, have previously happened to use the water within a certain area, does not in itself establish a "dedication" of the water supply to that particular area.

See Words and Phrases, Permanent Edition, for all other definitions of "Dedication".

6. Waters and water courses ⇐252

Although a water company might by appropriate steps dedicate its water for use in a certain area, it could not, in absence of a contract, dedicate one stockholder's beneficial interest, without his agreement or consent, to the use and benefit of other stockholders.

7. Waters and water courses ⇐252

A contractual right of a stockholder in a water company cannot be defeated by custom and usage, regardless of whether the water rights are appurtenant to land.

8. Waters and water courses ⇐252

Where water supplied by canal company had always been used in a particular area, but there was nothing in the articles and by-laws of the company, nor in the stock certificates issued by it restricting the use of the water to such area, there was no "dedication" of the water to the particular area and a purchaser of stock in the company was entitled to use his proportionate share of the water for land located outside the particular area previously served.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by the Crescent Canal Company against Kings County Development Company and others, involving the right of the named defendant to a proportionate share of water distributed by the plaintiff, wherein the named defendant filed a cross-complaint. From an adverse judgment, the plaintiff appeals.

Affirmed.

H. Scott Jacobs, of Hanford, and Hayhurst & Gibson, of Fresno, for appellant.

Gregory, Hunt & Melvin and Wallace Sheehan, all of San Francisco, for respondents.

BARNARD, Presiding Justice.

The plaintiff has appealed from a judgment awarding the corporate defendant and cross-complainant, which will be referred to as the respondent, the right to its proportionate share of the water distributed by the plaintiff.

The appellant was organized under the laws of this state in 1885. Its purposes, as set forth in its articles, are to construct and operate canals; to acquire water rights; and to appropriate and divert water and distribute the same through its canals for agricultural and other purposes. Neither its articles nor its by-laws contain any provision restricting the use of such water to any specified land, nor does the form of stock certificate used contain any such restriction. The company has but one canal, known as the Crescent canal, which takes out of the lower north fork of the Kings river and runs in a northwesterly direction for some twenty miles. While the company had an authorized capital stock of 150 shares its supply of water has always been limited and no more than 40 shares were ever issued. Immediately upon its organization the appellant adopted the policy of distributing its available water to its stockholders in proportion to their holdings of stock. By common consent it was also understood that water should be delivered to stockholders on the basis of one share of stock to each 320 acres desired to be irrigated and owned by the respective stockholders. The water thus furnished has heretofore always been used in a certain general area, the maximum acreage which has been so irrigated being some 13,000 acres, the boundaries of which are not clearly described in the evidence. Of this land, about 1200 acres are on the southerly side of the Crescent canal and the remainder on the northerly side.

Because the available water has been insufficient to meet the needs of its stockholders the appellant has refused to sell additional stock and, by common consent, the company and its stockholders have carried on the practice, where any stockholder did not use his water in a particular year, of redistributing that part of the water among the remaining stockholders. Also, where stock has been sold for delinquent assessments no effort has been made to sell or reissue the stock so retired. By reason of this fact the total issue of stock of the company has been reduced to 33 15/16ths shares. It appears from the evidence that the right of the stockholders to water depends upon their ownership of stock, and that if assessments thereon are not paid the stock is sold to the company and thereafter the appellant is not required to deliver any water represented by that stock until and unless it is redeemed. It further appears that no land outside of the 13,000 acres above mentioned has heretofore been served with water from the Crescent canal.

The respondent is the owner of a section of land on the southerly side of, and approximately one-half mile distant from, the Crescent canal as it cuts through the adjoining section. This land has never been irrigated from the Crescent canal. In the latter part of 1937 the respondent purchased 2¼ shares of the issued and outstanding stock of the appellant and shortly thereafter commenced the construction of a ditch for the purpose of obtaining and receiving its proportionate share of the water distributed by the appellant. This led to the filing of this action.

Among other things, the court found that for more than 50 years the appellant has diverted certain water from the lower north fork of the Kings river whenever said amount was available; that during all of that time the water so appropriated has been supplied by the appellant to a large number of landowners who were and are its stockholders, and who have put said water to beneficial uses; that subject to this beneficial use the appellant is the owner in fee of the right to divert and distribute said water; that the appellant has never engaged in business for profit but has continuously delivered its water at cost through the Crescent canal to its stockholders ratably and in the proportion that their stock bears to the total shares issued and outstanding; that neither the articles of incorporation of the appellant nor the stock certificates issued by it contain any restrictions upon the

use of water by its stockholders; that its by-laws contain no requirement that the water delivered to its stockholders shall be used upon any specified or appurtenant land; that said by-laws have never been recorded in the office of the county recorder of Fresno county; that all of the waters so appropriated and distributed are needed for the irrigation of the lands heretofore receiving and applying them; that said lands heretofore receiving and using said water are not entitled to the use thereof unless the owners thereof own and hold shares of stock in the appellant and then only ratably and in proportion to the stock so held; and that for this reason it is not true that the appellant or the landowners heretofore receiving such water will suffer great and irreparable damage if its proportion of said water is taken by the respondent. It was further found that the respondent is the owner of 2¼ shares of the capital stock of the appellant, that by reason thereof it is entitled to 2¼-33 15/16ths of the water flowing and to flow in the Crescent canal, that the described lands owned by the respondent have no other means by which they may be irrigated, and that unless the respondent receives the water to which it is entitled by reason of the ownership of this stock its lands will be and remain unproductive and the respondent will suffer great and irreparable damage. It was further found that these lands had never heretofore received water from the Crescent canal but that the respondent is now entitled to receive its proportion of water, that the respondent does not propose or intend to take more than its proper share of said water, with other findings as to the manner in which the respondent proposes to connect its ditch and obtain its share of the water through a control gate installed at its expense and operated under the supervision and direction of the appellant. Judgment was accordingly entered decreeing that the respondent is entitled to its proportionate share of this water and giving it the right to connect its ditch with the Crescent canal and receive such share through a control gate installed at its expense and to be operated under the supervision and direction of the appellant or of the court. This appeal followed.

The sole issue here presented is whether the appellant may refuse to furnish the respondent with its proportionate share of this water because the land on which it is proposed to use such water is not within the area within which all deliveries of water by the appellant have heretofore been confined. It is conceded "that there are no restrictions whatever contained in the articles of incorporation or the by-laws or the form of stock certificate in use by the Crescent Canal Company as to any particular land upon which the water of the Crescent Canal Company may be used or applied"; that the stock is not appurtenant to any particular piece of land; and that title to such stock passes by mere assignment and transfer. The appellant contends "that since the evidence shows without conflict that ever since the organization of the Crescent Canal Company all of the company's water supply has been continuously used upon a certain well-defined body of land, and since the available water supply of the company is insufficient to adequately serve this body of land heretofore using and applying the same, that the water supply and all thereof has been firmly dedicated to the lands heretofore using the same and cannot now be diverted to other lands even though the owner of such other lands be a stockholder in the Crescent Canal Company".

In support of its contention that its waters have thus been dedicated to the area in which they have been continuously used the appellant cites Riverside Land Co. v. Jarvis, 174 Cal. 316, 163 P. 54; Spurgeon v. Santa Ana, etc., Co., 120 Cal. 71, 52 P. 140, 39 L.R.A. 701, and Palo Verde L. & W. Co. v. Edwards, 82 Cal.App. 52, 254 P. 922. In the first of these cases stock in the water company in question was appurtenant to certain parcels of land and passed with a transfer of the land by virtue of a contractual relationship created by the articles of incorporation, the by-laws and the stock certificates. In the Spurgeon case the water company was organized for the purpose of delivering water to the owners of certain lands with provisions that the company would act as agent in supplying such water to said owners, that it would deliver water to no one else, and restricting transfers of shares of stock except with the lands to which they were attached. In the Palo Verde case the articles of incorporation provided that the purpose was to acquire water and deliver it to stockholders only for use upon lands within a described district and that each share of stock issued should be described in the certificate.

[1-6] It is apparent that the rules applied in these cases have no application under the admitted facts in the instant case. Aside from the formation of irrigation districts, water rights may become appurtenant to certain lands in at least two ways. Section 330.24, formerly section 324, of the Civil Code provides that this may be done by a mutual water company by providing therefor in its articles or by-laws, recording the same in the county where the lands are situated, and describing the particular land in the stock certificate. Section 552 of the Civil Code contains provisions under which a similar end is accomplished, but that section relates only to corporations which not only furnish water but have sold land. The appellant, in arguing that it is not a mutual water company and that section 330.24 has no application to it, points out the fact that it has not complied with that section and insists that it "is still authorized by its articles to sell or dispose of its water in any other manner consistent with the purposes for which it was *expressly* authorized as disclosed by its articles of incorporation". While arguing that it is thus free from having its water affixed to any particular land it then inconsistently argues, in contending that its water has been dedicated to a defined area, that while it has not sold land to any of the persons served by it it has delivered water to them "and is thereby obligated to continue such service" under section 552 of the Civil Code, and that it would defeat the purpose of that section to permit or oblige it to furnish water outside of that area. The appellant not being a corporation which has furnished water to land it has sold it is not a "such corporation" referred to in section 552 and that section has no application here. It also fully appears that the appellant has not complied with section 330.24, formerly 324, and that section is not applicable. In commenting on the application of that section the court, in Palo Verde L. & W. Co. v. Edwards, supra [82 Cal.App. 52, 254 P. 924], said: "There is no provision in the by-laws to the effect that the water stock shall be appurtenant to the land, and, of course, there being no by-law to that effect, none was or can be recorded." The court then stated that there was no evidence in the record showing that the water company, by its acts or practices, had held the water stock to be appurtenant to any land but, on the contrary, it had transferred stock regardless of the title to land and had allowed the stock to be moved from one location to another when the old certificate had been endorsed and surrendered. A similar situation appears here and it further appears that the appellant is willing, and claims the right, to discontinue serving water to a parcel of land which has always received it and permit the water to be used on other land by the same or a new stockholder, provided the new location is within the same general area. Doubtless the right to use certain water may be confined to a particular area by a contract mutually entered into by a water company and its stockholders when properly expressed through its articles, by-laws and certificates. It has been held that water rights which have become vested before section 324 of the Civil Code was adopted were not affected by that section. Estate of Thomas, 147 Cal. 236, 81 P. 539. It is difficult to see how water may be dedicated, not to particular land but to land within a certain area, in the absence of any contract to that effect and without complying with any statutory provision. In the instant case, apparently, there was not even a resolution of the board of directors purporting to dedicate this water to a particular area. The fact that stockholders entitled to water have heretofore happened to use it within a certain area, does not, in itself, establish a dedication. While a water company might by appropriate steps dedicate its water for use in a certain area it could hardly, in the absence of a contract, dedicate one stockholder's beneficial interest, without his agreement or consent, to the use and benefit of the other stockholders.

[7] In Richey v. East Redlands Water Co., 141 Cal. 221, 74 P. 754, where the water right was appurtenant to the land it was held that the water company could not, either by resolution or by custom, limit a part of the stockholders to water derived from one of two sources since their contract as stockholders gave them equal rights in all of the water; that the water company could not, by usage and custom, allocate the water derived from a particular source to one part of the land only; and that the contractual rights of a stockholder could not be defeated by custom and usage, where the water rights are appurtenant to the lands. This would seem to be equally true where the right to share in the water is not appurtenant to the land or to any land.

In Consolidated Peoples D. Co. v. Foothill D. Co., 205 Cal. 54, 269 P. 915, 920, the appellants owned shares of stock in the respondent water companies, the stock of which was not appurtenant to any lands and was transferable in the ordinary manner with the owners of such stock entitled to their proportionate share of the water acquired and distributed. While it was held in that case that the appellants were required to take their shares of water through the means of distribution supplied by the water companies and that they were not entitled to go to a point higher up the river to help themselves to their proportionate share the court there said: "The stockholders in corporations organized chiefly for the purpose of acquiring and distributing water have, it is true, a definite right to their proportion of the distribution of such water when so acquired, and the cases are uniform to the effect that they may individually enforce that right by appropriate proceedings in the event of its evasion or denial on the part of the officers of the corporation."

In Irrigation District v. Wutchumna W. Co., 111 Cal.App. 688, 296 P. 933, this court held that an irrigation district having purchased stock of the water company and being thereby entitled to receive a proportionate part of the water distributed by the company was entitled to take that water outside of the area previously served by the water company in spite of the fact that the water company, after the irrigation district had purchased some of its stock, passed a resolution reciting that it had been the long established policy of the company that its water should be used only on lands in a certain area and providing that from and after that date none of such water should be used outside of that area, and further providing that it should be applied only to lands which had never theretofore been supplied with such water.

[8] We think the principles of the cases last cited support the judgment and the right of the respondent to receive its share of the water distributed by the appellant and that, under the facts and circumstances here appearing, no such dedication of this water to a particular area has been shown as is sufficient to defeat the rights of the respondent as a stockholder in the appellant corporation.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

COTTEN et al. v. PERISHABLE AIR CONDITIONERS et al.*

Civ. 12202.

District Court of Appeal, Second District, Division 1, California.

March 10, 1941.

Hearing Granted May 8, 1941.

1. Judgment ⇐565

Where motion to vacate default judgment was denied without prejudice to its renewal, an objection to a subsequent motion on ground of "res judicata" could not be properly sustained.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Appeal and error ⇐552

Although there is some question as to sufficiency of record as presented by appellants under statute, appellate court may nevertheless examine the record, and if possible determine the cause upon the full record before it. Code Civ.Proc. § 953c; Rules of Supreme Court and District Courts of Appeal rule 8.

3. Partnership ⇐296(1)

The service upon one of partners, after dissolution of copartnership, in an action for injuries allegedly sustained in course of employment for copartnership prior to its dissolution, was insufficient to give court jurisdiction to enter judgment against copartnership, where it did not appear that partner served had any authority to wind up affairs of copartnership, and especially where copartnership was in hands of receiver. Civ. Code § 2429(3)(c).

4. Partnership ⇐278, 279

Dissolution has no effect on debts due from partnership, except that partners may not act for each other any further than may joint debtors.

5. Partnership ⇐296(1), 325(1)

Where, upon dissolution of copartnership, a receiver was appointed, proper procedure for bringing an action for injuries allegedly sustained in course of employment for copartnership prior to its dissolution would be either to serve each partner individually, or secure permission of court to bring action against receiver for dissolved partnership. Civ.Code § 2429(3)(c); Code Civ.Proc. §§ 414, 989, 990.

* Subsequent opinion 116 P.2d 603.

6. Judgment ⇐148

Where, upon dissolution of copartnership, a receiver was appointed, and thereafter a default judgment against copartnership was entered upon service of one of partners, receiver's interest in property of former partnership justified him in filing motion to vacate default judgment on ground that service on one of partners was insufficient to give court jurisdiction to enter judgment against copartnership. Civ.Code § 2429(3)(c).

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Charles D. Cotten, etc., and another, against the Perishable Air Conditioners, a copartnership, and others, to recover for injuries sustained by minor plaintiff, while working for defendant copartnership, wherein a default judgment was entered in favor of plaintiffs. From an order granting a motion to vacate a default and default judgment, the plaintiffs appeal.

Affirmed.

August J. O'Connor and George J. Hider, both of Los Angeles, for appellants.

Monta W. Shirley and R. R. Sleeper, both of Los Angeles, for respondent receiver.

YORK, Presiding Justice.

The facts pertinent to a determination of this appeal are chronologically as follows:

On November 13, 1937, the minor appellant, while working for respondent copartnership as a precooling operator and foreman, received serious personal injuries; it being alleged in the complaint herein that at the time mentioned said respondent copartnership did not carry compensation insurance as required by section 29 of the Workmen's Compensation Insurance and Safety Laws of the State of California, St. 1933, p. 975.

On January 17, 1938, in an action entitled Carroll v. Cross, the Perishable Air Conditioners, a copartnership composed of Dalton E. Cross and Irwin R. Carroll, was dissolved by an interlocutory order of the superior court of Los Angeles county, and R. E. Allen was duly appointed receiver thereof. Preparatory to filing suit to recover damages from said copartnership on account of the injuries sustained by the minor appellant, a motion was made for leave to sue the receiver Allen which was denied on March 18, 1938, on the ground that the minor's right accrued prior to the dissolution of the copartnership and appointment of the receiver, and therefore it was a matter to be litigated between the principal parties.

On March 19, 1938, appellants filed their complaint herein and on March 21st served "Perishable Air Conditioners, a co-partnership composed of Dalton E. Cross and Irwin R. Carroll, and Dalton E. Cross, individually". No answer having been filed in said cause, a default was entered by the court on April 11, 1938. In entering said default the court found: "It appearing to the court from an examination of the records and files in this action that the defendant Perishable Air Conditioners, a co-partnership, composed of Dalton E. Cross and Irwin R. Carroll, and Dalton E. Cross individually having been duly served with summons in the manner required by law, to-wit: personal service upon Dalton E. Cross, and having failed to answer the Plaintiff's Complaint herein, and the time for answering having expired, the default of said Defendant is hereby entered according to law."

On April 14, 1938, at a hearing held for that purpose, Dalton E. Cross being personally present, judgment was rendered for the sum of $3,405 in favor of appellants and against Perishable Air Conditioners, a copartnership composed of Dalton E. Cross and Irwin R. Carroll, and also against Dalton E. Cross. On April 14, 1938, notice of entry of said judgment was duly served upon said Dalton E. Cross.

Although neither motion is shown in the clerk's transcript herein, it is stated by respondent receiver in his points and authorities that appellants on April 20, 1938, filed a notice of motion for leave to levy execution on the assets of the copartnership in the hands of the receiver which motion was heard and denied on April 29, 1938; and it is also stated in appellants' brief that the court denied on April 20, 1938, a motion made by respondent receiver to vacate the default judgment on the ground that since the partnership had been dissolved and was not in existence, the court had no jurisdiction to enter judgment against it. Disregarding these motions purported to have been made and denied, the record discloses that on July 5, 1938, the court denied without prejudice the motion of respondent receiver (theretofore submitted under date of June 24th) to vacate said default judgment; and on December 1, 1938, respondent receiver again filed notice of motion to vacate the said default and default judgment on

the ground that said default was not properly entered against the copartnership because it had been dissolved by order of the superior court prior to the date of service of summons and complaint upon Dalton E. Cross, one of the copartners, and therefore the court had jurisdiction to enter judgment against said Cross individually but had no jurisdiction to enter judgment against the copartnership. Appended to said notice of motion was a certified copy of an order of the superior court theretofore made, instructing respondent receiver to file said notice of motion to set aside said default judgment and to take such further steps as might be necessary to protect the estate of the copartnership.

Counsel for appellants filed an affidavit in opposition to said motion to vacate on the ground that by its denial of the prior motion on July 5, 1938, the court had exhausted its power to again pass upon the same motion; that service was properly made upon the copartnership; that the injuries for which redress was sought were sustained by the minor appellant in the course of his employment at a time prior to the dissolution of the copartnership and the appointment of receiver; that the default judgment could not be vacated at the instigation of receiver, who is a stranger to the proceedings; and the affidavit in support of the motion "does not state that the partnership nor Irwin R. Carroll, who is now without the jurisdiction of the Court, has any meritorious defense."

Upon the issues joined by the affidavits in support of and in opposition thereto, said motion to vacate came on for hearing on December 19, 1938, and was granted. From the order which was thereafter entered this appeal is prosecuted.

It was stipulated by counsel herein that this appeal be submitted for decision upon the opening brief of appellants and the points and authorities of respondent filed in connection with a motion to dismiss said appeal which was denied by this court on June 26, 1939.

The questions presented upon this appeal are practically the same as those urged by appellants in their affidavit in opposition to the motion to vacate the default judgment, as hereinbefore recited.

[1] With respect to the first of such questions, "the law is well settled in this state that, if a motion is denied without prejudice to its renewal, an objection to a subsequent motion on the ground of res judicata may not be properly sustained. Bowers v. Cherokee Bob, 46 Cal. 279, 286; Andersen v. Superior Court, 187 Cal. 95, 102, 200 P. 963; Tiffany Productions, Inc., v. Superior Court, 131 Cal.App. 729, 22 P.2d 275." City of Los Angeles v. Forrester, 12 Cal.App.2d 146, at page 149, 55 P.2d 277, at page 278.

[2] Although there is some question as to the sufficiency of the record as presented by appellants under section 953c of the Code of Civil Procedure, nevertheless the Supreme Court has held that it is proper for an appellate court to examine the record, and if possible to determine the cause upon the full record before it. (See rule VIII of the Rules of Supreme Court and District Courts of Appeal.)

[3] Section 2429, subdivision (3) of the Civil Code provides: "The partnership is in no case bound by any act of a partner after dissolution * * * (c) Where the partner has no authority to wind up partnership affairs; * * *."

There is nothing in the record here which indicates that Dalton E. Cross, the partner served, had any authority to wind up the affairs of the partnership. Therefore, the partnership could not be affected by service upon said Dalton E. Cross. This is especially true where the partnership is in the hands of a receiver, who is an officer of the court. This is not a case where the court has consented to having the receiver sued; as a matter of fact the court herein denied appellants' motion for leave to sue the receiver.

[4] As is very pertinently stated in 20 California Jurisprudence at 804: "Dissolution has no effect on debts due from a partnership, except that the partners may not act for each other any further than may joint debtors." As there is no statutory provision permitting the entry of judgment against all of several joint debtors by service upon only one of them, the only method to pursue is that provided by sections 414, 989 and 990 of the Code of Civil Procedure.

[5] After dissolution, service of process upon one partner will not authorize judgment against the other. 20 Cal.Jur. 768, 769. Therefore, a judgment entered against a copartnership upon service of only one of the partners would come within this rule. Since neither partner had authority to wind up the partnership affairs, the proper procedure would be either to serve each partner individually, or secure permission of the

court to bring the action against the receiver for the dissolved copartnership.

[6] With respect to appellants' point that respondent receiver is a stranger to the instant action, it is shown by the record herein that prior to filing their complaint appellants "moved the court for an order permitting (them) to join the Receiver as a party defendant", which motion was denied; that they then filed their complaint alleging "that on the 15th day of December, 1937, R. E. Allen was appointed Receiver for Dalton E. Cross and Irwin R. Carroll, said copartners, doing business under the firm name and style of Perishable Air Conditioners, and that on the 15th day of December, 1937, said R. E. Allen qualified by posting bond in the penal sum of $8,000, and from thence hitherto has been and still is the duly and regularly appointed, qualified and acting Receiver for said copartnership."

It is also shown herein that respondent receiver just prior to making his second motion to vacate the default judgment petitioned the court for instructions in the dissolution action between Carroll and Cross, and that the following order instructing receiver was made under date of August 23, 1938:

"Petition for instructions came on regularly for hearing in Department 29 of the above entitled Court on Wednesday, August 17, 1938, Monta W. Shirley, Esq., appearing as attorney for R. E. Allen, Receiver, Earl C. Demoss, Esq., appearing as attorney for defendant (Cross) and no one appearing for plaintiff (Carroll), and it appearing to the Court that it is to the advantage and best interests of the estate that the Receiver present a motion to the Superior Court of this County in the case of Charles D. Cotten v. Perishable Air Conditioners to set aside the judgment against Perishable Air Conditioners,

"It is Hereby Ordered, Adjudged and Decreed: That the Receiver be, and he is hereby, instructed to file notice of motion to set aside the judgment against Perishable Air Conditioners in the said case of Charles D. Cotten v. Perishable Air Conditioners and to take such further steps in said proceedings as may be necessary to protect the estate of Perishable Air Conditioners."

The motion to set aside default and default judgment which was granted on December 19, 1938, was made pursuant to said order of instructions.

The interest of the receiver in the property of the former partnership is such that he is justified in preserving the property from the levy of an illegal judgment, if he is not actually required to do so.

There is no merit in any of the questions raised upon this appeal.

The order granting the motion to vacate the default judgment herein is affirmed.

We concur: DORAN, J.; WHITE, J.



43 Cal.App.2d 411

PEOPLE v. ONE 1939 BUICK 8 COUPE, ENGINE NO. 43787923 et al.

Civ. 6488.

District Court of Appeal, Third District, California.

March 10, 1941.

Rehearing Denied April 8, 1941.

Hearing Denied May 8, 1941.

1. Forfeitures ⇐5

In proceeding for forfeiture of automobile used to conceal or transport drugs, claimant has burden of proving investigation of automobile purchaser's moral responsibility, character, and reputation, of the kind and to the extent required by statute. St. 1939, p. 768, § 11620.

2. Forfeitures ⇐3

Though scope and reasonableness of automobile purchaser's moral responsibility, character, and reputation, required by statute to protect claimant of automobile against forfeiture on ground of use in concealing or transporting drugs, is primarily a question of fact, it must meet certain legal requirements, and should reveal prospect's home address, his employer, either past or present, source of his income, and his family or social connections, and, in case of a stranger, some inquiry as to his prior location and standing in that community. St.1939, p. 768, § 11620.

3. Forfeitures ⇐3

In order to protect claimant of automobile against forfeiture for use to conceal or transport drugs, statute requires inquiry

concerning automobile purchaser along two distinct lines, his financial status and his moral responsibility, and a purely financial examination will not necessarily reveal facts necessary to pass upon moral responsibility, character, and reputation. St.1939, p. 768, § 11620.

4. Forfeitures ⇐3

Investigation of proposed purchaser of automobile, in order to protect claimant against forfeiture for use in concealing or transporting drugs, is not alone to protect financial investment of seller or bank, but to protect public, and to keep automobiles out of the possession of those who might use them for an unlawful purpose. St.1939, p. 767, § 11610 et seq.

5. Forfeitures ⇐5

Evidence *held* not to show sufficient investigation of moral responsibility, character, and reputation of automobile purchaser, so as to protect purchaser of conditional sales contract against forfeiture of automobile for use to conceal or transport drugs. St.1939, p. 768, § 11620.

Appeal from the Superior Court of Merced County; James D. Garibaldi, Judge.

Proceeding by the People of the State of California against one 1939 Buick 8 Coupe, Engine No. 43787923, for forfeiture of automobile used to conceal and transport opium, wherein the Bank of America filed claim. From a judgment for claimant, the People of the State of California appeal.

Reversed.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellant.

C. Ray Robinson, of Merced, and Louis Ferrari, G. D. Schilling, and D. Bianco, all of San Francisco, for respondent.

PULLEN, Presiding Justice.

This is an appeal by the People of the State of California from a judgment under proceedings provided for in division X, chapter 7, article 1, § 11610 et seq., of the Health and Safety Code (Chap. 60, p. 767, Stats.1939), in which it was held that the 1939 Buick here involved had been unlawfully used for the purpose of concealing and transporting opium, but the forfeiture of the Buick automobile was denied and released to respondent Bank of America, the legal owner thereof.

On September 28, 1939, Charles L. Fink, an automobile dealer in Fresno, sold and delivered respondent Buick to Jimmie H. Fong for $609.55 in cash and the balance payable in monthly installments as provided in a conditional sales contract. On October 2, 1939, the contract was sold to Bank of America, and the certificate of legal ownership was delivered to the bank. On November 13, 1939, Jimmie Fong, while driving the automobile in question, was arrested in Merced county and charged and later convicted of transporting narcotics.

The Division of Narcotic Enforcement took possession of this automobile under the provisions of the Health and Safety Code and commenced this action for the forfeiture of the car.

The Bank of America, as legal owner, filed its answer setting forth that the sale was a bona fide transaction between Fink and Fong; that the bank was the owner of the car, and that approximately $700 was still due the bank. The answer also denied the unlawful use of the automobile for the transportation of narcotics, and alleged the bank had no knowledge of the unlawful use or intention so to use; that the bank had made a reasonable investigation of the moral responsibility, character and reputation of Fong before its right, title or interest in the automobile had been created, and asked that the automobile be returned to the bank or that it be sold and the balance due under the contract be paid it.

After trial the court found in favor of the bank, holding it had made reasonable investigation of the moral responsibility, character and reputation of Fong, and entered judgment in favor of the bank, directing the Buick be released to the bank and not forfeited to the state.

From this judgment the State has appealed, principally upon the ground the evidence did not support the allegations and finding that the seller and the bank had made a reasonable investigation of the moral responsibility, character and reputation of the purchaser, Jimmie Fong.

Section 11620 of the Health and Safety Code provides: "The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge

that the vehicle was being, or was to be, used for the purpose charged."

Testimony respecting negotiations leading up to the sale of the Buick to Fong is given by Hiram Wong, a Chinese salesman employed by the Fink Company. He testified he first met Fong when he came in to discuss the purchase of a used automobile, about six months prior to the sale of this particular car. No sale was then made. The witness Wong said that after that first meeting he saw Fong from time to time in the Fresno Chinatown, sometimes in a coffee shop operated by Mabel Tom, and sometimes in China alley. He testified he had talked to Mrs. Tom about Jimmie Fong and was asked: "During your conversation with her (Mrs. Tom) what was said with reference to Jimmie Fong? A. Mrs. Tom told me that Fong is a good character, his moral is good, and good reputation too." Asked as to who was present during this conversation, the witness stated there were some customers in the restaurant but he did not know their names, and he was then asked:

"At the time you talked with Mrs. Tom you had discussed the sale of an automobile to Jimmie Fong? A. Yes sir, I asked Mrs. Tom whether he paid his bills and whether he is a good character and she told me he is.

"The Court: You misunderstood the question: Did you ever talk to Fong prior to the time you talked to this lady about him buying a car from you or you selling him a car? A. No, I didn't.

"Question by counsel: It was after you talked with Jimmie Fong concerning the sale of an automobile that you talked with Mrs. Tom? A. After?

"Q. Yes, it was after you talked with Jimmie Fong about selling him an automobile that you talked with Mrs. Tom about his character and reputation, is that so? A. Yes sir."

He also, prior to September 29th, talked on the telephone with one Johnnie Gamble, of whom the witness seemed to know practically nothing. "I asked him how his (referring to Fong) character—and he told me he has a good reputation and morals is all right." The witness testified he told Mr. Fink, his employer, "that boy is all right,—he pay his bills, he is a good character and his morals are O. K."

It was brought out that the address given by Fong was that of a Chinese club, the Bing Kong Tong headquarters, but the Chinese witness seemed to know nothing about the club or the nature of its accommodations, he never having been inside. Although Wong had lived in Fresno since 1917, and the Chinese population of Fresno was only about 700 or 800 people, he talked to no one else about Fong. Upon cross-examination the witness could not recall a conversation with Mr. Creighton, an inspector for the State Narcotic Division, in which Creighton testified Wong had told him he had made no investigation of Fong prior to the sale. The witness admitted Fong was a stranger to him, and the only persons of whom he inquired were the two witnesses we have mentioned, Mrs. Tom and Gamble. He did not ascertain his business nor his residence address, nor make inquiry of any of his countrymen, except Mrs. Tom, nor learn where he had previously lived, or the nature of his work, or the names of any employers.

Mr. Davis, who was in charge of the installment sales department of the Fresno main branch of the Bank of America, the purchaser of the sales contract in question, obtained a financial report from the Fresno Merchants Association, and talked to the sales manager of the Charles Fink Company as to the investigation made by them. He also, upon inquiry of the West Fresno Branch of Bank of America, learned the condition of Fong's bank deposits and balance in that bank. This information was obtained by the bank after the signing of the contract of purchase by Fong, and before the contract was taken over by the bank. The information furnished by the selling agency to the bank was that their investigation showed to their satisfaction the character of Fong, and that, in their opinion, with the down payment the contract was satisfactory.

The report as received by the bank from the merchants association is as follows: "Copy of report from Fresno Merchants Association—Memorandum for Credit Files. 10-16-39. Auto Loan. Jimmie H. Fong, 921 China Alley, Fresno. New to files. Claims to be 27, and single. Employed by self. No information by those at the given address. No one knows about him. Personal Reference reports HC of $10.00, and subject always pays as agreed. Another personal reference cannot be located. West Fresno reports balance of $445.00 in Savings Account."

Mr. Lieu, a Chinese bank teller in the West Side Branch, Bank of America, testified to meeting Fong when he first came into the bank to open an account in January, 1939. At that time Fong told him he was a waiter and had come from Sacramento to Fresno with the intention of opening a restaurant. By September of that year Fong had built up his account from the opening deposit of $50 to $1,055, after which date he made withdrawals from time to time until it was practically closed at the time of his arrest. Whether or not the information possessed by Mr. Lieu was communicated to anyone in the bank or to the Fink Company or the main bank of the Bank of America is rather uncertain, the testimony on that matter being rather vague. Mr. Creighton, the state inspector, testified as to conversations with Mr. Wong, and he disputed the testimony of Wong in that he said Wong told him he had made no investigation before the sale of the car to Fong. He also testified that Mr. Davis of the Bank of America told him he (Davis) had made no investigation of Fong other than the financial report record from the credit association. The bookkeeper for Charles L. Fink also told Creighton they had made no investigation other than financial of Fong.

The foregoing constitutes in substance the evidence as to the investigation made by Fink and the bank as to the financial and moral responsibility of Jimmie Fong.

[1-3] In the recent case of People v. One 1938 Buick, 39 Cal.App.2d 42, 102 P.2d 447, some of the problems here presented were met and considered and we need not again review the cases there collected and analyzed. It is clear, however, that the burden of proving an investigation of the kind and to the extent required by the statute rests upon the claimant, and although the question of the scope and reasonableness of such an investigation is primarily one of fact, is must meet certain legal requirements. It would seem that a bona fide investigation should, among other essentials, reveal the home address of the prospect, his employer, either past or present, the source of his income, his family or social connections, and as in the case here of a stranger, some inquiry as to his prior location and his standing in that community. It is very clear the law requires inquiry along two distinct lines, his financial status and his moral responsibility. These cover two spheres of activity and a purely financial examination will not necessarily, and it did not here reveal the necessary facts to pass upon the moral responsibility, character and reputation of the prospect.

Here we have an investigation by Hiram Wong, who by leading and suggestive questions tells of making inquiry of Mrs. Tom, a restaurant keeper, whose only contact with Fong was that he took some meals at her place of business, and sometimes she gave him credit for a small amount, which he paid. He also inquired of one Gamble, but who Gamble was or what his ideas of moral responsibility may have been, the record is silent. Wong did not inquire of the many respectable and high-principled Chinese undoubtedly to be found in the Chinese quarters of Frenso; he did not attempt to ascertain his home address; he did not know with whom he associated, nor the source of his rather rapidly growing bank deposits, except that he was in business for himself, but he did not inquire what kind of business. The one name furnished by Fong as a relative, was a man living in Sacramento, and he was not contacted.

We also have an investigation by the bank, which is quite obviously a financial investigation. The manager of the installment department called the Fink Company to ascertain the extent of their investigation; he obtained a merchant's report and a bank report from the bank in which Fong carried an account.

[4] It seems the investigation here was no more than would have been done if the subject of the contract had been for the purchase of a piano or a refrigerator. The investigation of a proposed purchaser of an automobile is not alone for the protection of the financial investment of the seller or the bank, but the legislature has, in effect, said the public also has an interest in the character of persons who may acquire automobiles.

The purpose of the law clearly is to keep automobiles out of the possession of those who might use them for an unlawful purpose. It is one method devised to aid in the prevention of crime, and therefore it becomes the duty of the courts to assist in the accomplishment of the purpose of the law.

[5] The investigation here detailed is so slight that to place the stamp of approval upon such a cursory examination of

one's moral background and to hold it as sufficient, would be to make this particular law of little value. The facts do not support the findings or the judgment. The judgment is reversed.

We concur: TUTTLE, J.; THOMPSON, J.



43 Cal.App.2d 425

In re SHANNON'S ESTATE.
WALCOTT v. CRAMER.

Civ. 11638.

District Court of Appeal, First District, Division 2, California.

March 11, 1941.

Rehearing Denied April 10, 1941.
Hearing Denied May 8, 1941.

1. Wills ⇐728

Under will devising house and lot to executrix for as long as she lived with remainder over to others, executrix was not required to pay rent for her occupation of the property pending probate proceedings and prior to distribution.

2. Appeal and error ⇐1030

Whether reservation of rulings is ground for reversal in any given case depends on the circumstances.

3. Executors and administrators ⇐507(2)

If trial court was in doubt whether executrix should be allowed credit for payment of taxes and insurance on property devised to and occupied by her, the court should have retired the items and held the question open for determination on rendition of final account.

4. Wills ⇐736

Under will devising house and lot to executrix for life and directing that executrix maintain and pay taxes on the property, where occupation of the property by executrix after death of testator was not as executrix but as life tenant, executrix was personally bound to bear the expense of taxes and fire insurance.

5. Executors and administrators ⇐514

Order settling second annual account over objection that executrix had improperly claimed credit for expenditures for insurance and taxes was not "res judicata" of right to challenge fourth annual account on ground that credits were improperly claimed for similar expenditures made subsequent to rendition of second account.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceeding in the matter of the estate of John William Shannon, deceased, wherein Anna Walcott, executrix of the last will and testament of Nellie Kelleher, deceased, a devisee, filed written objections to the fourth annual account filed by Lillian Marie Cramer, as executrix of the estate of John William Shannon, deceased. From an order overruling the objections, Anna Walcott, as executrix, appeals.

Reversed.

Tobin & Tobin and Raymond J. Arata, all of San Francisco, for appellant.

Frank L. Barrett, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal from an order settling the fourth annual account of the executrix of the estate of the decedent. The decedent left an holographic will. It is very long and need not be set forth at length. Among other provisions it contained the following:

"I give, devise and bequeath. to my sister Mrs. Nellie. Kelleher. my House. and Lot. and all improvements. there on. Lot two. Block 4088 on hampshire Street. San Francisco. California. to be hers for Ever.

"Second I give, devise and bequeath to Mrs. Lillian. Marie. Cramer. My. House. and Lot. and all improvements thear on. Lot 8. Block 4. San Rafael. Marin County. California. to be hers as long as she lives. and on and after her Death. then it shall be the property of John William and Helen Margaret. Cramer. share and share a like, to be thears for Ever. Mrs. Lillian M. Cramer shal keep the improvements repaired and all Taxes Paid. for use of the same. it shall not be sold or Mortgaged, during her life."

The will named Mrs. Lillian Marie Cramer as executrix. After the death of the

decedent Mrs. Cramer applied for and letters testamentary were issued to her. She duly qualified and since then she has continued to act as executrix. On the 19th of August, 1938, she filed her fourth annual account. It may be noted that at the time of the death of the decedent and ever since then Mrs. Cramer and her family have occupied the house and lot designated as lot 8, block 4 in San Rafael, Marin County, California. In the said account the executrix did not charge herself with interest on the value of said premises nor for rent for the use of said premises. But she did charge the estate with all taxes levied thereon and the cost of fire insurance. Said account covered a period commencing June, 1936, and extended down to August, 1938. Anna Walcott, executrix of the last will and testament of Nellie Kelleher, deceased, appeared and filed written objections to said account. Said objections were as follows:

"1. That said executrix has failed to charge herself with rent for the real property of said estate situate in the County of Marin, State of California, nor has she charged herself with a reasonable value of the use and occupation of said premises.

"2. That said executrix has not charged herself with interest in the legal rate upon the amount due to the estate for the reasonable value of the use and occupation of the Marin County real property of said estate.

"3. That said executrix, without right, has credited herself with disbursements for taxes and insurance upon the Marin County real property of said estate."

After hearing the parties the court made an order overruling objections 1 and 2, and then continued as follows: "3. That objection numbered 3, to said fourth account, so heard as aforesaid, be and the same is, hereby overruled and disallowed, subject, however, to the right to renew the same upon final accounting herein." From that order Anna Walcott has appealed.

[1] Under the clear wording of the will it appears that decedent intended that Mrs. Cramer should have the use of said premises and that she should not be charged rent. That document contains nothing showing any intention on the part of the testator that Mrs. Cramer should vacate the premises after the date of his death, or that the premises should be rented to her or to anyone else pending the probate proceedings and until distribution had. Nor does it show that the right of Mrs. Cramer to occupy the premises free of rent should commence at the date of distribution. No authority has been cited which requires us to place a different interpretation on the language used in the will. Therefore we think the trial court did not err in its rulings on objections 1 and 2 hereinabove set forth.

[2, 3] The appellant does not seriously contend that the court erred in ruling on those two objections. However she earnestly contends the trial court should have ordered the executrix, under the facts hereinabove set forth, to charge herself with the payments of taxes and insurance. In that connection it should be noted that the trial court made no fixed ruling on that contention. In effect, it reserved its ruling until the hearing of the final account. The real question presented on this appeal is whether the trial court erred in failing to make, in the instant proceeding, a direct ruling on the appellant's contention. The latter contends that it did. She calls to our attention these additional facts. At the time of the death of the decedent he owned lot 8 of block 4 which with improvements was valued at $8,000, and lot 2 block 4088 on Hampshire street in San Francisco, with improvements valued at $2,000. He also owned items of personal property in the sum of $675. Whether the personal property has been sold does not appear. From August 4, 1936, to July 27, 1938, all receipts, $587.54, were rent received from the Hampshire street property. Nothing appears showing that in the future there will be receipts of any other kind. The disbursements were $703.80. The deficit as shown on the third annual account was $52.31. As shown on the fourth annual account the deficit had increased and the total then was $116.26. From all of the facts it appears the deficit will increase each succeeding year. It further appears that no claims have been filed against the estate. But the report of the executrix recites: "That said estate is not ready for final distribution, or partial distribution, for the reason that there is not sufficient money on hand or sufficient property (other than the said real property specifically devised to Nellie Kelleher) out of which to pay the debts, expenses of administration, and charges, of said estate, and/or the bequests contained in the last will and testament of said de-

cedent." Under the foregoing circumstances the appellant argues the failure of the trial court to rule on her contention that the executrix should pay the taxes and insurance will result in an indefinite postponement of distribution and perhaps the complete divestitute of appellant's claim as a devisee under the will of the decedent. We see no escape from that contention. It will hardly be contended that in no instance may a trial court reserve its ruling on an objection. But, "Whether the practice of reserving rulings is ground for reversal in any given case depends upon the circumstance." 24 Cal.Jur. 776. If the trial court was in doubt as to whether to allow the executrix credit for the payment of taxes and insurance, the proper order was for it to retire said items and hold the question open for determination on the rendition of the final account. 11b Cal. Jur. 601; In re Estate of Dillon, 149 Cal. 683, 685, 87 P. 379.

[4] In what we have just said we are not intimating that there may be a doubt as to whether the executrix should personally bear the expense of taxes and insurance. Under the facts, ever since the death of the decedent the executrix has been in possession of the San Rafael lot not as executrix but as the life tenant thereof. As such she was, under the terms of the will, bound to pay the taxes and the cost of fire insurance. In re Banfield's Estate, 137 Or. 256, 299 P. 323, 3 P.2d 116; In re Paradis' Estate, 134 Me. 333, 186 A. 672.

[5] The executrix controverts the proposition last stated and claims that the question, in the instant case, is not an open one. She claims it is res judicata. She calls attention to the fact that when she rendered her second account the appellant appeared, made the same objections, and that the objections were overruled and such ruling has become the law of the case. That contention may not be sustained. The charges now complained of occurred since the rendition of the second account. It is not res judicata. In re Estate of Mailhebuau, 218 Cal. 202, 205, 22 P.2d 514. Furthermore said last-mentioned order, as set forth in the record, was based on objections 1 and 2, and not on objection 3 as hereinabove set forth. Objection 3 was by counsel withdrawn without prejudice to the renewal of same. No ruling was had thereon. It follows that the order settling the second annual account is not res judicata on the contention the appellant now makes.

The order appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.



43 Cal.App.2d 380

TOWNSEND et al. v. PERRY et al.

Civ. 11562.

District Court of Appeal, First District, Division 2, California.

March 10, 1941.

As Modified on Denial of Rehearing April 9, 1941.

Hearing Denied May 8, 1941.

1. Constitutional law ⇨312

In unlawful detainer action, order directing receivers to surrender possession of realty involved to holder of notes secured by trust deed, subject to which defendant held title, and order denying defendant's motion to vacate such previous order, were not erroneous as depriving defendant of his property without due process of law, as such orders were purely ancillary to issues involved and did not attempt to determine title to any property.

2. Receivers ⇨166

In unlawful detainer action, holder of notes secured by trust deed of realty sold on foreclosure to note holders' agent, had right to file petition for order directing receivers, regularly appointed by trial court, to surrender possession of realty to such holder, without intervening in or being made party to action.

3. Receivers ⇨71

Possession of realty by receivers, regularly appointed by trial court in owner's unlawful detainer action against tenant thereof, cannot be disturbed without court's permission.

4. Receivers ⇨166

In unlawful detainer action, where holder of notes, secured by trust deed on property involved, appeared, filed verified petition, gave notice of intention to move for order directing receivers to surrender property to petitioner, recited in such notice that motion would be supported by her verified petition, and made such motion and read petition at time stated in notice, no affidavit in opposition was presented or filed, and defendant's answer alleged no facts showing that he held title to property superior to lien of trust

deed, trial court properly granted relief asked in petition, though petitioner did not intervene. Code Civ.Proc. §§ 1003, 2009.

5. Appeal and error ⇐1047(5)

In unlawful detainer action, order directing receivers to surrender possession of realty involved to nonintervening petitioner and order denying defendant's motion to vacate previous order will be affirmed on appeal as against contention that trial court had no power to take notice of records, files and documents in other pending actions involving property because they were not formally offered in evidence, in absence of record showing that defendant was prejudiced by contents of any record noticed by trial court.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action in unlawful detainer by F. V. L. Townsend and others against Will H. Perry and others, in which receivers were appointed and Anna Baumann filed a petition to direct the receivers to surrender the property involved to her. From an order granting the petition and an order denying defendant Perry's motion to vacate the previous order, defendant Perry appeals.

Orders affirmed.

C. E. Spencer, of Los Angeles, for appellant.

Thomas F. McCue, of Los Angeles, for petitioner and respondent.

STURTEVANT, Justice.

From an order directing the receiver to deliver the possession of property, both real and personal, and from an order refusing to vacate the former order, the defendant Perry has appealed.

Heretofore H. O. Harrison and Daisy Harrison, his wife, were the owners of lot 23 of tract 2289 in the city and county of Los Angeles, together with the building standing thereon occupied as a hotel and certain business purposes. On May 1, 1930, they executed promissory notes in the sum of $500,000 in favor of Lane Mortgage Company and to secure the payment thereof they executed a trust deed naming the Bank of America as trustee and Lane Mortgage Company as beneficiary. Anna Baumann, hereinafter mentioned as the petitioner, and numerous other persons became the owners of the said promissory notes. Thereafter B. L. Vaughn and Adele J. Vaughn, his wife, became the owners of the real estate above mentioned. On November 1, 1931, the Vaughns executed to Lane Mortgage Company a promissory note in the sum of $5,000 and to secure the payment thereof they executed a trust deed in which they named the Bank of America as the trustee and the Lane Mortgage Company as the beneficiary. The title of one of the tenants was assigned to the defendant and he entered into possession of the property as a tenant. Thereafter under the terms of said deed of trust executed by the Vaughns a sale was had and the property was sold to F. V. L. Townsend, Henry G. Bedford, J. A. Mottashed and Jacob D. Poorman, the plaintiffs in this action. On April 23, 1937, the plaintiffs commenced this action in unlawful detainer against Will H. Perry alleged to be in possession of said property. Before commencing said action the plaintiffs caused to be served a notice as provided in section 1161a of the Code of Civil Procedure. Later Perry filed an answer admitting that he held his title subject to a first trust deed executed to secure $500,000 of notes. On the 28th day of April, 1937, the trial court appointed C. E. Spencer the attorney for the defendant, and Henry O. Wackerbarth the attorney for the plaintiffs, as receivers. Thereafter they duly qualified and entered into the possession of said property.

The Harrisons and their successors in interest defaulted in the payment of interest and on March 18, 1937, Anna Baumann, as a bondholder, in behalf of herself and the holders of other bonds, commenced an action to foreclose the deed of trust theretofore executed by the Harrisons. In due time a decree was awarded to Anna Baumann and the property was sold to the agent of the bondholders on August 25, 1937. From the order of sale in the action last mentioned an appeal was taken and is now pending. The record does not show that a stay was had. Thereafter an action in partition was commenced. It was entitled Anna Baumann v. Henry E. Bedford et al. Still later another action in claim and delivery involving title to the furnishings, etc., in the building was commenced. That action was entitled W. B. Goes v. Will H. Perry et al.

Each and all of said actions were, on August 25, 1937, pending in the same department of the same court. On that date Anna Baumann appeared in the unlawful detainer action, filed a petition and served notice that on the 1st day of September, 1937, she would move the court for an order

directing the receivers to surrender to her the property hereinabove described. The defendant Perry filed written objections, a demurrer, and also an answer. The petition came on for hearing on the 3d day of September, 1937. On that date some proceedings were had in said court in each of said actions. In this action no witness was called and examined and no document was formally offered in evidence. On December 10, 1937, the trial court ordered the objections overruled, the demurrer overruled, and that the petition be granted. It also made orders appointing H. F. Metcalf receiver of the real property involved in the action entitled Baumann v. Bedford, and also receiver of the personal property involved in the case of Goes v. Perry. Thereafter, on December 14, 1937, the defendant Will H. Perry served a notice that on December 16, 1937, he would move the court for an order vacating the order directing the receivers to surrender possession of the real estate described in the petition of Anna Baumann. The latter motion was heard and denied on December 16, 1937, and from those orders the defendant Perry has appealed.

[1] Claiming the orders last mentioned were in effect a final decree, the defendant contends they were appealable. Fish v. Fish, 216 Cal. 14, 13 P.2d 375. The petitioner makes no reply. We will assume, without deciding, that the orders were appealable. The defendant earnestly contends the orders deprived him of his property without due process of law. A most cursory examination of the record discloses that the orders were purely ancillary to the issues involved. Neither order attempted to determine title to any property. Therefore we find no merit in that contention. 16 C.J. S. Constitutional Law, § 613, p. 1233; see, also, Pacific Railway v. Wade, 91 Cal. 449, 455-457, 27 P. 768, 13 L.R.A. 754, 25 Am.St. Rep. 201.

[2, 3] In his next point the defendant asserts that as Anna Baumann did not intervene in the unlawful detainer action and was not made a party to it, she could not demand any relief. That point has no merit. The trial court had regularly appointed the receivers. It is settled law that their possession could not be disturbed without permission of the court. 22 Cal.Jur. 499. In filing a petition the petitioner was not in any proper sense asking relief in unlawful detainer, she was merely attempting to protect her own interest. She was asking no determination of title.

In his next point the defendant states the court erred in ordering the surrender of the property to a stranger to the action upon the petition of a nonintervener whose rights, if any, are solely dependent upon contested issues alleged in still other cases. That point is the gist of the grievance of the defendant in this action. Conceding, without deciding, that the petitioner might have intervened in the unlawful detainer action, she was not bound to do so. In certain instances, as a third party claimant, she had the right, after first obtaining permission of the court, to intervene, to maintain a separate action, or to appear in the unlawful detainer action and make a motion for relief. 53 C.J. 122 and 330; I Clark on Receivers, 746, 750. She selected the latter remedy, that is, she appeared and filed a verified petition. That was one proper course to take. 53 C.J. 122; De Forrest v. Coffey, 154 Cal. 444, 450–453, 98 P. 27. She gave notice of her intention to move and in that notice of intention she recited that her motion would be supported by her verified petition, or in other words, her affidavit. That procedure was authorized by the statute. Code Civ.Proc., secs. 1003 and 2009. At the time stated in the notice she made her motion and read her petition. No one presented or filed any affidavit in opposition. The defendant Perry had filed an answer. The record does not disclose that he read it. Assuming that he did, the most that can be said is there was a conflict in the evidence. However, the defendant's answer alleged no facts showing he held any title to the property that was superior to the lien of the $500,000 bond issue, the title held by the petitioner. In the absence of such a showing the trial court would not withhold from the petitioner the relief asked in her petition. Bolich v. Prudential Ins. Co. of America, 202 N.C. 789, 164 S.E. 335, 337, 82 A.L.R. 974.

[5] In connection with the point discussed last the defendant vigorously contends the trial court had no power to take notice of the records, files and documents on file in its court in the other actions above enumerated because they were not formally offered in evidence. Conceding, without deciding, that it did not have power to take judicial notice of such actions, nevertheless from the record it does not appear the defendant was in any manner prejudiced by the contents of any record noticed by the trial court. Schomer v. R. L. Craig Co., 137 Cal.App. 620, 627, 31 P.2d 396.

The orders appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

43 Cal.App.2d 378

SVOBODA v. LAMBERT et al.

Civ. 2926.

District Court of Appeal, Fourth District, California.

March 8, 1941.

1. Appeal and error ⇐800

Where clerk's transcript and opening brief were filed in reviewing court before motion to dismiss appeal was heard, appeal would not be dismissed on ground that transcript was not filed within time allowed by law.

2. Appeal and error ⇐616(1)

On appeal from an order made after judgment, a clerk's transcript is not sufficient unless it bears certificate of the trial judge that it contains documents used at hearing and considered by trial judge in making the questioned decision.

3. Appeal and error ⇐640

Where record on appeal indicated that new trial was granted after trial court had lost jurisdiction to grant new trial, but the only record was a clerk's transcript not disclosing anything which was before trial judge in passing upon the motion for new trial, there was no record upon which to consider any issue in connection with such order, and appeal was dismissed.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Clem V. Svoboda against A. C. Lambert and others for declaratory relief. Judgment was rendered for plaintiff, and from an order vacating order granting new trial, defendants appeal. On motion to dismiss the appeal.

Appeal dismissed.

Theo. G. Krumm and Grant Holcomb, both of San Bernardino, for appellants.

C. E. Crowley, of Ontario, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal on the ground that a transcript was not filed within the time allowed by law and on the further ground that the transcript which is now on file was not certified and settled as required by law, with the result that there is no record on which any issue presented by the appeal may be determined.

The action was one for declaratory relief. Judgment was entered in favor of the plaintiff on November 21, 1939. Notice of entry of judgment was served by mailing it in the city of Ontario addressed to attorney for defendant in the city of San Bernardino on November 21, 1939. See § 660, Code Civ. Proc. More than sixty days thereafter and on January 23, 1940, an order was entered granting a motion for a new trial. On October 29, 1940, on motion of the plaintiff, the court entered an order vacating and setting aside the previous order by which a new trial had been granted. On November 9, 1940, the defendants appealed from the order vacating the order which had granted them a new trial.

[1] Before this motion to dismiss the appeal was heard a clerk's transcript and an opening brief were filed in this court. For present purposes, at least, this may be deemed a sufficient answer to the first ground of the motion now before us.

With respect to the second ground, that no sufficient record is before this court, no reporter's transcript or bill of exceptions has been filed. The regular time for filing the same has expired and it appears by affidavit and by the clerk's certificate that no stipulation or order has been filed extending the time for preparing such a reporter's transcript or settling such a bill of exceptions. No record is before us except a clerk's transcript, which was filed on February 27, 1941. It contains the clerk's certificate to the effect that the various documents contained therein are correct copies of the originals of such documents as filed in the clerk's office. It does not purport to contain any record of any affidavits or other matter which may have been before the trial judge in passing upon the issues presented in connection with, and which led to, the order from which this appeal was taken. Nor is there any certificate of the trial judge in connection with any such matters.

[2] It has frequently been held that, on such an appeal from an order made after judgment, a clerk's transcript is not sufficient unless it bears the certificate of the trial judge to the effect that it contains the documents which were used at the hearing and which were considered by him in making the decision which is questioned. Bartholomew v. Cross, 1 Cal.Dec. 385, 108 P.2d 49, and cases there cited.

[3] It would appear from such record as is before us that the former order granting a new trial was made after the court had lost jurisdiction to make such an order. In any event, there is no record before us which discloses anything which was before the trial judge and which was considered by him in making the order appealed from. Under such circumstances, there is no record upon which any issue in connection with the making of that order can be here presented or considered.

The appeal is dismissed.

We concur: MARKS, J.; GRIFFIN, J.



43 Cal.App.2d 347

In re FORREST'S ESTATE.

FORREST v. BENNETT.

Civ. 11641.

District Court of Appeal, First District, Division 2, California.

March 6, 1941.

Hearing Denied May 1, 1941.

1. Executors and administrators ⇐20(9)

An order appointing executrix may incorporate the court's findings of fact on issues presented by objections to the appointment.

2. Executors and administrators ⇐15

Property settlement agreement executed after separation of husband and wife did not preclude wife from serving as executrix under husband's will, in absence of inconsistency, though agreement provided that each party relinquished the right to administer on the estate of the other. Probate Code, § 407.

3. Executors and administrators ⇐20(10)

The rights of legatees to take under will were not matters in issue on appeal from order appointing executrix, except in so far as disqualification of executrix was shown.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the estate of Francis G. Forrest, deceased. From an order appointing Georgina E. Forrest as executrix, Helen F. Bennett appeals.

Affirmed.

Clarence M. Oddie, and Duncan A. McLeod, both of San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal from an order appointing Georgina E. Forrest executrix of the will of Frank G. Forrest, deceased. The decedent and Georgina E. Forrest intermarried on June 29, 1915. They lived together until April, 1922, at which time Mrs. Forrest filed a suit for divorce. Later both an interlocutory decree of divorce and a final decree were entered in favor of Mrs. Forrest. On December 31, 1923, they remarried. They continued to live together until May, 1928, when they separated. Mrs. Forrest again filed a suit for divorce but no interlocutory decree was ever entered. The parties so lived separate and apart until 1932 when they commenced living together again. For about five years they lived together until 1937, when Mrs. Forrest filed a suit for separate maintenance. The complaint was subsequently amended to pray for a divorce and an interlocutory decree was entered on March 4, 1938. A property settlement agreement dated February 28, 1938, was executed prior to the entry of the interlocutory decree. No final decree in that action was entered. On May 29, 1939, Mr. Forrest died.

On August 6, 1921, Mr. Forrest executed an holographic will. On July 14, 1933, he executed an holographic codicil. In the will as executed August 6, 1921, the decedent inserted, "My wife, Georgina E. Forrest to serve as administratrix without bonds." After his death the decedent's wife applied to be appointed executrix. Helen F. Bennett, a sister of the decedent, appeared and filed objections to the petition filed by Mrs. Forrest and also asked to be appointed administratrix with the will annexed. After hearing the petitions and objections the trial court granted the petition of Mrs. Forrest and ordered that she be appointed executrix to serve without bonds. That is the order from which this appeal was taken.

[1] The appellant Helen F. Bennett contends that the trial court erred in failing to make and sign written findings of fact upon the issue presented by the objections contained in her written opposition. The answer to that contention is that the trial court did make findings and did sign the same. The order appealed from as set forth in the transcript consists of more than nine folios. The trial court recites many facts, among others, "* * * that said Georgina E. Forrest is nominated (in the will) as the executrix of said will, to serve without bonds, and consents to act as such executrix * * * that said decedent never in any way altered or revoked said will * * * or her appointment or right to act as such executrix; that said Georgina E. Forrest never by agreement or otherwise waived, relinquished, or surrendered * * any of her rights to letters testamentary or to be appointed or to act as such executrix; that at the time of the death of said decedent said Georgina E. Forrest was the wife of said decedent". We do not note any material fact, pertinent to the issue we are considering, on which the court did not make a finding. The mere fact that the order and the findings are contained in one document constitutes no legal objection to the latter. Shaingold v. Shaingold, 191 Cal. 438, 216 P. 603.

[2] The next point made by the appellant is that the provisions of the property settlement agreement entered into by and between Georgina E. Forrest and F. G. Forrest were inconsistent with the provisions of the will and operated as a revocation thereof. An examination of said agreement discloses nothing inconsistent with the provisions of the will. With reference to the right to act as executrix, in said agreement it is provided, "And the parties hereto and each of them, do hereby expressly waive, relinquish, and surrender * * * the right to administer upon the estate of the other party." That provision it may be conceded would have been pertinent if this were an application for letters of administration but it is an application for letters testamentary. Section 407 of the Probate Code provides: "Objections to appointment. Any person interested in the estate or will may file objections in writing to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court; a petition may, at the same time, be filed for letters of administration with the will annexed. If no objection is made, the court when admitting a will to probate must direct the issuance of letters thereon to the persons named therein as executors who are competent to discharge the trust, unless they or either of them have renounced their right." There was no claim Mrs. Forrest was incompetent. The property settlement agreement mentioned contains no express renunciation. Nor were its provisions inconsistent with the will. In Re Estate of Maddux, 138 Cal.App. 430, at page 431, 32 P.2d 392, speaking of the provisions of a property settlement agreement, the court said: "By said agreement it was the expressed intention of the parties thereto to forever settle and adjust all mutual and respective rights and obligations arising out of the marriage relation, to determine the respective rights of inheritance, divide all community property between the parties, in full and final settlement of any claim, one upon the other, and to absolve each from future acts of the other affecting property or property rights. The will previously executed was not mentioned therein, nor did the testatrix by her codicil dated thereafter make any change of executor. It is argued, in effect, that the severance of marital property rights and obligations constituted a renunciation of such nomination, but the executed documents do not evidence such intention, nor can it be said that any reason stated for such severance is capable of interpretation as a disqualification. Probate Code, § 401 et seq." So in the instant case there is nothing on the face of the property settlement agreement showing that the existence of the will of the decedent, or any part or portion thereof, was before the contracting parties.

[3] In her next point the appellant discusses the rights of the legatees named in the will to take thereunder. Those questions are not involved on this appeal except to show the disqualification of Mrs. Forrest; and, as stated by the court in Re Estate of Maddux, supra, they do not show a disqualification.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

17 Cal.2d 563

SANDERSON v. NIEMANN et al.

L. A. 17538.

Supreme Court of California.

March 7, 1941.

1. Husband and wife ⇐270(1)

A married woman has a separate right to bring an action in her own name for injuries to her person and she is a "necessary party" to that action, though her husband may join her therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

2. Judgment ⇐502

Wife was not a "necessary party" to action in small claims court for damages to community-owned automobile and for financial loss to community from wife's injuries but where no objection was made to her joinder therein, complaint thereof could not be made on appeal from judgment in wife's separate action for injuries, particularly where cause of action for wife's injuries was not tendered as an issue in the small claims court.

3. Husband and wife ⇐19(15)

A husband must provide his wife with reasonable medical care and attention and is primarily responsible for payment of such services. Civ.Code § 174.

4. Statutes ⇐225

The scope and meaning of statute permitting a married woman without joinder of her husband to sue for personal injuries must be determined by considering it in the light of other statutes including those defining the property rights and interests of husband and wife. Code Civ.Proc. § 370; Civ.Code §§ 161a, 172, 172a, 174.

5. Husband and wife ⇐265

A husband and wife by statute are given an equal interest in the community property during continuance of the marriage relation, but they do not possess equal power of management, control or disposition, and husband has power of management and control. Civ.Code §§ 161a, 172, 172a.

6. Husband and wife ⇐270(1)

A husband must bring all actions that concern the community property, unless express statutory exceptions permit her to bring such action. Civ.Code §§ 161a, 172, 172a.

7. Husband and wife ⇐260

Consequential damages which may be recovered for expenses incurred by either husband or wife in the treatment of his or her injuries are presumably community property, in absence of allegation that separate property of either was obligated for payment of such expenses. Code Civ.Proc. § 370; Civ.Code §§ 161a, 172, 172a, 174.

8. Action ⇐50(3)

Cause of action by wife for injuries may be joined with cause of action by husband for consequential damages. Code Civ. Proc. §§ 370, 427.

9. Husband and wife ⇐270(1)
Judgment ⇐597

A husband has primary right, of which he is not divested by statute authorizing wife to sue for personal injuries, to seek recovery of consequential damages from financial loss to community, though such damages are result of injuries to wife, and hence wife's joinder in husband's action in small claims court for damages to community-owned automobile and consequential damages from financial loss to community as result of wife's injuries did not preclude wife, on ground that there had been a "splitting of causes of action", from maintaining separate action for injuries. Code Civ.Proc. §§ 370, 427; Civ.Code §§ 161a, 172a, 174.

See Words and Phrases, Permanent Edition, for all other definitions of "Splitting of Causes of Action".

10. Automobiles ⇐234

Where recovery from automobile owner for injuries caused by negligence of driver was sought on theory of respondeat superior, driver was not a "necessary party". Vehicle Code § 402; St.1937, p. 2353.

11. Judgment ⇐542, 720

A judgment of any court whether of high or low jurisdiction, and of record or not, constitutes a complete bar against a second suit on the same cause of action, but constitutes merely an "estoppel" in a second suit on a different cause, or a conclusive determination of such issues only as were actually raised and litigated.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

12. Courts ⇐175

The small claims court was established to obtain speedy settlement of small claims by informal proceedings conducted in a

spirit of compromise and conciliation. Code Civ.Proc. §§ 117b, 117g, 117h, 117j.

13. Judgment ⇐639

Judgment against automobile owner in small claims court for damages to community-owned automobile and consequential damages from financial loss to community as result of injuries to wife was not "res judicata" of the issues of negligence and contributory negligence raised in superior court action by wife to recover damages for her injuries. Code Civ.Proc. §§ 117b, 117g, 117h, 117j.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

In Bank.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Hazel Sanderson against Charles Niemann, Jr., individually and doing business as the Hillside Motor Company and others, to recover damages for personal injuries sustained in an automobile collision. Judgment in favor of the named defendant and plaintiff appeals.

Reversed.

For prior opinion see 100 P.2d 508.

Jack R. Kates and Kenneth C. Miller, both of Los Angeles, for appellant.

Mills, Hunter, Dunn & Liljestrom and H. J. Hunter, all of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment which was rendered in favor of the defendant Charles Niemann, Jr., individually, and doing business as Hillside Motor Company, in an action which was brought by the plaintiff, Mrs. Hazel Sanderson, to recover damages for injuries to her person. The damages were allegedly sustained as the result of an accident in which were involved an automobile owned as community property by plaintiff and her husband, Job Sanderson, and one owned by defendant, which automobile, at the time of the accident, was being operated by one William Frost. Plaintiff Hazel Sanderson was riding in the automobile which her husband was driving at the time when the collision occurred.

Subsequent to the happening of the accident and prior to the institution of the present action, Job and Hazel Sanderson filed an action in the small claims court of the city of Los Angeles against the defendant herein, Charles Niemann, Jr., for the recovery of a judgment for damages to their automobile, as well as for money which had been expended by the plaintiff husband for medical services rendered to the wife as a result of the injuries received by her in the said accident. The plaintiffs in that action were awarded a judgment in the sum of $12.58.

The complaint which was filed in the present action embraced two causes of action—in the first of which was set forth a claim for damages, for personal injuries, and in the second, in addition to the incorporation by reference of the allegations of the first cause of action, was set forth the claim that the judgment obtained in the small claims court was res judicata of the question of defendant's negligence and liability in connection with the accident. The court overruled a general demurrer to the complaint, but granted a motion to strike the second cause of action. Defendant's answer set forth the following as affirmative defenses: (1) contributory negligence of plaintiff, which was asserted to be imputable to her by reason of the fact that her husband was the operator of the Sanderson automobile at the time of the collision; (2) that the plaintiff, Hazel Sanderson, had split and divided her claim for personal injuries and therefore was estopped from maintaining the present action; and (3) that the former judgment was res judicata of all claims which plaintiff might have had as a result of the accident.

At the trial of the instant action, the record of the proceedings which were had in the small claims court was introduced in evidence, and in that connection testimony was given by plaintiff and by the judge who presided at the hearing of the former action. At the close of that testimony, defendant objected to the introduction of further evidence on the part of plaintiff. The trial court sustained that objection—whereupon plaintiff made an offer of proof with respect to the circumstances surrounding the happening of the accident, the extent of her injuries, etc., which offer was refused by the court. Thereafter, judgment was rendered in favor of defendant on the ground that the former judgment was a bar to the instant action, and that by virtue of the proceedings had in the small claims court plaintiff had "split" her cause of action against defendant and was es-

topped from prosecuting the present action. From the latter judgment plaintiff has instituted this appeal.

Perhaps it should first be made clear that appellant and her husband did not incorporate in the pleadings which they filed in the former action the issue of damages for appellant's personal injuries. No relief in that respect was prayed for, nor was any evidence received by the court in that connection, except in the following respect: During the proceedings had in the former action the judge made certain inquiries of Mrs. Sanderson with regard to the nature of the medical treatment which assertedly was received by her because of her alleged injuries. According to the testimony that was given by the judge, he had asked those questions for the reason that the statement of indebtedness for medical treatment which the plaintiffs had offered in evidence did not disclose the extent of the medical services that were rendered to appellant Hazel Sanderson as a result of the injuries—as distinguished from medical treatments which, it appeared, she had received in connection with a physical ailment which was not related to the said injuries. The statements which Mrs. Sanderson thereupon made to the judge with regard to the nature of her injuries, and the treatment thereof, were solely in response to his inquiries. The record shows that her answers were not intended to have the effect of injecting into the issues the question of general damages in connection with those injuries; and the judge's testimony was to the effect that such statements were not so understood by him.

Both parties to the appeal concede that the identical question here presented has not heretofore been brought before the appellate courts of this state for consideration. The question is: Did the plaintiff wife—by joining her husband in an action for the recovery, in part, of "consequential" damages, i. e., *financial loss* resulting to the community, which were sustained from, and were solely incident to, the personal injuries which she suffered, —preclude herself from bringing a subsequent action in her own name for the recovery of general damages which were allegedly sustained by her strictly as a result of, and attributable solely to, the said personal injuries?

Respondent's argument is to the effect that—in view of the provisions of section 370, Code of Civil Procedure—since appellant joined her husband in the former action in which was tendered the issue of consequential damages for indebtedness incurred as the result of her injuries, she was compelled to litigate therein, if at all, *any* claim which she might have had for injuries to her person; and that her failure to do so, and the presentation by her of that issue in this action amounted to such a "splitting" of a cause of action that, by reason thereof, she should be effectively estopped from recovering in the present proceeding. Respondent contends that the basis of the claim presented in the small claims court was the negligence of defendant and, therefore, that the latter was entitled to have presented therein *all* claims which resulted from, or which in any way depended upon, his alleged negligence.

[1, 2] In this state it is well settled that the law has conferred upon a married woman a separate right to bring an action in her own name for damages for injuries to her person (§ 370, Code Civ.Proc.), and that she is a necessary party to that action (Redwing v. Moncravie, 131 Cal.App. 569, 21 P.2d 986), although her husband *may* join her therein. Such a right of action establishes an exception to the rule that the husband has control of the community property and that he must bring all actions which concern it. But appellant directs attention to the fact that two separate and distinct causes of action are involved in this proceeding,—namely, appellant's present action which was brought in her own name for injuries to her person, and the former action which was filed in the small claims court, to which her husband alone was a necessary party, wherein it was sought to collect damages sustained to the community-owned automobile, and consequential or incidental damages due to financial loss which resulted to the community by virtue of the wife's injuries. The wife was not a necessary party to the former action. However, no objection was made to her joinder therein as a party plaintiff and consequently none may now be made in that regard. See Webb v. Tischauser, 89 Cal.App. 267, 272, 264 P. 526, and cases there cited. Moreover, in the said former action respondent was not deprived of any substantial right by virtue of the joinder of the wife, since the husband was a necessary and proper party plaintiff therein, and the cause of action for which the wife is now seeking to recover damages for injuries to her person was not tendered as an issue. Asevado v.

Orr, 100 Cal. 293, 300, 34 P. 777; Daly v. Ruddell, 137 Cal. 671, 674, 70 P. 784. Therefore, unless it can be said that the provisions of section 370, Code Civ.Proc., authorize the bringing of an action by the *wife* to recover for incidental or consequential damages which may have been sustained by reason of financial loss to the community,—which right of action has heretofore been generally recognized as existing in the *husband*—there has been no "splitting" of a cause of action, and respondent's contentions may not be upheld. As amended in 1921, section 370, Code Civ. Proc., provides as follows:

"A married woman * * * may sue without her husband being joined as a party in all actions, including those *for injury to her person*, libel, slander, false imprisonment, or malicious prosecution, or for the recovery of her earnings, or concerning her right or claim to the homestead property." (Italics added.)

[3-6] However, under the provisions of section 174, Civil Code, a husband owes to his wife the duty of support. He must provide her with reasonable medical care and attention, for the payment of which services he is primarily responsible. Medical Finance Ass'n v. Allum, 22 Cal.App.2d Supp. 747, 66 P.2d 761; Davis v. Fyfe, 107 Cal.App. 281, 290 P. 468. And in determining the scope and meaning of the provisions of section 370, Code Civ.Proc., as sought to be applied herein, they must be considered in the light of other provisions of the law, including those sections of the Civil Code wherein are defined the property rights and interests of husband and wife. Although under the provisions of section 161a, Civil Code, the husband and wife have an equal interest in the community property during the continuance of the marriage relation, they do not possess equal power of management, control or disposition thereof. Frost v. Mighetto, 22 Cal.App.2d 612, 71 P.2d 932. The husband has the management and control of the community property. Myers v. Tranquility Irr. Dist., 26 Cal.App.2d 385, 388, 79 P.2d 419; section 172, 172a, Civ. Code. And, based on the foregoing considerations, the rule which has long been recognized in this state is that (except where express statutory exceptions have been made in favor of the wife with respect to her right to bring an action in connection with the community property) the husband must bring all actions that concern the community property. Johnson v. National Surety Co., 118 Cal.App. 227, 5 P.2d 39; 3 Cal.Jur.Supp. p. 612, and cases there cited.

[7] When read in the light of the Civil Code sections hereinbefore referred to, there is nothing in the language of section 370 of the Code of Civil Procedure which would imply that in enacting the provisions of that section the Legislature intended to divest the husband of the primary right (which theretofore had been recognized as existing in the husband) to bring an action for the recovery of damages due to financial loss which had resulted to the community through the wrongful act of another,—and, in lieu thereof, to vest that right in the wife, merely because the damages thus sought to be recovered may have been sustained as a result of injuries which were personal to the wife. In that regard, in one portion of his argument to this court, respondent concedes that "a wrongful act which causes an injury to the wife may involve two distinct wrongs, one to the wife for personal injury and another to the husband for consequential damages". Consequential damages which may be recovered for expenses incurred by either husband or wife in the treatment of his or her injuries—in the absence of an allegation that the separate property of either was obligated for the payment of such expenses—are presumably community property. Scoville v. Keglor, 27 Cal.App.2d 17, 29, 80 P.2d 162; Martin v. Costa, 140 Cal.App. 494, 498, 35 P.2d 362. Although a few decisions have been rendered in this state wherein, in an action instituted by a married woman, in her own name, for the recovery of general damages for injuries to her person, it was held that she might also recover consequential damages, —the weight of authority in this state is to the effect that the right of action for the recovery of consequential damages which may result from financial loss suffered by the community resides in the husband by virtue of his right of control of the community property. Thus, in the case of Redwing v. Moncravie, 131 Cal. App. 569, 572, 21 P.2d 986, 987, after stating that it was well settled that damages for personal injuries sustained by a married woman were not recoverable unless she was a party plaintiff in an action brought therefor, the court said: "He [the husband], as the sole plaintiff, could

sue only for consequential or special damages *suffered by him* as the proximate result of the injuries to her." Also, in the case entitled Martin v. Costa, 140 Cal.App. 494, 498, 35 P.2d 362, 364, wherein it appeared that a married woman had brought an action for damages for personal injuries, the following was said: "The complaint in the present suit states a good cause of action for personal injuries sustained by the plaintiff [wife]. Consequential damages were not alleged or sought. It was therefore not necessary for the husband of plaintiff to have been joined in the action. Code Civ.Proc. § 370." In each of the two last-mentioned decisions it is expressly recognized that the right exists in the husband to bring an action for consequential damages which may have resulted to the community by reason of personal injuries suffered by the wife; and both of those cases were decided subsequently to the enactment of section 370, Code Civ.Proc. Also, in the case entitled Johnson v. National Surety Co., 118 Cal. App. 227, 230, 5 P.2d 39, in referring to the provisions of section 370, Code Civ. Proc., in effect the court said that the section confers on a married woman no right to sue alone on an obligation where the right of action is given to the husband.

[8] Moreover, appellant directs attention to the fact that section 427, Code Civ. Proc., which pertains to the subject of joinder of causes of action, contemplates the existence of a separate right of action in the husband for the recovery of consequential damages sustained by reason of personal injuries to the wife. That section provides, in part, as follows: "* * * in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages *suffered or sustained by the husband alone,* including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, *may be* alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband." (Italics added.)

The quoted language imports a recognition of two separate rights or causes of action for damages which may arise out of injuries to the wife, which have been sustained through the wrongful act of another; the one which exists in the wife for damages "caused by * * * injury to the *wife*", and the other in the husband, for the recovery of consequential damages suffered or "sustained by the husband *alone*", which may include "indebtedness incurred by reason of such injury to his said wife". The joinder in one action of both of those causes is authorized by the provisions of that section. Thomas v. Smith, 2 Cal.App.2d 701, 38 P.2d 827; Orrick v. Hoeptner, 110 Cal.App. 360, 294 P. 29; Martin v. Costa, 140 Cal.App. 494, 35 P.2d 362. But the language is permissive and not mandatory. Martin v. Costa, 140 Cal.App. 494, 35 P.2d 362; Lynch v. Kemp, 4 Cal.2d 440, 49 P.2d 817; Realty, etc., Mtg. Co. v. Superior Court, 165 Cal. 543, 132 P. 1048.

[9] In consideration of the foregoing, it follows that the action which was brought in the small claims court was essentially one by the husband for the recovery of damages which had been sustained by the community interests; that although the wife joined in that action she was not a necessary party thereto; and that since the cause of action on which she now seeks recovery was not involved as an issue therein, no "splitting" of a cause or causes of action has resulted.

The case of Kidd v. Hillman, 14 Cal. App.2d 507, 58 P.2d 662, which is cited and relied on by respondent, presents a factual situation that is distinguishable from the one here concerned. In that case the plaintiff brought two separate actions against the defendant therein,—in each of which she sought to recover for damages to personal property, where the respective damages were sustained as the result of one tort.

[10] Respondent also makes the contention—for the first time on this appeal—that appellant may not recover in the instant action for the reason that, in pursuance of the provisions of section 402, Motor Vehicle Code, St.1935, p. 153, as amended by St.1937, p. 2353, in order to impose liability against respondent as the owner of the automobile which was alleged to have been negligently driven by another, it was necessary that William Frost (who at the time of the accident was driving respondent's automobile) be made a party defendant in these proceedings. It appears that William Frost was not made a party to the former action; and that although in the present action he was joined as a party defendant, during the proceedings had in the superior court.

appellant dismissed the action as against him. However, the ruling which was made in the case of Holland v. Kodimer, 11 Cal. 2d 40, 77 P.2d 843, does not support respondent's contention in that regard (see, also, cases cited therein).

Moreover, appellant contends that William Frost was not a necessary party to the instant action, in that in both the former and the present action liability was not predicated on the provisions of section 402, Motor Vehicle Code, but was sought to be imposed against respondent on the theory of respondeat superior. Appellant cites the cases entitled Shippy v. Peninsula Rapid Transit Co., 97 Cal.App. 367, 275 P. 515, and Daniel v. Jones, 140 Cal.App. 145, 35 P.2d 198, in support of her contention that where, as in this type of action, liability against a defendant is predicated on an employer-employee relationship, the joinder of the employee as a party defendant is not necessary. Furthermore, it is alleged in the complaint, and appellant offered to prove (which offer was erroneously rejected), that William Frost was the employee of respondent at the time the accident occurred, and that as such employee he was then driving the automobile of respondent during the course and in the scope of his employment.

[11] Appellant further contends that, in any event, the issues of negligence and contributory negligence were conclusively determined in the former action in the small claims court and therefore may not be raised in the present action. We cannot accept that contention. As is pointed out in the leading case of Todhunter v. Smith, 219 Cal. 690, 28 P.2d 916, the doctrine of res judicata has a dual aspect. The authorities indicate that although a judgment of any court whether of high or low jurisdiction, and of record or not, constitutes a complete bar against a second suit on the *same* cause of action,—in a second suit upon a *different* cause of action it constitutes but an estoppel or conclusive determination of such issues only as were actually raised and litigated. Inasmuch as the present litigation is based upon a *different* cause of action from that involved in the prior small claims suit, though tracing its origin to the same transaction, we are here solely concerned with the latter aspect of the doctrine of res judicata. It therefore is our problem to determine whether the judgment of a small claims court is res judicata on the issues of negligence and contributory negligence in a subsequent action in a higher court on a different cause of action. Our determination will be facilitated by a consideration of the nature of a small claims court.

[12] It is apparent that such a court was established in order to offer a means of obtaining speedy settlement of claims of small amounts. The theory behind its organization is that only by escaping from the complexity and delay of the normal course of litigation could anything be gained in a legal proceeding which may involve a small sum. Consequently, the small claims court functions informally and expeditiously. The chief characteristics of its proceedings are that there are no attorneys, no pleadings and no legal rules of evidence; there are no juries, and no formal findings are made on the issues presented. At the hearings the presentation of evidence may be sharply curtailed, and the proceedings are often terminated in a short space of time. The awards—although made in accordance with substantive law—are often based on the application of common sense; and the spirit of compromise and conciliation attends the proceedings. See, generally, Leuschen v. Small Claims Court, 191 Cal. 133, 137, 215 P. 391; Superior Wheeler C. Corporation v. Superior Court, 203 Cal. 384, 387, 264 P. 488; 34 Columbia Law Review 932; 9 St.Johns Law Review 247.

[13] An examination of the significant portions of the California statute creating a small claims court serves to emphasize its peculiarly informal character. The action is commenced by an affidavit which states a claim for money due from the defendant, with no indication of the nature of the claim. Code Civ.Proc., 117b. The claim must be prosecuted and defended by the parties themselves without the aid of attorneys. Code Civ.Proc., 117g. No formal pleading, other than the claim and notice, is necessary, and the hearing and disposition of all such actions is informal, "with the sole object of dispensing speedy justice between the parties". Code Civ.Proc., 117h. The judge or justice may also informally make any investigation of the controversy between the parties "either in or out of court and give judgment and make such orders as to time of payment or otherwise as may, by him, be deemed to be right and just". Code Civ.Proc., 117g. The judgment is conclusive upon the plain-

tiff; only the defendant may appeal. Code Civ.Proc., 117j.

The foregoing characteristics are of the utmost significance in disclosing sound theoretical grounds for refusing to apply the second aspect of the doctrine of res judicata to judgments of small claims courts. And we may reasonably assume that in an action arising out of an automobile collision, such as the case here involved, the technical aspects of proximate cause, contributory negligence, imputed negligence and the doctrine of last clear chance, of necessity have not been fully presented or considered. Nor would it seem probable that in proceedings had in a small claims court recognized rules of evidence could or would be observed. As was said in 1 Wigmore Evidence, 3d Ed., 1940, section 4d, page 106: "In small cases generally * * * it would be a defiance of common sense and a nullification of the main purpose, to enforce the jury-trial rules of evidence; for the parties are expected to appear personally without professional counsel, and they cannot be expected to observe rules which they do not know."

There are a number of cases which illustrate the application of the doctrine to inferior courts such as justices' and municipal tribunals, where such courts, though with lesser jurisdiction, nevertheless function as courts of law with some form of pleadings, and in accordance with legal rules of evidence and the right of representation by counsel. In such cases issues can be framed and decided and therefore may be given conclusive effect in a subsequent suit based on a different cause of action. But a small claims court is not a typical inferior court, and no case has been called to our attention wherein a judgment of a tribunal which operates in the entirely informal manner of a small claims court, as hereinbefore indicated, has been considered to come within the second aspect of the doctrine of res judicata.

The policy which underlies the institution of a small claims court has been recognized in the legislation which created the small claims court for the city of New York. Therein it was provided that a judgment rendered by the small claims court may be pleaded as res judicata only as to the amount involved in the particular action, and that it should not otherwise be deemed to be an adjudication of any fact at issue or found therein in any other action or court. See 34 Columbia Law Review pp. 932, 942, note 76. It is apparent that such a statutory provision was intended to prevent collateral findings made in such an informal proceeding from being conclusive in subsequent suits based on different causes of action.

For the reasons heretofore discussed on this point, it is our conclusion that the prior judgment which was rendered in the small claims court upon a different cause of action cannot be said to be determinative of the issues of negligence and contributory negligence here involved.

From the foregoing it follows that the judgment should be, and it hereby is, reversed.

HOUSER, J., took no part in the decision of this case.



17 Cal.2d 621

PEOPLE v. GRIGGS.

Cr. 4335.

Supreme Court of California.

March 12, 1941.

1. Criminal law ⇐274

A court may, in its discretion, permit a plea of guilty to be withdrawn and a plea of not guilty substituted at any time prior to judgment. Pen.Code, § 1018.

2. Criminal law ⇐274, 1149

The discretion of the trial court in matter of permitting plea of guilty to be withdrawn and a plea of not guilty to be substituted should be liberally exercised and determination of the trial court must be upheld unless abuse of discretion is clearly shown. Pen.Code, § 1018.

3. Criminal law ⇐274, 980(1)

The district attorney cannot bind the trial court by an agreement that a sentence of life imprisonment only will be imposed if defendant pleads guilty of murder in the first degree but the law should be particularly considerate of one who in good faith has acted on inducement of the district attorney and who later seeks to stand on his right to a trial, offering to produce substantial evidence of his innocence. Pen.Code, § 1018.

4. Homicide ⇐27

Chronic alcoholism and mental deterioration are grounds for defense against charge of murder in the first degree and may be urged in mitigation of punishment.

5. Criminal law ⇐53, 57

Drunkenness does not excuse crime, but, when insanity is the result of long continued intoxication, it affects responsibility in same way as insanity produced by other cause.

6. Criminal law ⇐55

Intoxication may be considered by court or jury to determine purpose, motive, or intent with which an act is done, such being of particular importance where degree of crime committed depends on defendant's state of mind, as in a homicide case.

7. Criminal law ⇐274, 1167(5)

Where accused withdrew pleas of not guilty and not guilty by reason of insanity and pleaded guilty to murder in the first degree after receiving assurance of district attorney that if he did so a sentence of life imprisonment would be imposed, but court after considering the evidence declared that it felt bound to impose death sentence, though it appeared that accused was intoxicated at time of offense, and physicians appointed by the court reported that accused was a chronic alcoholic suffering from mental deterioration, motion then made to withdraw the plea of guilty to murder in the first degree should have been granted and judgment sentencing accused to death would be reversed with directions to grant the motion. Pen.Code, §§ 22, 1018.

In Bank.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Ralph Griggs was convicted of murder on his plea of guilty after motion to withdraw the plea had been denied, and he appeals.

Reversed with directions.

Raymond E. Hodge, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

EDMONDS, Justice.

The appellant, charged with murder, pleaded guilty but later moved the court for leave to withdraw that plea. This motion was denied and he was sentenced to death. The sole ground upon which he relies for a reversal of the judgment is that, under the particular circumstances shown, it was an abuse of discretion for the trial judge to deny his motion.

The case is an unusual one. When the appellant was arrested he had the body of Gladys Long in his automobile. At that time she had been dead about ten days. He freely told the police officers that he had killed her and related the circumstances of the crime. Upon arraignment, he entered the pleas of not guilty and not guilty by reason of insanity. Later, upon the advice of his counsel, who had discussed the case with the district attorney, by leave of court he withdrew these pleas and pleaded guilty to murder in the first degree. The appellant contends that this action was taken upon the assurance of the district attorney that if he did so, a sentence of life imprisonment would be imposed; that there was no denial of the statements made by his counsel in open court; that the law seeks no unfair advantage over one charged with crime; and that in the interests of justice the court should have allowed him to withdraw a plea of guilty which was influenced by both hope and fear.

Upon the issue as to the sentence which should be imposed, the district attorney presented the facts pertaining to the commission of the crime as the appellant had given them to the officers. According to the appellant's statement, the crime occurred when he and Gladys Long, who had been living with him for some time, went on a trip and spent several days at a camp ground. One morning they arose early and began drinking. He stumbled against their tent and kicked some dirt into a frying pan. This angered the woman. He backed away trying to pacify her when she picked up a couple of rocks about as large as a fist and threw them at him. He then picked up a rough surfaced rock weighing about seven or eight pounds and threw it at her. He declares that as he threw it she was looking at him, but she turned her back to dodge and the rock struck her in the back of the head, causing injuries which resulted in her death within a very few minutes. He then wrapped the body in the bed covering, put it in the rear compartment of his automobile, and drove back to Los Angeles. After his arrival there he continued his drinking and remained in an intoxicated condition

until the odor from the body led to his arrest.

The district attorney stated that he could produce other evidence which he summarized as follows: When the appellant returned to Los Angeles he had all of the woman's belongings with him. These consisted of her clothing and $840 in money. An acquaintance told the appellant that he was in no condition to carry this money around wiith him. He thereupon gave it to her and she deposited it in a bank to her own credit. During the time he had the money in his possession, he told several persons that it represented the proceeds of ore obtained from a gold mine he owned in San Bernardino county.

In concluding his presentation of the case the district attorney said that the only information he had concerning the killing was obtained from the appellant. He added, "Everything we have at the autopsy and his condition while he was in Los Angeles is all consistent with his statement that he made in regard to this matter."

Following some discussion as to the crime disclosed by this evidence, the trial judge announced that he felt it was his duty to impose the extreme penalty upon the appellant. His counsel then said in substance: "May I make a statement before that? Several days ago Mr. Knauf approached me and gave me the substance of the testimony the state would present here, and he assured me at the time that if I could persuade the defendant to enter a plea of guilty in the first degree he was certain life imprisonment would be imposed. I talked with the defendant about the matter and he complied with my suggestion because of the assurance I had from Mr. Knauf. I also informed him I would take the matter up with his sister in Los Angeles and tell her what had been passed on to me. I did do that and I assured her the extreme penalty would not be imposed, and with that understanding the plea was entered this morning. It puts me in a position that if the Court feels the death penalty should be imposed I certainly would like to withdraw my plea of guilty of murder in the first degree."

Later the appellant's counsel formally moved the court for permission to withdraw this plea of guilty for the purpose of reentering the plea of not guilty. In further support of his motion he stated, "I might say further, Your Honor please, that since talking with all his relatives with respect to the plea of not guilty by reason of insanity I find a great deal more evidence than I thought I would have or could have in support of that plea. I am convinced that this defendant is not mentally sound. I am convinced that he was not at the time this killing took place. I am convinced that I can produce considerable testimony as to his mental condition in addition to the fact that he is a chronic alcoholic."

[1-3] Prior to the judgment a court may at any time, in its discretion, permit a plea of guilty to be withdrawn and a plea of not guilty substituted. Pen.Code, sec. 1018. The discretion thus vested is one to be liberally exercised (People v. Miller, 114 Cal. 10, 45 P. 986), and the determination of the trial court must be upheld unless abuse of discretion is clearly shown. People v. Bostic, 167 Cal. 754, 141 P. 380. But the ruling upon the appellant's motion, under the circumstances shown, cannot be justified. The district attorney did not deny that he had made the representations stated by counsel for the appellant, and, unquestionably, the appellant pleaded guilty in reliance upon them. Of course, the district attorney had no authority to make any agreement which would bind the court, but the law should be particularly considerate of one who, in good faith, has acted upon the inducement of a prosecuting officer and later seeks to stand upon his right to a trial, offering to produce substantial evidence in support of his innocence of the crime charged against him. These principles are particularly applicable in the present case.

Although the appellant admits that Gladys Long met her death at his hands, there is considerable question concerning the crime which he committed. In the statement relied upon by the district attorney the appellant stated that at the time of the quarrel both he and the woman were drunk although, he added, "I was able to see and talk and walk around." Other evidence before the court showed a record of inebriation extending over many years. As the district attorney very fairly pointed out, the physicians appointed by the court reported that the appellant is a chronic alcoholic who at the time of their examination was suffering from mental deterioration or mental aberration.

[4-6] These facts are grounds for a defense against the charge of murder in the first degree and may also be properly urged in mitigation of punishment. For

although drunkenness is no excuse for crime, when insanity is the result of long continued intoxication, it affects responsibility in the same way as insanity which has been produced by any other cause. People v. Hower, 151 Cal. 638, 91 P. 507. Also, the fact of intoxication may be considered by the court or jury for the purpose of determining the purpose, motive or intent with which an act is done. Sec. 22, Pen.Code; People v. Burkhart, 211 Cal. 726, 297 P. 11; People v. Murphy, 1 Cal.2d 37, 32 P.2d 635. This may be of particular importance where the degree of the crime committed depends upon the defendant's state of mind, as in a homicide case. People v. Sutton, 17 Cal.App.2d 561, 62 P.2d 397.

[7] The judgment is reversed with directions to the trial court to grant the appellant's motion to withdraw his plea of guilty to the crime of murder in the first degree and thereafter to permit him to enter such plea or pleas as he may be advised.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.; CURTIS, J.; CARTER, J.



17 Cal.2d 552

McLELLAN v. McLELLAN et al.

S. F. 15887.

Supreme Court, Department 1, California.

March 7, 1941.

Rehearing Denied April 3, 1941.

1. Executors and administrators ⇐315(6)

If decree of distribution which determined persons to whom decedent's estate should be distributed and the amount to which each person was entitled was erroneous, the remedy was by an appeal.

2. Executors and administrators ⇐315(6)

Where decree of distribution allowed no interest on trust legacy and the decree became final, and the trustees received no interest thereon the trustees could not be required to account in subsequent suit in equity for interest on the legacy.

3. Executors and administrators ⇐315(6)

Decree rendered under provisions of probate code relating to administration of trusts, when it becomes final, stands as a bar to any claim brought against a testamentary trustee who is also executor of the estate. Probate Code, § 1123.

4. Executors and administrators ⇐315(6)

Although testamentary trustee had duty to prevent estate from being mismanaged during course of administration, decree of distribution conclusively negatived any charge of mismanagement, negligence, or fraud on the part of the executor and determined that the trustee was under no duty to move to obtain trust assets contrary to the provisions of that decree. Probate Code, § 1123.

5. Executors and administrators ⇐315(6)

The law charges the probate court with the duty of scrutinizing the accounts of an executor in determining the issues presented by petition for distribution, and, where none of those issues is withdrawn from judicial investigation, the determination upon them is conclusive in favor of the executor and the testamentary trustee. Probate Code, § 1123.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Asher Bates McLellan, special administrator of the estate of Mary Bates McLellan, deceased, who was the beneficiary of a trust created by the will of Mary Belle McLellan, deceased, against Asa D. McLellan and others, wherein the controversy concerned the right of the beneficiary to interest from date of testatrix' death to the date of distribution of her estate. From an adverse judgment, the defendants appeal.

Reversed with directions to enter judgment for the defendants.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for appellants.

Alfred J. Harwood, of San Francisco, for respondent.

EDMONDS, Justice.

The appellants, testamentary trustees of the estate of Mary Belle McLellan, are resisting a judgment entered against them in an action brought by the special administrator of the estate of Mary Bates McLellan, who was a beneficiary of one of the trusts created by Mrs. McLellan's will. They were also named as executors and residuary legatees of this will. The con-

troversy concerns the right of the beneficiary to interest from the date of the testatrix's death to the date of distribution of her estate.

Among other bequests, Mrs. McLellan left money in trust with instructions to pay the income thereof, and such portion of the principal as the trustees deemed necessary or advisable, to or for the support and maintenance of Mary Bates McLellan. Almost exactly one year after the testator's death in 1927, her estate was distributed and the trustees received $3,941 under this provision of the will, which amount did not include any interest.

The trust fund was administered by the trustees until the death of Mary Bates McLellan in December, 1934. During the period interest and $500 of the principal was paid to her. The first and final account of the trustees was filed in 1935. Objections to this account were filed by Asher Bates McLellan, special administrator of his mother's estate (the respondent in the present action), upon the ground, among others, that it did not include interest from the date of death of the testatrix to the date of the decree of distribution. Upon appeal, it was held that the decree of distribution, having become final, was not subject to collateral attack in the subsequent proceeding for the settlement of the trustees' account. Estate of McLellan, 14 Cal.App.2d 271, 57 P.2d 1338. The respondent then commenced the present action in equity, charging that by reason of the trustees' failure to obtain distribution of interest upon the corpus of the trust, that they benefited as residuary legatees to the amount of $275.

Appellants contend that as the decree of distribution did not include interest, the probate court, in effect, found that no interest was due; that this decree is now final and relief from it can only be had upon a showing that it was procured by extrinsic fraud not the result of negligence of the respondent or his predecessor; that assuming a cause of action for extrinsic fraud has been stated, it is one to establish a constructive trust and lies only against appellants as individuals, and their demurrer, as trustees, should have been sustained on this ground; and, finally, that an action to establish a constructive trust has been barred by the statute of limitations.

Respondent answers that this is a suit in equity in which the court may grant relief from a decree of distribution which has become final; that the facts alleged in the complaint and found by the court show extrinsic fraud; and that the action is against the trustees of an express trust in which the trustees cannot rely upon the statute of limitations without a showing either that they have repudiated the trust or that the trust has terminated.

[1,2] The decree of distribution has long since become final. It determined the persons to whom the estate should be distributed and also the amount to which each person was entitled. If there was any error in the decree, the remedy was by appeal. Estate of Schmierer, 168 Cal. 747, 145 P. 99. In Estate of McLellan, supra, which concerned objections made by the respondent in the present action to an order of the probate court upon the ground that interest had not been collected by the trustees, it was held that they could not be required to account for interest not received by them. The same question was later presented to this court on behalf of another beneficiary under the will of Mrs. McLellan, and decided in favor of the trustees. Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120.

[3-5] Section 1123 of the Probate Code provides: "A decree rendered under the provisions of this chapter, when it becomes final, shall be conclusive upon all persons in interest, whether or not they are in being." Such a decree, this court has recently held, stands as a bar to any claim brought against a testamentary trustee who was also the executor of the estate. Although recognizing the duty of a testamentary trustee to prevent the estate from being mismanaged during the course of administration, it was held that the decree of distribution conclusively negatives any charge of mismanagement, negligence or fraud on the part of the executor and likewise determines that the trustee was under no duty to move to obtain trust assets contrary to the provisions of that decree. Carr v. Bank of America, etc. Ass'n, 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282. The basis of this decision is that the law charges the probate court with the duty of scrutinizing the accounts of the executor and determining the issues presented by a petition for distribution, and where none of those issues are withdrawn from judicial investigation, the determination upon them is conclusive in favor of the executor and also the testamentary trustee. That reasoning is par-

ticularly applicable to the controversy now before the court.

As these conclusions are determinative of the issues before the court, it is unnecessary to consider other points relied upon.

The judgment is reversed with directions to enter judgment in favor of the appellants.

We concur: SHENK, J.; CARTER, J.



17 Cal.2d 606

CITY AND COUNTY OF SAN FRANCISCO et al. v. BOYD.

S. F. 16430.

Supreme Court of California.

March 12, 1941.

As Modified April 8, 1941.

1. Municipal corporations ⇐887

Under San Francisco charter providing for creation of a fund for reconstruction and replacements due to physical and functional depreciation of utilities under jurisdiction of the utilities commission, "functional" depreciation includes replacement of parts due to obsolescence and inadequacy as well as to complete decay, and research necessary to determine amount of reconstruction and replacement to be done is a proper charge against such fund, and the substitution of any means of transportation for a decayed or outmoded means in place would be an "improvement" contemplated by that provision.

See Words and Phrases, Permanent Edition, for all other definitions of "Functional" and "Improvement"

2. Municipal corporations ⇐887

Where money transferred from surplus of municipal railway reconstruction and replacement fund for purpose of having plans prepared looking toward solution of transportation problem was to be used in connection with contemplated future improvement of transit system of San Francisco, that money was not in fact "transferred" to the use of another department within charter provision but was merely "set aside" for use of the railway and its improvement.

See Words and Phrases, Permanent Edition, for all other definitions of "Set Aside" and "Transferred".

3. Automobiles ⇐49
Licenses ⇐33

Under statute providing that money derived from gasoline taxes and registration license fees should be deposited in a special road improvement fund and expended by the county for acquisition of realty or interests therein or construction, maintenance, or improvement of highways, bridges, or culverts, accrued surplus in county road fund transferred by state to county could be used by the City and County of San Francisco in connection with contract to procure services of a civil engineer to aid in solution of traffic and transit problems. St. 1937, p. 2562, § 1622.

4. Highways ⇐99¼

The County Road Fund Act should be construed liberally. St.1937, p. 2562, § 1622.

5. Municipal corporations ⇐296(1)

A San Francisco charter provision that all examinations, plans, and estimates required by supervisors in connection with any public improvements, exclusive of those to be made by the public utilities commission, should be made by the director of public works and that he should, when requested to do so, furnish information and data for use of supervisors, applies only to specific public improvements and does not apply to a general survey proposed to be carried on to aid in the solution of traffic and transit problems.

6. Municipal corporations ⇐867(2)

That San Francisco might lose some economic benefit from payment of a civil engineer's fee did not invalidate contract to procure engineer's services for five years to aid in the solution of traffic and transit problems under constitutional debt limit provision, nor was that provision violated because there was no showing that under no possibility would funds be available for future years. Const. art. 11, § 18.

7. Municipal corporations ⇐63(1), 228

Whether it was worth $20,000 per year to have a civil engineer merely to advise the San Francisco board of supervisors on matters developed by his investigation of traffic and transit problems and to submit reports was a matter for the board to determine, and it was not the function of the controller to attempt to defeat the board's purpose or of the Supreme Court to interfere with that determination.

8. Municipal corporations ⇐868(3)

Notwithstanding the limitation prescribed by charter on the passage of any ordinance or resolution for the expenditure of money, the San Francisco board of supervisors has broad powers as the lawmaking body to contract on behalf of the city and county, and its powers are extensive in all strictly municipal matters.

9. Municipal corporations ⇐868(3)

To promise payment of money upon the performance of a contract for expert professional temporary service out of an unencumbered and unexpended fund admittedly set aside for such expenditure is not to contract a "liability" in violation of San Francisco charter provision prohibiting the passage of an ordinance or resolution for the expenditure of money without certification that there is sufficient money for the proposed expenditure, since there is no "debt" until the service has been rendered, even though some of the contingent payments may become payable five years later.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt" and "Liability".

10. Municipal corporations ⇐868(3)

That an initial payment by San Francisco under contract for expert professional temporary services might prove to have been injudiciously made, and that the scheme might fail of execution for want of appropriation, are immaterial on question of validity of contract under charter provision prohibiting the passage of an ordinance or resolution for the expenditure of money without certification that there is sufficient money for the proposed expenditure.

11. Municipal corporations ⇐868(3)

Where each year's consideration is severable from the remainder of a proposed plan, and municipality's obligation to pay under a contract is conditioned upon the rendition of services, the contract is not prohibited by charter provision prohibiting the passage of an ordinance or resolution for the expenditure of money without certification that there is sufficient money for the proposed expenditure.

12. Municipal corporations ⇐868(3)

A municipality's contract to procure the services of an individual for a period of five years is not invalid under charter provision prohibiting the passage of any ordinance or resolution for the expenditure of money without certification that there is sufficient money available for the proposed expenditure and that revenue anticipated and properly applicable to meet the expenditure will be available to meet it as it becomes due, unless it is shown that any installment coming due in any year is in excess of the incoming revenue of that year.

13. Municipal corporations ⇐60

The delegation of the several powers of administration to officers, boards, and commissions was not intended by the framers of the charter of the City and County of San Francisco to deprive the board of supervisors of the power to plan, study, and legislate for civic betterment and improved conditions of municipal affairs. Const. art. 11, § 6.

14. Evidence ⇐83(2, 4)

On question of validity of a contract to procure the services of a civil engineer for five years to aid in the solution of traffic and transit problems of the City and County of San Francisco under charter provision requiring all positions to be included in the classified civil service and to be filled from lists of eligibles prepared by the civil service commission, excepting persons employed in positions in any department for expert professional temporary services, the Supreme Court was required to presume that the exception would be complied with by the commission by exempting the engineer and his aides from the classified service before executing the contract.

15. Municipal corporations ⇐216(1)

The provisions of the San Francisco charter specifying the positions which must be included in the classified civil service and filled from lists of eligibles prepared by the civil service commission indicate that it was the intention of the framers of the charter that civil service should apply only to persons employed in permanent positions in municipal departments to the end that public service should be free from political shifting and control resulting from changes in administration.

16. Municipal corporations ⇐216(1)

"Employees" of San Francisco under civil service occupy the relationship of "servant" to "master" and are subject to the control of the municipality, but persons hired by a civil engineer under contract requiring him to supply municipality with estimates, plans, programs, and reports of traffic and transit problems would in no respect occupy a "position" in a "department" as contemplated by the civil service provisions of the municipality's charter, nor would they

become city "employees" in the sense of that word as used in reference to the classified service.

See Words and Phrases, Permanent Edition, for all other definitions of "Department", "Employee", "Master", "Position", and "Servant".

17. Municipal corporations ⇐216(1)

Because the supervisors of San Francisco in exercising their discretion preferred to keep check on details of cost of work to be done by a civil engineer proposed to be hired for five years to aid in the solution of traffic and transit problems, rather than to contract for the survey to be done for a lump sum, did not alter the fact that engineer was employed as an "independent contractor" who was not within the civil service provisions of the San Francisco charter.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

18. Municipal corporations ⇐236

The employment of a person who is highly and technically skilled in his science or profession may properly be made by a municipality without competitive bidding.

In Bank.

Original proceeding for a writ of mandate by the City and County of San Francisco and others against Harold J. Boyd, etc.

Peremptory writ ordered to issue as prayed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for petitioners.

B. J. Feigenbaum, of San Francisco (S. A. Ladar and Richard W. Jennings, both of San Francisco, of counsel), for respondent Harold J. Boyd as Controller, etc.

MOORE, Justice pro tem.

This is an original proceeding for a writ of mandate whereby petitioners seek to compel the respondent to certify to the petitioners that there is a sufficient unencumbered balance in a fund that may legally be used for the proposed expenditure of the sum of $100,000 for the services of one Purcell, a civil engineer. The municipality seeks by a contract to procure the services of Purcell for a period of five years to aid in the solution of traffic and transit problems. The certification sought was also to cover the maximum additional sums that may be expended in the fiscal year ending June 30, 1940. The petition recited that on or about the 18th day of March, 1940, the petitioners adopted a resolution No. 906, series 39, as follows: "* * * that there is a sufficient unencumbered balance in a fund that may legally be used for the proposed expenditure of $100,000, for the services of said * * * Purcell * * * and the maximum additional sums that may be expended in the fiscal year ending June 30, 1940, pursuant to said contract to reimburse said * * * Purcell, and that in the judgment of the controller revenues as anticipated in the appropriation ordinance for said fiscal year and properly applicable to meet such proposed expenditure will be available in the treasury in sufficient amount to meet the same when it becomes due; * * *"

On April 12, 1940, the controller notified the board in writing that there was not sufficient unencumbered funds that could legally be used for the proposed expenditure; that in his judgment revenue properly applicable to the proposed expenditure would not be available in the treasury in sufficient amount to meet the same and that the proposed expenditure could not legally be made for the purposes and in the manner provided even if funds were available.

The respondent has filed a demurrer and an answer to the petition herein. As originally filed the answer appeared to raise an issue of fact as to the existence of unencumbered funds. By stipulation of the parties subsequently filed it now appears, however, that there remains unencumbered and unexpended $110,000 appropriated by the petitioning board of supervisors in March, 1939, and thereafter approved by the mayor. One-half of this sum ($55,000) was appropriated by ordinance No. 101 from the surplus existing to the credit of the Municipal Railway reconstruction and replacement fund "for the purpose of having a plan or plans prepared looking toward solution of the *transportation* problem". The remaining one-half ($55,000) was appropriated by ordinance No. 102 from the accrued surplus in the county road fund "for the purpose of having a plan or plans prepared looking toward solution of the *traffic* problem". Inasmuch as the stipulation admits that the entire fund so appropriated "has not been expended", a consideration of the arguments and authorities advanced by respondent in support of

his demurrer will serve to dispose of all legal issues with respect to the availability of such sum for the proposed contract above mentioned.

The proposed contract provides that the work contemplated is to be completed in five years; that Purcell as the contractor shall from time to time advise the petitioners relative to the solution of traffic and transit problems; that he shall submit to the mayor and the petitioners from time to time reports and recommendations as to the feasibility and costs of the proposed projects; that he shall devote his entire time to the work contemplated and shall post a bond of faithful performance in the sum of $25,000; that the city shall pay Purcell $20,000 per annum and all actual costs and expenditures incurred in the performance of his duties in the manner contemplated by the agreement; that no liability for such costs and expenses shall arise until the same shall have been actually incurred; that Purcell shall engage his own employees, not to exceed five in number, at certain specified salaries; that the city shall furnish Purcell suitable office quarters and shall reimburse him for expenses incidental thereto; that said employees shall be selected by Purcell as the contractor and that they shall have no claim for compensation against the city; that Purcell shall not be reimbursed for any expenditure incurred in any fiscal year from funds of any succeeding fiscal year; that "the cost of borings, traffic checks and the actual cost of reproducing maps and plans and the cost of performance of any duties not in the ordinary course of employment" of said employees is to be borne by the city; that Purcell shall be entitled to use the services of the several officers and departments of the city interested in the work which he is performing; that he shall not incur any expenses for which he has to be reimbursed unless there shall first have been regularly appropriated for the year in which the obligations are incurred a sufficient sum of money to provide for the payment of such obligations, and that if there shall be no lawful appropriation of such moneys in any year, the city shall be obligated only to the extent of said $20,000, payable to Purcell for his own services.

[1, 2] Preliminary to a consideration of respondent's contention that the unencumbered and unexpended $55,000 appropriated from the surplus of the municipal railway reconstruction and replacement fund may not legally be used for the proposed expenditure under the Purcell contract, it should be stated that section 77 of the charter provides that: "On the request of a department head and approved by the administrative officer, board or commission, respectively, and on the authority of the controller, funds appropriated for a specific purpose of such department which become surplus may be transferred and used for another specific purpose within the department." The public utilities commission already had adopted a resolution requesting the supervisors to appropriate from the unappropriated surplus of the municipal railway the sum of $55,000 to be used in payment of one-half the cost of retaining Purcell to make surveys, investigations, reports and recommendations relative to traffic and transit conditions and the extension and improvement of the municipal railway. Inasmuch as section 128.1 of the charter provides for the creation of a fund for reconstruction and replacements due to physical and functional depreciation of the utilities under the jurisdiction of the utilities commission, the suggested illegality in the appropriation from the surplus of the municipal railway must arise, if it does arise, upon the hypothesis that the proposed survey is not a reconstruction or a replacement. The word "functional" defining the depreciation of the utilities must include replacement of parts due to obsolescence and inadequacy as well as to complete decay. If the replacement of a property due to either inadequacy or obsolescence is to be paid out of the reconstruction and replacement fund, then the research necessary to determine the amount of reconstruction and replacement to be done is also a proper charge against such fund and the substitution of any means of transportation for a decayed or outmoded means now in place would be an "improvement" contemplated by the charter section. It will surely be conceded that any transit system that has been used for more than a quarter of a century must have many units that require replacement, if indeed the entire system, itself may not be outmoded. Whether it is outmoded, however, can be determined only by the survey of an expert in the field of transportation. Inasmuch as the moneys transferred from the surplus of the municipal railway are to be used in connection with the contemplated future improvement of the transit system of the city and county, they are not in fact transferred to the use of another department but are merely "set

aside" for the use of the railway and its improvement. The case of Mobley v. Board of Public Works, 44 Cal.App. 167, 186 P. 412, offers no obstacle. It was concerned with the problem of whether or not the funds of the municipal railway system might be employed for the purpose of conducting an investigation as to the condition, availability and value of a private railway system. The case is not only factually distinguishable but arose under a former charter containing many provisions not in the present charter.

[3-5] As to the appropriation from the accrued surplus in the county road fund, the respondent contends that monies derived from gasoline taxes and registration license fees, and transferred by the state to the county, cannot be used in connection with the Purcell contract. We cannot accept the contention. Section 1622 of the Streets and Highways Code, St.1937, p. 2562, provides that such monies "shall be deposited in a 'special road improvement fund'" and shall be expended by the county "exclusively for the acquisition of real property or interests therein, or the construction, maintenance or improvement of highways, bridges or culverts in that county". That the County Road Fund Act should be construed liberally is indicated by our decision in Long Beach v. Payne, 3 Cal.2d 184, 44 P.2d 305, wherein it was held that highways included canals as an integral part of the highway system. Obviously, before the authorities can properly construct a bridge or a highway within the city and county of San Francisco some intelligent planning must be done with a view both to economy and to obtaining the maximum of service from the investment made. Nor do we think that section 106 of the charter offers any obstacle. That section provides that "All examinations, plans and estimates *required* by the supervisors in connection with any public improvements, exclusive of those to be made by the public utilities commission, shall be made by the director of public works, and he shall, *when requested* to do so, furnish information and data for the use of the supervisors". We are not inclined to apply this charter provision to a general survey such as is here proposed. Reasonably construed, the provision would appear to have application only to specific public improvements. Moreover, the director of public works is to furnish plans, etc., when "required" or "requested" by the board of supervisors. Such a provision does not purport to foreclose the procurement of the proposed assistance here sought.

The respondent next contends that revenues properly applicable to meet the proposed reimbursements of Purcell will not be available in the treasury in sufficient amounts to meet the same as they become due. Inasmuch as the stipulation above referred to discloses the availability of a sum in excess of the total sum payable to Purcell, we have only to consider whether the lack of an appropriation of sufficient monies payable on the contract for the future fiscal years invalidates the contract under article XI, section 18, of the Constitution which forbids any city to incur "any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof * * *."

Because the payment of the disbursements made by Purcell during each fiscal year as the work progresses is not provided for by any fund now on hand, respondent fears that the happening of some dire event might render unavailable such necessary moneys in the future and that consequently the sums paid to Purcell will be wholly lost to the municipality. Even though the contract were not completed and the final report were not to be made, yet we must assume that the prosecution of the work under the contract will proceed in a normal way and that partial reports will be made from time to time. It provides for the partial accomplishment of the project year by year and it provides for the furnishing of the money to pay for the work as it progresses.

[6,7] The fact that the municipality might lose some economic benefit from the payment of Purcell's fee does not invalidate the contract. In re City and County of San Francisco, 191 Cal. 172, 215 P. 549. The constitutional provision is not violated because there is no showing that under no possibility would funds be available for the future years. City of Oakland v. Williams, 15 Cal.2d 542, 103 P.2d 168. If the funds necessary for the current year are available, it is a fair presumption that the contract will be carried out by both parties and that the future needs for moneys will be met as the time arrives. The speculation that the engineer may die or that a tidal wave might destroy the city were suitable topics for consideration of only the

legislative discretion and involve such risks as a municipality must always suffer in contracting for professional services covering a period of years. The fears of respondent that no economic benefits will be derived by the city in the event of a failure of the complete performance of his contract by Purcell are not justified in view of Purcell's obligation that at all times he shall furnish advice and make reports as to conditions found to exist and recommend methods for improving such conditions; that such repairs and services will be completed with promptness and submitted when completed; that on the first of July of each year a progress report for the preceding year shall be submitted, including surveys, recommendations and cost estimates; that Purcell shall develop his organization, which would be available to continue with the work in the event of his decease; that he shall attend meetings of the supervisors and all interested departments; that all of his plans and specifications, surveys and reports shall become the property of the city;—these things are of a definite economic value and justify the legislative body of the municipality in deciding to make the payments. If the board of supervisors should determine that it is worth $20,000 per annum to have Purcell merely to advise the board on matters developed by his investigation and to submit reports, that was a matter for the board to determine and it is not the function of respondent to attempt to defeat their purpose or of this court to interfere with such determination.

[8-12] Section 86 of the charter provides that "no ordinance or resolution for the expenditure of money, except the annual appropriation ordinance, shall be passed by the board of supervisors unless the controller first certify to such board that there is a sufficient unincumbered balance in a fund that may legally be used for such proposed expenditure" and that "in the judgment of the controller, revenue anticipated under the appropriation ordinance for such fiscal year and properly applicable to meet such expenditure will be available in the treasury in sufficient amount to meet the same as it becomes due". Notwithstanding the limitation prescribed by the quoted section, petitioners have broad powers as the lawmaking body to contract on behalf of the city and county. Their powers are extensive in all strictly municipal matters. Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745. To promise the payment of money upon the performance of a contract out of an unincumbered and unexpended fund admittedly set aside for such expenditure is not to contract a liability in violation of the charter. And this is true even though some of the contingent payments may become payable five years later. Krenwinkle v. City of Los Angeles, 4 Cal.2d 611, 51 P.2d 1098; Doland v. Clark, 143 Cal. 176, 76 P. 958. Where the city and county of San Francisco contracted to reimburse a sister city in the sum of $5,000 for expenses in obtaining plans for a hospital to be used by both cities and the auditor admitted the $5,000 was available, the validity of the contract was held no longer in question. Also, the possible inability of the city to meet future obligations from funds falling due in years to come was prematurely presented. That an initial payment might prove to have been injudiciously made is immaterial. Because the scheme might fail of execution for want of appropriation is immaterial. In re City and County of San Francisco, 191 Cal. 172, 215 P. 549; California Pac. Title and Trust Co. v. Boyle, 209 Cal. 398, 287 P. 968. Where each year's consideration is severable from the remainder of the proposed plan and the obligation to pay is conditioned upon the rendition of the services, the contract is not prohibited. California Pacific Title and Trust Co. v. Boyle, supra; McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191. Such a contract as that proposed is not invalid unless it be shown that any installment coming due in any year is in excess of the incoming revenue of that year. Wyckoff v. Force, 61 Cal. App. 246, 214 P. 489.

The authorities cited by respondent (Chester v. Carmichael, 187 Cal. 287, 201 P. 925; In re controversy between City and County of San Francisco and Thomas F. Boyle, as Auditor of said city, 195 Cal. 426, 233 P. 965; Mahoney v. City and County of San Francisco, 201 Cal. 248, 257 P. 49; Browne v. City of Boston, 179 Mass. 321, 60 N.E. 934) do not apply. In all of these cases the point decided was that a municipality does not have the power to incur an obligation against the city to make future payments for the purchase price of land, in default of which payments the city would forfeit its right to purchase and lose all sums theretofore paid.

[13] Respondent next contends that the contract is violative of the charter (1) in that it provides for an illegal duplication of the functions and duties of existing officers, departments and commissions; and (2) in that it ignores the civil service and residential provisions of the charter. Both claims are without merit. Numerous provisions of the charter are cited to show that the powers of the city and county mentioned therein are delegated to certain officials, boards and commissions named in the charter. A quotation of all of the charter provisions quoted by respondent would lengthen this opinion unduly. Suffice it to say that the delegation of the several powers of administration to officers, boards and commissions was not intended by the framers of the charter to deprive the board of supervisors of the power of legislating on behalf of the city and county. Prior to 1914, the legislative function of a city was confined to such powers only as were delegated by the charter but in that year rapid changes were occurring and others were certain to occur by reason of the growth of metropolitan centers and by reason of the available variety of implements and machinery required to function in the operation of the modern city, as well as in the extension of the comfort and convenience of the people. It was determined then to extend the powers of self-government to all municipalities who desired to accept and exercise such power. The City and County of San Francisco was one of those municipalities to accept the privilege thus extended. It adopted a charter under which it has full control of all "municipal affairs" except in those particulars limited or controlled by the constitution or by a specific charter provision.

This power of the city is contained in section 2 of the charter, which reads: "The city and county may make and enforce all laws * * * in respect to its affairs * * * subject only to the restrictions and limitations provided in this charter. * * * *the exercise of all rights and powers of the city when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors.*"

Section 9 provides: *"The powers of the city and county,* except the powers reserved to the people or delegated to other officers, boards or commissions by this charter, *shall be vested in the board of supervisors.* * * * The board of supervisors may by ordinance confer on any officer, board or commission such other and additional powers as the board may deem advisable."

While it is true that the charter provides for an independence of the various departments of the city in the performance of their respective duties, and while it is true that to the various commissions certain duties have been delegated, yet there is nothing in the language delegating such duties and functions to the police department, to the chief administrative officer, to the street traffic advisory board, to the city planning commission, to the department of public works and the public utilities commission,—nothing is said which suggests a limitation upon the powers of the board of supervisors to plan, study and legislate for civic betterment and improved conditions of municipal affairs.

This power of the board of supervisors has been the subject of numerous decisions by this court. We have consistently held that cities which have accepted the privilege of complete autonomy granted by article XI, sec. 6 of the constitution may "make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters" (Sec. 6); that "the enumeration of some powers does not exclude the exercise of powers not enumerated except as limited by the charter and the Constitution" (West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 523, 95 P.2d 138, 143); that where a charter is silent a city may exercise powers conferred upon it by general law provided such general powers are not inconsistent with those granted by the charter; if no restrictions or limitations are found in the charter, the power of the city in municipal affairs is full and complete, assuming for the present purposes that sewage disposal generally is a municipal affair as distinguished from a state affair (City of Oakland v. Williams, supra); that a public agency may contract for expert services unless specifically prohibited by constitutional or statutory provision (State Compensation Insurance Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985); that "in order to remove the * * * municipal affairs from the control of general laws it is sufficient if the city has availed itself of the offer extended to it by the Constitution * * *." City of Pasadena v. Charleville, supra [215 Cal. 384, 10 P.2d 748]. The trend has been universal in recent years to permit munici-

palities "a wider range in undertaking to promote the public welfare or enjoyment". Egan v. City of San Francisco, 165 Cal. 576, 133 P. 294, 295, Ann.Cas.1915A, 754.

The cases cited by respondent (Merriam v. Barnham, 116 Cal. 619, 48 P. 727; Denman v. Webster, 139 Cal. 452, 73 P. 139; Rafael v. Boyle, 31 Cal.App. 623, 161 P. 126; MacLeod v. Long, 110 Cal.App. 334, 294 P. 54; Allen v. Payne, 1 Cal.2d 607, 36 P.2d 614, and Tax Factors v. County of Marin, 20 Cal.App.2d 79, 66 P.2d 666) do not support his contention that the proposed contract is void by reason of its alleged illegal duplication of the functions and duties of existing officers, departments and commissions. In each of the cited cases the function which the contract had attempted to duplicate had been specifically, by statute, imposed upon a specified officer. In none of them was there involved such a city charter as that involved herein. In each of them the duties of some county official, specifically established by the general law, were to be duplicated by a contract for the services of an outside party.

[14] In the next place, respondent contends that the contract is illegal because it violates section 142 of the charter. Said section reads as follows: "All positions in all departments and offices of the city and county * * * shall be included in the classified civil service of the city and county, and shall be filled from lists of eligibles prepared by the civil service commission, excepting * * * (4) *persons employed in positions in any department for expert professional temporary services,* and when such positions are exempted from said classified civil service for a specified period of said temporary service, by order of the civil service commission." As to subdivision 4, we must presume that it will be complied with by the civil service commission by exempting the contractor and his aides from the classified service before executing the contract.

[15] But in considering the section respondent fails to observe the significance of the provisions of secs. 140, 141, 142, 145, 146, 148. Section 140 refers to "appointments in the public service"; section 141 refers to: *"All places of employment in the departments and offices of the city";* section 142 refers to: "All *positions* in all departments and offices" but specifically excepts persons employed in positions in any department for expert temporary service; section 145 refers to: *"Positions* in the uniformed forces"; *"Positions* in the mechanical trades and occupations"; and for examination of laborers, allowing credit for military or naval service; section 146 refers to: *"Promotion* in the service". Section 148 provides that *vacancies* shall be filled upon requisition of the "appointing officer". A reading of the entire text of said several sections indicates clearly that it was the intention of the framers of the charter that civil service should apply only to persons *employed in permanent positions* in municipal departments to the end that public service should be free from political shifting and control resulting from changes in administration. If section 142 were to be given the literal application suggested by respondent, it would be impossible for the municipality to make an independent contract with any person or corporation to render an extraordinary service or to make surveys with a view of legislation on behalf of the municipality.

[16, 17] The proposed contractor is not to be placed in any position provided for by the charter. He is to be engaged under a contract to do a specific job and all of the assistants which he will employ from the typist in his office to his most highly paid engineer are to be instrumentalities of his own choosing and for whom he is to be responsible. They do not become city employees in the sense of that word, as used in reference to the classified service, but are to be employees of the engineer whose contract requires that he supply the city with estimates, plans, programs and reports, such as will enable the municipality to advance the public welfare by the improvement of conditions with respect to which his services will be rendered.

The contention presented by respondent with respect to ignoring the civil service provisions of the charter was answered in the City of Oakland v. Williams, supra. The contiguous cities having by agreement chosen Berkeley as sponsor of the proposed survey and custodian and disburser of the funds of the signatories, the city auditor insisted that the contract violated charter provisions relating to civil service. But this court held that those provisions were "without relevancy for, obviously, such provisions can have no application to the employees of those who contract with the City of Oakland". [15 Cal.2d 542, 103 P.2d 173.] Merely because Purcell's appointees will render services for the city

does not place such appointees in a "position" or a "department" or in an "office". "Employees" under civil service occupy the relationship of servant to master and are, of course, subject to the control of the municipality but the position of the employees of the contractor will in no respect occupy a "position" in a "department" of the city as contemplated by the charter's civil service provisions. Because the supervisors in the exercise of their discretion prefer to keep check upon the details of the cost of the work to be done by the contractor rather than to contract for the survey to be done for a lump sum does not alter the fact that the contractor is employed as an independent contractor to do a specific job and to get for himself a definite profit.

[18] Respondent's suggestion that the contract is a violation of charter provisions requiring that bids be received on all contracts is without merit. The employment of a person who is highly and technically skilled in his science or profession is one which may properly be made without competitive bidding.

Let the peremptory writ issue as prayed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; CARTER, J.



17 Cal.2d 594

TAYLOR v. OAKLAND SCAVENGER CO. et al.

S. F. 16470.

Supreme Court of California.

March 11, 1941.

1. Automobiles ⇐244(3)

In action for injuries sustained by 15-year-old high school girl who was struck by garbage truck while running across courtyard from gymnasium to athletic field, evidence that truck driver was familiar with courtyard between main high school building and gymnasium and knew that children frequently ran across the area, and that truck driver drove around blind corner without sounding horn or giving other warning at rate of 25 miles per hour, which was five miles in excess of prima facie speed limit set by Vehicle Code, warranted finding that truck driver was negligent. Vehicle Code, § 511, St.1935, p. 176.

2. Automobiles ⇐155

A truck driver has clear duty of care toward pedestrians and is required to exercise greater caution in a school yard than under ordinary circumstances.

3. Schools and school districts ⇐121

In action against school district for injuries sustained by 15-year-old high school girl who was struck by garbage truck while running from gymnasium to athletic field, evidence that principal had known for seven years of practice of physical education students to run to field, and that school authorities permitted 18 trucks to drive on school grounds subject to no safety requirements other than general provisions of Vehicle Code, warranted finding that school district was negligent. Vehicle Code, § 511, St.1935, p. 176.

4. Schools and school districts ⇐89

School authorities must supervise at all times conduct of children on school grounds and must enforce such rules and regulations as are necessary to their protection.

5. Schools and school districts ⇐89

A school district is liable for injuries resulting from failure of officers and employees to use ordinary care in supervising conduct of children on school grounds and enforcing rules and regulations necessary for protection of school children.

6. Schools and school districts ⇐89

The question whether there has been negligence in permitting vehicles on school premises subject only to provisions of Vehicle Code relating to traffic on highways should be determined on the facts of each case. Vehicle Code, § 511, St.1935, p. 176.

7. Schools and school districts ⇐89

The negligence of school authorities in permitting vehicles on school premises subject only to provisions of Vehicle Code relating to traffic on highways is established if reasonably prudent person would foresee that injuries of same general type would be likely to happen in absence of additional safeguards, and it is not necessary to prove that the very injury which occurred must have been foreseeable by school authorities in order to establish that their failure to provide additional safeguards constituted

negligence. Vehicle Code, § 511, St.1935, p. 176.

8. Trial ⇐260(8)

In action against school district for injuries sustained by 15-year-old high school girl who was struck by truck on school grounds, failure to instruct that if school authorities were justified in relying on provisions of Vehicle Code as adequate for protection of children on grounds and were not guilty of any negligence, school district would not be liable was not error, where jury was instructed that only basis for imposing liability on district was negligence of its officers or employees, that provisions of Vehicle Code were applicable to vehicles on school grounds in absence of special regulations, and that question whether school authorities should have imposed special regulations was question of fact to be determined in light of conditions existing at time of accident. Vehicle Code, § 511, St.1935, p. 176.

9. Automobiles ⇐246(5)

In action against school district for injuries sustained by 15-year-old high school girl who was struck by truck while running across school grounds, trial court did not erroneously instruct jury that driver of truck was not obligated to follow applicable provisions of Vehicle Code, where trial court stated that relevant sections of Vehicle Code were applicable to traffic on school grounds in absence of special regulations, and further instructed that truck driver had clear duty to drive truck on grounds at careful and prudent speed. Vehicle Code, § 511, St.1935, p. 176.

10. Trial ⇐241

In action against school district for injuries sustained by 15-year-old high school girl who was struck by truck while running across school yard, trial court's use of language from opinion of Supreme Court when case was before Supreme Court on demurrer, in instructions to jury that general provisions of Vehicle Code might be inadequate for situations arising on school grounds, was not error. Vehicle Code, § 511, St.1935, p. 176.

11. Appeal and error ⇐1064(1)

In personal injury action wherein instruction as first given omitted element of proximate cause, subsequent withdrawal of erroneous instruction and re-reading it to members of jury and telling them to disregard it and issuing a proper instruction in place thereof was not prejudicial error.

12. Trial ⇐241

In action against school district for injuries sustained by 15-year-old high school girl who was struck by truck while running across school grounds, instruction in language of School Code that school district was liable for negligence of its officers and employees did not impose a greater burden on school district than that enjoined by law. School Code, § 2.801.

13. Negligence ⇐61(2), 62(3)

If an injury is produced by concurrent effect of two separate wrongful acts, each act is "proximate cause" of injury, and either act can operate as an efficient "intervening cause" with regard to the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Intervening Cause" and "Proximate Cause".

14. Negligence ⇐61(1)

The fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury.

15. Appeal and error ⇐996

In action against school district and owner and driver of truck for injuries sustained by 15-year-old high school girl who was struck by truck on school grounds, determination of jury that negligence of school district and owner and driver of truck contributed concurrently to girl's injury would not be disturbed on appeal, where more than one conclusion could reasonably be drawn from the conflicting evidence.

16. Negligence ⇐136(9)

Contributory negligence is a "question of law" only when court is impelled to say that from the facts reasonable men can draw but one inference pointing unerringly to the negligence of the plaintiff contributing to his injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

17. Automobiles ⇐223(2)
Schools and school districts ⇐89

A 15-year-old high school girl suing school district and owner and driver of garbage truck and company under contract with city to collect garbage, for injuries sustained when she was struck by truck on school grounds, was bound only to that duty of care

which a normal child of the same age would be expected to exercise in such a situation.

18. Automobiles ⇐223(4)
Schools and school districts ⇐89

In determining contributory negligence of 15-year-old high school girl suing for injuries sustained when she was struck by truck while running from gymnasium to athletic field on school grounds, question was whether girl, as a 15-year-old girl in physical education class on grounds of high school used mainly for school activities and not as thoroughfare for automobiles, exercised proper caution in running to athletic field without being on the alert for sudden appearance of motor vehicle.

19. Automobiles ⇐244(55)
Schools and school districts ⇐121

In 15-year-old high school girl's action for injuries sustained when she was struck by truck while running from gymnasium to athletic field, evidence that girl had never seen automobiles or trucks pass gymnasium while children were on school grounds, and that it was customary for most of children in physical education classes to run to athletic field, warranted finding that girl was not contributorily negligent.

20. Master and servant ⇐300, 315

An employer is generally liable for negligent acts of employee performed within scope of employment, but, if an independent contractor rather than master and servant relationship exists, independent contractor usually is alone liable for such negligent acts.

21. Master and servant ⇐317

Where individual or corporation undertakes to carry on activity involving possible danger to public under license or franchise granted by public authority subject to certain obligations imposed by public authority, such liabilities cannot be evaded by delegating performance to independent contractor.

22. Automobiles ⇐243(12)

In action against driver and owner of garbage truck and company under contract with city to collect garbage, for injuries sustained when 15-year-old high school girl was struck by truck on school grounds, ordinance and contract between city and county, enunciating rule of policy to effect that, as a condition of exercising the garbage franchise, the company must assume master and servant liability for acts of persons engaged by company to collect garbage, were admissible to establish such rule of policy.

23. Automobiles ⇐194(1)

Where ordinance and contract between city and company to which garbage franchise was granted, enunciated rule of policy to the effect that, as condition of exercising franchise, the company must assume master and servant liability for acts of persons engaged by company to collect garbage, company could not escape liability for injuries sustained when plaintiff was struck by garbage truck, by delegating collection of garbage to independent contractor.

24. Automobiles ⇐243(12)
Trial ⇐127

In action against driver and owner of garbage truck and company under contract with city to collect garbage, for injuries sustained when plaintiff was struck by garbage truck, contract between city and company granting garbage franchise to company was admissible in an attempt to establish existence of master and servant relationship between driver and owner of truck and company as one basis of liability, and incidental disclosure by contract that owner was insured did not render contract inadmissible.

25. Appeal and error ⇐1060(1)

In personal injury action, any misconduct which might have existed on part of plaintiff's attorney, in questioning one of defendants' witnesses concerning attempt to photograph plaintiff without plaintiff's knowledge, was not sufficiently prejudicial to justify reversal, especially where trial court refused to grant new trial on such ground.

26. Damages ⇐132(6)

$20,000 damages for injuries sustained by 15-year-old girl when rear wheel of truck ran over foot and tore sole loose from foot in such a manner as to render foot permanently defective with possibility of eventual loss of foot, in view of accompanying pain, worry, embarrassment, and restriction of activity, were not excessive.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Eleanor Taylor, a minor, by her guardian ad litem, Frank B. Taylor, against the Oakland Scavenger Company

and others, for injuries sustained by the minor when struck by a garbage truck while she was on the premises of the Oakland High School District of Alameda County. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

For prior opinion, see 103 P.2d 605.

Ralph E. Hoyt, Dist. Atty. of Oakland, Charles V. Barfield, of San Francisco, and Appelbaum & Mitchell, of Oakland, for appellant Oakland High School Dist.

Weinmann, Quayle & Berry, of Oakland, for appellant Oakland Scavenger Co. et al.

Elliott Johnson and Crozier C. Culp, both of Oakland, for respondent.

TRAYNOR, Justice.

Plaintiff, a fifteen-year-old girl, was enrolled in the Castlemont high school in Oakland where she took the required course in physical education. On September 29, 1936, she and other members of the class assembled in the gymnasium, changed from street to gymnasium clothes, and received instructions from the teacher to go outdoors into the athletic field to play volley ball. As was their custom, most of the members of the class surged out of the gymnasium and commenced running to the field. Plaintiff took the lead, followed closely by a classmate, and ran north in a passageway between the main high school building and the gymnasium. As she approached the northeast corner of the gymnasium, a blind corner, a garbage truck came around the corner without warning and turned toward her at a rate of about twenty-five miles per hour. Plaintiff, unable to stop herself, struck the truck at the cab door and was knocked to the pavement. While in that position the right rear wheel of the truck ran over her left foot and tore the sole loose from the foot in such a manner as to render her foot permanently defective with a possibility of ultimate loss.

Plaintiff brought suit against Albert Santucci, the driver of the truck; Oresti Santucci, the owner of the truck; the Oakland Scavenger Company, under contract with the city to collect and dispose of garbage; and the Oakland High School District. She claimed that the truck was driven in a negligent manner, that the owner of the truck was an employee of the Oakland Scavenger Company, and that the school district was negligent in failing to take adequate precautionary measures to prevent such accidents.

The judgment of the trial court which sustained without leave to amend a demurrer of the defendant Oakland High School District was reversed by this court on appeal. 12 Cal.2d 310, 83 P.2d 948. Upon a trial of the case the jury awarded plaintiff damages in the amount of $25,000 against all of the defendants. The trial court denied a motion for a new trial on the condition that plaintiff accept a reduction of the amount to $20,000, and judgment was entered accordingly. All defendants have appealed.

The school district claims that there is no evidence establishing negligence on its part and that the negligence of the truck driver was an efficient intervening cause insulating it from liability. The Santuccis and the Oakland Scavenger Company claim that there is no evidence establishing the negligence of the driver of the truck, that the negligence of the school district is an efficient intervening cause insulating them from liability, that the trial court committed prejudicial error in admitting certain evidence, and that plaintiff's counsel was guilty of prejudicial misconduct. The Oakland Scavenger Company further denies liability on the ground that the owner of the truck was an independent contractor and not an employee. In addition, all of the defendants assert that plaintiff was guilty of contributory negligence as a matter of law, that the trial court erred in giving certain instructions and withholding others, and that the damage award is excessive as a matter of law.

[1, 2] There is substantial evidence to support the finding by the jury that the driver of the truck was negligent. A driver has a clear duty of care toward pedestrians, and he is required to exercise greater caution in a school yard than under ordinary circumstances. Lampton v. Davis Bread Co., 48 Cal.App. 116, 191 P. 710. He was familiar with the courtyard where the accident occurred, and knew that children frequently ran across the area. He nevertheless drove around the blind corner without sounding his horn or giving other warning at a rate of about twenty-five miles per hour, five miles in excess of the prima facie speed limit set by the Vehicle Code, § 511, St.1935, p. 176, thereby causing injury to the plaintiff.

[3-7] There is likewise sufficient evidence to justify the finding of negligence on

the part of defendant school district. It is the duty of the school authorities to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. Bellman v. San Francisco High School Dist., 11 Cal.2d 576, 81 P.2d 894; Ogando v. Carquinez G. School Dist., 24 Cal.App.2d 567, 75 P.2d 641. The school district is liable for injuries which result from a failure of its officers and employees to use ordinary care in this respect. Id. The evidence in this case establishes that the principal of the Castlemont high school knew for seven years of the practice of students in physical education classes to surge out of the gymnasium and run along the courtyard to the playground. The school authorities likewise knew that at least six delivery trucks came into the grounds every morning, seven other trucks once a week, and five more trucks every week or two. They nevertheless took no precautions to minimize the danger of injury to the students after the trucks had entered the grounds other than to issue an instruction to the custodian of the grounds to supervise the traffic that came on the grounds and to caution people to drive carefully. They failed to post a danger sign or to warn the students against running across the courtyard. The eighteen trucks were permitted to drive on the school grounds at all times subject to no safety regulations other than the general provisions of the Vehicle Code. "The question whether there has been negligence in permitting vehicles on school premises subject only to the provisions of the Vehicle Code relating to traffic on the highways is to be determined on the facts of each case." Taylor v. Oakland Scavenger Co., 12 Cal.2d 310, 83 P.2d 948, 951. It is not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities in order to establish that their failure to provide additional safeguards constituted negligence. Their negligence is established if a reasonable prudent person would foresee that injuries of the same general type would be likely to happen in the absence of such safeguards.

[8, 9] The school district contends that the trial court failed to instruct the jury that if the school authorities were justified in relying upon the provisions of the Vehicle Code as adequate for the protection of the children on the grounds and were not guilty of any negligence, the school district would not be liable. The trial court, however, covered this matter when it instructed the jury that the only basis for imposing liability on the school district is the negligence of its officers or employees, that the provisions of the Vehicle Code are applicable to vehicles on the school grounds in the absence of special regulations, and that the question whether the school authorities should have imposed special regulations and conditions governing traffic on the grounds is one of fact to be determined in light of the conditions existing at the time of the accident. Nor is there merit in the argument of the school district that the trial court erroneously instructed the jury that the driver of the truck was not obligated to follow the provisions of the Vehicle Code applicable to the circumstances. The court quoted the relevant sections of the Vehicle Code to the jury, told them that such provisions were applicable to traffic on the school grounds in the absence of special regulations, and further instructed them that the driver of the truck had a clear duty to drive his truck on the school grounds "at a careful and prudent speed, not greater than was reasonable and proper, under all the circumstances then and there existing, with special regard to the probability of encountering school children, moving, proceeding, walking or running upon said grounds and premises".

[10] The trial court's use of language from the opinion of this court when this case was before it on demurrer (Taylor v. Oakland Scavenger Co., supra) in its instructions to the jury that the general provisions of the Vehicle Code may be inadequate for situations arising on school grounds likewise does not constitute error. The instruction was sound as a matter of law, and left to the jury the determination of the facts.

[11] One of the instructions to the jury as first given omitted the element of proximate cause. The trial court subsequently withdrew the erroneous instruction, re-read it to the members of the jury, told them to disregard it, and issued a proper one in its place. This method of substitution of instructions, the only practical one available to the court, does not constitute prejudicial error. See 24 Cal.Jur. 867.

[12] In instructing the jury that the school district was liable for the negligence of its officers and employees, the trial court

used the language employed in section 2.801 of the School Code and therefore did not impose a greater burden on the school district than that enjoined by law. Neither did it make the school district an insurer of the safety of its pupils, for it expressly instructed the jury that the district was not an insurer of the pupils and that the school authorities were required to exercise only ordinary care. Taken as a whole, the instructions to the jury present the proper legal principles and contain no prejudicial error.

[13-15] The school district maintains, however, that any breach of duty on the part of its employees was not a proximate cause of the injury to plaintiff because the negligence of the truck driver was an efficient intervening cause. Conversely, the Santuccis and the scavenger company contend that any breach of duty on the part of the truck driver was not a proximate cause of the injury because the negligence of the school authorities was an efficient intervening cause. If an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and either can operate as an efficient intervening cause with regard to the other. Rest.Torts, secs. 432(2), 439; Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.2d 781; Smith v. Schwartz, 14 Cal.App. 2d 160, 57 P.2d 1386. The fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury. Herron v. Smith Bros., Inc., 116 Cal. App. 518, 2 P.2d 1012; Sawdey v. Producers' Milk Co., et al., 107 Cal.App. 467, 290 P. 684. The arguments of defendants themselves make clear that more than one conclusion may reasonably be drawn from the conflicting evidence of this case, and the determination of the jury that the negligence of each defendant contributed concurrently to the plaintiff's injury cannot therefore be disturbed on appeal. Lacy v. Pac. Gas & Electric Co., supra; Smith v. Schwartz, supra.

[16-19] The defendants are united, however, in the contention that the plaintiff was guilty of contributory negligence as a matter of law. The jury found plaintiff not guilty of contributory negligence. "Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury." Smellie v. So. Pac. Co., 212 Cal. 540, at page 562, 299 P. 529, at page 538; Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369. Plaintiff is bound only to that duty of care which a normal child of the same age would be expected to exercise in such a situation. Anderson v. Walters, 135 Cal.App. 380, 27 P. 2d 100; 19 Cal.Jur. 605. The question is not whether plaintiff must be viewed as an adult or as a child but simply whether the plaintiff as a fifteen-year-old girl in a physical education class on the grounds of a high school, used mainly for school activities and not as a thoroughfare for automobiles, exercised proper caution in running across the courtyard toward the athletic field without being on the alert for the sudden appearance of a motor vehicle. The answer is not so obvious that this court can say as a matter of law that the jury was unjustified in finding plaintiff free from fault (Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 23 P.2d 769), particularly when the record shows that plaintiff had never seen automobiles or trucks pass the gymnasium while children were on the school grounds. There is evidence indicating that it was customary for most of the children in the physical education classes to run across the courtyard to the athletic field. To hold that the plaintiff was guilty of contributory negligence as a matter of law is to hold that a majority of average children in a like situation have been acting in a negligent manner, a result which contradicts the very standard utilized in determining the existence of negligence.

The Oakland Scavenger Company contends that under its contract with Oresti Santucci the latter was an independent contractor and that it therefore is not liable for any negligence of the truck driver. It points out that the truck was not owned by it but by Santucci and that it exercised little supervision or control over the col lection and disposal of the garbage by Santucci. Plaintiff introduced in evidence not only the garbage ordinance of the City of Oakland (852 N.S.), which makes it unlawful for any person other than a contractor with the city or a person in the employ of such contractor to collect garbage within the city, but the contract between the City of Oakland and the Oakland Scavenger Company in which it was agreed that any person collecting garbage for the scavenger

company was to be considered an employee of such company. Plaintiff introduced also the contract between the Oakland Scavenger Company and Oresti Santucci which is expressly made subject to all regulations and ordinances of the City of Oakland, as well as to the requirements of other contracting parties with the scavenger company. It requires Oresti Santucci to keep his trucks insured against damage to persons and property in order to protect the scavenger company from any claim that might arise against it because of his accidental or wilful misconduct, to keep his truck numbered and painted in a uniform color to be determined by the scavenger company, and to supply his collectors with a special badge bearing a serial number determined by the scavenger company.

[20-23] An employer is generally liable for negligent acts of an employee performed within the scope of employment, but if an independent contractor rather than master and servant relationship exists, the independent contractor usually is alone liable for his negligent acts. If, however, an individual or corporation undertakes to carry on an activity involving possible danger to the public under a license or franchise granted by public authority subject to certain obligations or liabilities imposed by the public authority, these liabilities may not be evaded by delegating performance to an independent contractor. The original contractor remains subject to liability for harm caused by the negligence of the independent contractor employed to do the work. Res.Torts, secs. 428, 417; Snow v. Marian Realty Co., 212 Cal. 622, 299 P. 720; Luce v. Holloway, 156 Cal. 162, 103 P. 886; Colgrove v. Smith, 102 Cal. 220, 36 P. 411, 27 L.R.A. 590; Spence v. Schultz, 103 Cal. 208, 37 P. 220; Chicago Economic Fuel Gas Co. v. Myers, 168 Ill. 139, 48 N.E. 66; Cotton v. Ship-By-Truck Co., 337 Mo. 270, 85 S.W.2d 80, 81; West v. St. Louis, etc., Co., 63 Ill. 545; Murray v. Lehigh Valley R. Co., 66 Conn. 512, 34 A. 506, 32 L.R.A. 539; 39 C.J. 1338. The Oakland Scavenger Company was franchised by the city to carry on an activity requiring the operation of large motor vehicles upon the public streets which clearly involved the risk of danger to the public. The city, by ordinance and by contract with the scavenger company, enunciated a rule of policy to the effect that as a condition of exercising the franchise the scavenger company must assume master and servant liability for the acts of persons engaged by it to collect garbage. Both the ordinance and the contract are admissible to establish this rule of policy. While they do not establish that Santucci was an employee of the scavenger company rather than an independent contractor, they fix a liability upon the scavenger company which it cannot escape by delegating performance to an independent contractor.

[24] Plaintiff introduced the contract between the scavenger company and Oresti Santucci for the purpose of showing that these parties themselves contemplated an employer-employee relationship. The scavenger company remains liable whether or not this contract actually established such a relationship, but plaintiff could properly introduce the contract in evidence in an attempt to establish the existence of a master and servant relationship as one basis of liability. The incidental disclosure by the contract that Santucci was insured does not render it inadmissible since proper grounds exist for its admission. Schellenberg v. Southern Cal. Music Co., 139 Cal. App. 777, 35 P.2d 156; Perry v. A. Paladini Inc., 89 Cal.App. 275, 264 P. 580.

[25] Any misconduct which may have existed on the part of plaintiff's attorney in questioning one of defendants' witnesses concerning an attempt to photograph the plaintiff without her knowledge is not sufficiently prejudicial to justify reversal, especially since the trial court refused to grant a new trial on this ground. See Imlay v. California Cab Co., 124 Cal.App. 68, 11 P.2d 1116; Alberts v. Lytle, 1 Cal. App.2d 682, 37 P.2d 705, at page 709.

[26] In view of the serious injury to plaintiff's foot with the accompanying pain, worry, embarrassment and restriction of activity as well as the possibility of eventual loss of the foot, the damages as finally assessed by the trial court are not excessive as a matter of law.

The judgment of the trial court is affirmed.

We concur: GIBSON, C. J.; EDMONDS, J.; CURTIS, J.; CARTER, J.

17 Cal.2d 555

McCREERY et al. v. McCOLGAN.

S. F. 16350.

Supreme Court of California.

March 7, 1941.

1. Taxation ⇐104

The purpose of the provision of the California Personal Income Tax Act of 1935, that for the purpose of the act a personal holding company shall not be recognized as a legal entity separate and distinct from its shareholders, is to reach the income of persons whose property has been transferred to holding companies to escape payment of income taxes. St.1935, §§ 1 et seq. and 34, pp. 1090, 1122.

2. Constitutional law ⇐92

A taxpayer can have no constitutional protection against any particular method of avoiding a tax, such as a state income tax.

3. Taxation ⇐25

The Legislature has the right to provide measures to reach all of a particular class of taxable property in imposing an income tax.

4. Taxation ⇐54

The Legislature, in providing a state income tax, is not hampered by the constitutional limitation of apportionment involved in federal legislation.

5. Corporations ⇐1

The corporate entity is not a bar to the taxation of corporate income to its shareholders.

6. Taxation ⇐104

Shareholders in a corporation may be liable for a state income tax on their proportionate shares of undistributed profits of the corporation.

7. Taxation ⇐104

Shareholders of personal holding company were liable for state income taxes on undistributed profits of the corporation. St. 1935, §§ 1 et seq. and 34, pp. 1090, 1122.

8. Constitutional law ⇐283

The enactment of provisions for taxes, such as income taxes, is governed by the due process clauses. U.S.C.A.Const. Amend. 14.

9. Constitutional law ⇐229(1), 283
Statutes ⇐72
Taxation ⇐54

The provision of the California Personal Income Tax Act of 1935, that for the purposes of the act a personal holding company shall not be recognized as a legal entity separate and distinct from its shareholders, does not violate the provision of the State Constitution that all laws of a general nature shall have a uniform operation, nor "due process of law" nor "equal protection of law" provisions of the Federal Constitution. St.1935, §§ 1 et seq. and 34, pp. 1090, 1122; Const.Cal. art. 1, § 11; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Equal Protection of the Law".

10. Constitutional law ⇐48

Presumption obtains that facts exist which support classification imposed by Legislature in assessing income tax.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Actions by Mary C. McCreery and others against Charles J. McColgan, etc., to recover income taxes paid under protest. From judgments for the defendant, the plaintiffs appeal.

Judgments affirmed.

John C. Altman, of San Francisco (Willard L. Ellis, of San Francisco, of counsel), for appellants.

Todd W. Johnson and Philip D. Johnston, both of Los Angeles, and Jesse H. Steinhart, B. J. Feigenbaum, and Chickering & Gregory, all of San Francisco, and Claude I. Parker, Ralph W. Smith, and Bayley Kohlmeier, all of Los Angeles (Richard W. Jennings, of San Francisco, of counsel), amici curia for appellants.

Earl Warren, Atty. Gen., and H. H. Linney, Valentine Brookes, and James J. Arditto, Deputy Attys. Gen., for respondents.

PER CURIAM.

Four actions were brought by different plaintiffs to recover income taxes paid under protest. In each action an appeal was taken from the judgment entered for the defendant. These appeals are presented in one record and each involves the question of the constitutionality of section 34 of the California Personal Income Tax Act of 1935 (Stats.1935, pp. 1090, 1122), under which the taxes were imposed.

The act is entitled: "An act to provide for the levy and collection of a tax upon the incomes of individuals, estates and trusts, and to provide for the disposition of the revenues therefrom, and to provide that this act shall take effect immediately." Its provisions applied to tax incomes received or accrued after January 1, 1935. Section 34 provided: "For the purpose of this act a personal holding company whether or not organized under the laws of this State shall not be recognized as a legal entity separate and distinct from the shareholders thereof. Any such company having more than one shareholder shall be deemed a partnership." By section 22 the net income of a partnership was computed in the same manner and upon the same basis as in the case of an individual. Section 2(*o*) defined "personal holding company" as any corporation (with exceptions not pertinent here), "if (1) at least eighty per centum of its gross income for the taxable year is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities, and (2) at any time during the last half of the taxable year more than fifty per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals. For the purpose of determining the ownership of stock in a personal holding company—(3) stock owned, directly or indirectly, by a corporation, partnership, estate, or trust shall be considered as being owned proportionately by its shareholders, partners or beneficiaries; (4) an individual shall be considered as owning, to the exclusion of any other individual, the stock owned, directly or indirectly, by his family, and this rule shall be applied in such manner as to produce the smallest possible number of individuals owning, directly or indirectly, more than fifty per centum in value of the outstanding stock; and (5) the family of an individual shall include only his brothers and sisters (whether by the whole or half blood) spouse, ancestors, and lineal descendants." The provisions quoted from sections 34 and 2(*o*) were repealed at the next session of the legislature (Stats.1937, p. 1831).

The following facts are admitted by the pleadings or by stipulation:

The Mary C. McCreery Trust, of which Mary C. McCreery was the beneficiary, owned 1,500 shares, and Richard S. McCreery, her husband, owned 3,000 shares of stock of Burlingame Investment Company, a California corporation, which during 1935 was a personal holding company as defined by the act. Each shareholder paid income tax for the year 1935. In June, 1938, the Franchise Tax Commissioner, after notice and over the protest of the McCreerys, levied a deficiency income tax of $580.83 on Mary C. McCreery and $772.88 on Richard S. McCreery, based on additions of income for 1935 by virtue of the provisions of section 34 of the Personal Income Tax Act of 1935. The deficiency taxes were paid under protest.

Lucie Stern owned stock of Northern Fisheries, Inc., a Washington corporation. That company was doing business in this state. It was a personal holding company within the definition of the act. Lucie Stern paid under protest a deficiency income tax of $90.45, determined pursuant to the provisions of said section 34 of the income tax act.

Similarly Eleanor H. Koshland paid a deficiency income tax for 1935 of $1,825.98, based on her pro rata share of the net undistributed income of Santa Inez Company and Iris Securities Company, as adjusted by the commissioner. The Santa Inez Company and the Iris Securities Company were domestic corporations defined as personal holding companies under the act.

It is stipulated that the computations of the commissioner in all cases were correct and that the several deficiency taxes were properly imposed, if section 34 of the Personal Income Tax Act of 1935 was constitutional.

The trial court based its judgments for the defendant on findings that the respective pro rata shares of undistributed income represented taxable income of the respective plaintiffs for the year 1935; that section 34 violated neither the due process nor the equal protection clauses of the Federal Constitution, Amend. 14, nor section 11 of Article I of the State Constitution providing that all laws of a general nature should have a uniform operation. It is the contention of the several plaintiffs that the court erroneously concluded that sections 34 and 2(*o*) did no violence to the above mentioned constitutional provisions.

[1] Unquestionably the purpose of the legislation was to reach the income of per-

sons whose property had been transferred to holding companies to escape payment of income taxes. The subject matter had long been a problem to both federal and state authorities. Section 117 of the Internal Revenue Act of 1864 (13 Stat. at Large, 281), taxing shareholders of certain corporations on corporate income, whether divided or otherwise, was upheld in The Collector v. Hubbard, 12 Wall. 1, 79 U.S. 1, 20 L.Ed. 272. By the sixteenth amendment to the Constitution congress for the first time was empowered to tax incomes without apportionment among the several states. The Federal Income Tax Act of 1913 (38 Stat. 114, 166), provided that for the purpose of computing the graduated additional tax known as surtax the individual taxpayer's income should embrace his proportion of profits, whether divided or not, in a corporation formed or fraudulently availed of for the purpose of preventing the imposition of that tax. The Revenue Act of 1916 (39 Stat. 756, 758) provided that dividends be included in net income, whether distributed in cash or in stock of the corporation, the stock dividend to be considered income to the amount of its cash value. In Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189, 64 L.Ed. 521, 9 A.L.R. 1570, the tax was held invalid because it was a levy on capital, which congress was not empowered to exercise without apportionment. Of the case of Collector v. Hubbard, supra, it was said that insofar as it seemed to uphold the right of congress to tax without apportionment a stockholder's interest in accumulated earnings prior to dividend it must be regarded as overruled by Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108. Congress thereupon repealed the provision taxing stock dividends. However, the rule of Eisner v. Macomber was not followed in cases where dividends were issued in stock of a reorganized corporation (United States v. Phellis, 257 U.S. 156, 42 S.Ct. 63, 66 L.Ed. 180); where common stock was issued as a dividend to holders of preferred stock of the same company (Koshland v. Helvering, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756); or where preferred stock dividends were issued to holders of common shares of the same corporation. Helvering v. Gowran, 302 U.S. 238, 58 S.Ct. 154, 82 L.Ed. 224. In such cases the dividend stock was held to be income and not capital.

[2-4] Eisner v. Macomber, supra, is relied upon as support for the contention that to tax a shareholder on his pro rata share of the undivided profits of a corporation amounts to a tax on capital or property, as distinct from a tax on income. It is, therefore, claimed that the provisions of the act here in question were invalid because they embraced a subject not expressed in the title. Sec. 24, Art. IV, Calif. Const. It is also urged that treatment of undivided corporate profits as income of the shareholders for the purposes of the act was a measure of the tax upon one person's income by reference to the income of another, contrary to the due process and equal protection clauses as exemplified in Hoeper v. Commission, 284 U.S. 206, 52 S.Ct. 120, 76 L.Ed. 248, 78 A.L.R. 346. Neither of those cases, however, presents an obstacle to valid state legislation enacted to prevent income tax evasion. A taxpayer can have no constitutional protection in any particular method of tax avoidance. The legislature has the right to provide measures to reach all of the particular class of taxable property. See Helvering v. National Grocery Co., 304 U.S. 282, 58 S.Ct. 932, 82 L.Ed. 1346. It is not hampered by the constitutional limitation of apportionment involved in federal legislation. See Eisner v. Macomber, supra, 252 U.S. at page 217, 40 S.Ct. 189, 64 L.Ed. 521, 9 A.L.R. 1570; State v. Nygaard, 174 Wis. 597, 183 N.W. 884; State v. Cary, 181 Wis. 564, 191 N.W. 546.

[5, 6] Since the case of Eisner v. Macomber, congress has enacted various provisions imposing higher income tax rates on personal holding corporations. It has also provided for taxation to resident stockholders on their proportionate shares of the accumulations of income of foreign holding companies. Recent decisions of the United States Supreme Court indicate that the corporate entity may not be a bar to the taxation of corporate income to its shareholders. See Heiner v. Mellon, 304 U.S. 271, 58 S.Ct. 926, 82 L.Ed. 1337, and Helvering v. National Grocery Co., 304 U.S. 282, 58 S.Ct. 932, 82 L.Ed. 1346. The decision in the latter case discloses that shareholders may be made liable for an income tax on their proportionate shares of undistributed profits of a corporation.

[7] The conclusion that the legislature may impose an income tax on shareholders

of personal holding corporations on the basis of the undistributed profits of such corporations is determinative of the appeals herein. The contention that the legislature should have accorded different treatment to domestic and to foreign corporations, as has been done by the federal government, is not meritorious. It is true that the federal government has imposed income surtaxes on domestic personal holding companies (Sec. 500, 26 U.S.C.A. Int.Rev.Code, 52 Stat. 557), and has imposed income taxes on shareholders of foreign personal holding corporations based on the undistributed profits of such corporations. Sec. 337, 26 U.S.C.A. Int.Rev.Code, 52 Stat. 549. The test provided in each instance as to what constitutes a personal holding corporation is similar to that contained in the California act. This separate treatment, however, cannot be said to proceed from any predetermination that so to tax the shareholders of domestic corporations would result in taking property without due process of law. If the state legislature may tax the shareholders on corporate profits of personal holding corporations, whether distributed or not, it may be required under the fourteenth amendment, to tax alike the shareholders of domestic and foreign personal holding corporations. It is not necessary herein to decide that question.

[8] It is true that the enactment of taxing provisions is governed by the due process clauses. Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772; Coolidge v. Long, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562; Blodgett v. Holden, 275 U.S. 142, 276 U.S. 594, 48 S.Ct. 105, 72 L.Ed. 206; Nichols v. Coolidge, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081; Brushaber v. Union Pac. R. Co., 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas. 1917B, 713. Such cases have held unconstitutional, attempts to impose taxes retroactively, or taxes based on an incontrovertible presumption of fact.

The federal courts, however, have upheld the classification of personal holding corporations provided by the federal act imposing income surtaxes on domestic personal holding corporations. Foley Securities Corp. v. Commissioner, 8 Cir., 106 F.2d 731; Noteman v. Welch, D.C., 26 F.Supp. 437, affirmed, 1 Cir., 108 F.2d 206. The court in the Foley Securities Corporation case relied on decisions of the United States Supreme Court to the effect that except in rare and special instances the due process of law clause of the fifth amendment was not a limitation upon the taxing power conferred upon congress and that no reason existed for applying a different rule against a state in the case of the fourteenth amendment. It placed special reliance on Magnano Co. v. Hamilton, 292 U.S. 40, 44, 54 S.Ct. 599, 601, 78 L.Ed. 1109, where it was said: "That clause [the fifth amendment] is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. * * * Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses * * * unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state." In Noteman v. Welch, 1 Cir., 108 F.2d 206, a company coming within the definition of personal holding corporation was held covered by the act even though in fact it might not have been formed for the purpose of tax evasion.

[9, 10] In the present case there can be no question of confiscation, tax disguise, or arbitrary classification. The statute was clearly one imposing an income tax, which the legislature had the power to do, upon shareholders of personal holding corporations as defined by the act. The statute clearly imposed on resident shareholders of all such personal holding corporations a tax on undistributed profits of such corporations. It therefore operated uniformly on all alike throughout the state. Arbitrary discrimination cannot be held to result because a test of tax evasion was not made the basis for the imposition of the tax on shareholders. Inasmuch as such a basis was not made the test of tax liability, it cannot be said that the present case is governed by Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772, holding that a statute which imposes a tax based upon an incontrovertible assumption of fact is violative of the fourteenth amendment. No good reason is presented why the legislature may

not define personal holding corporations and classify them for income tax purposes in accordance with the provisions of the statute. That such classification resulted in a different treatment of the shareholders of such companies, i. e., as partners, was not an insuperable obstacle to the constitutionality of the provisions. The plaintiffs have not met the burden of showing that there could not have been any reasonable basis for the judgment of the legislature in providing for the different treatment. In fact the presumptions are to the contrary, namely, that facts existed which supported such a basis of classification and that the same, therefore, was reasonable.

The judgments are affirmed.

TRAYNOR, J., took no part in the consideration or decision of this case.



43 Cal.App.2d 418

LAKESIDE PARK ASS'N OF KELSEYVILLE v. KEITHLY.

KEITHLY v. NORTON et al.

Civ. 6517.

District Court of Appeal, Third District, California.

March 10, 1941.

1. Landlord and tenant ⇐290(2), 291(2)

Suit for unlawful detainer was properly instituted against lessee for restitution of the property after notice was served on him as provided by law for failure to pay rent at time and in the manner specified in lease. Civ.Code, § 791; Code Civ.Proc. § 1161.

2. Landlord and tenant ⇐290(5)

Neither a cross-complaint nor a counterclaim may be properly filed in a suit for unlawful detention of property though the alleged cause therein contained grows out of the subject matter involved in the original suit. Code Civ.Proc. § 1161.

3. Appeal and error ⇐236(2)

Where cross-complaint was improperly filed in unlawful detainer action, but no motion to strike the cross-complaint was made and the issues presented therein were determined by the trial court without objection, the right to file the cross-complaint would not be questioned on appeal by defendant from judgment for plaintiff.

4. Landlord and tenant ⇐92(1)

Where land acquired by nonprofit corporation for park purposes was rented to a private party under a lease giving him an option to purchase the property on the same conditions that it was offered for sale to any other proposed purchaser, a proposal by the corporation to county that county assume payment of unpaid purchase price and take over and maintain the property as a park was not an "offer to sell" which would entitle lessee to purchase the property on the same terms, since option contemplated an absolute sale as distinguished from a donation on condition, particularly in absence of evidence that county ever intended to accept the proposal.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer to Sell".

5. Landlord and tenant ⇐37

The meaning of a clause in a lease is determined by applying the same rules of construction as are applied in construing other contracts.

6. Landlord and tenant ⇐37

Entire lease should be read together to determine purpose and intention of the parties as expressed in a particular clause.

7. Evidence ⇐65

Where property was acquired by nonprofit corporation for park purposes, corporation was in existence for several years, and lessee's wife was a member thereof, lessee who was given option to purchase the property on same conditions that it was offered for sale to any other proposed purchaser would be presumed to have known importance of attaching to proposal by corporation that county take over the property and assume payment of only the unpaid balance of the purchase price the condition that county maintain the property as a park.

8. Specific performance ⇐49(2), 51

A contract must be reasonable and the consideration therefor adequate before it will be specifically enforced.

9. Specific performance ⇐121(3)

Where lessee cross-complained for specific performance of option to purchase, evi-

dence that the property cost lessor $5,000, and that it had paid approximately $3,500 toward the purchase price furnished prima facie proof, in absence of contrary evidence, that $1,474.25 offered by lessee was so grossly inadequate as to warrant refusal of specific performance. Code Civ.Proc. § 1161.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by the Lakeside Park Association of Kelseyville against Glenn Keithly for unlawful detention of real property, wherein the defendant filed a cross-complaint against Fred H. Norton and others for specific performance of an option to purchase the property. Judgment for plaintiff and defendant appeals.

Affirmed.

Ralph V. Devoto, of Lakeport, for defendant and appellant.

Lovett K. Fraser, of Lakeport, for plaintiff and respondent.

THOMPSON, Justice.

In a suit for unlawful detention of real property under section 1161 of the Code of Civil Procedure, the plaintiff recovered judgment against the defendant and cross-complainant for unpaid rent in the sum of $111.80, and for restitution of the property in the event that sum was not paid within five days after notice of the entry of judgment. The rent was not paid. In his cross-complaint the defendant asked for specific performance of an option contained in the lease authorizing him to purchase the property "upon the same terms and conditions" it was offered for sale to any other proposed purchaser. The judgment directed that the defendant take nothing by reason of his cross-complaint. From that judgment this appeal was perfected.

June 17, 1920, F. J. Norton and other residents of Lake county organized a non-profit corporation under the name of Lakeside Park Association of Kelseyville, to purchase land and operate a recreation park in that vicinity. Mr. P. Q. Robinson was elected president of the company. Many residents of that community became members of the association and contributed to the enterprise the sum of $25 apiece for that purpose. The wife of the defendant Glenn Keithly was a member of the company. June 10, 1920, the association bought from the Yolo Water and Power Company 62 acres of land at Kelseyville on Clear Lake for the agreed sum of $5,000 to be used as a recreation park. The sum of $2,500 was then paid in cash toward the purchase price. By consent of the association the title to the land was taken and held in the name of F. J. Norton as trustee for the company. Two years later ten acres of that land were sold and conveyed to George Kitto for $1,250. That sum was applied toward the payment of the balance of the purchase price. July 1, 1935, there remained unpaid on the purchase price of the land a balance of $1,474.25, including principal and interest. On the last-mentioned date, with the consent of the association, Norton executed a written five-year lease of the remaining 52 acres of land to the defendant, Glenn Keithly. At the same time, and as a part of that transaction, Keithly loaned to the lessor the sum of $1,474.25, with which to pay the balance of the original purchase price of the land. Norton executed and delivered to him his note for that amount to be paid in five years at seven per cent interest per annum. The note was secured by a trust deed on the same premises. The lease provides for annual rental to be paid in an amount "equivalent to seven (7%) per cent interest on Fourteen hundred seventy four and 25/100ths ($1474.25) Dollars", together with all taxes assessed against the land. It is also provided that so long as the aforesaid indebtedness remains unpaid, the rental for the land shall be credited upon the note to offset the interest due thereon. For failure to pay the rent when due, or for breach of any other covenant of the lease, the lessee reserves the right to re-enter the premises, or to terminate the lease, at his option. The instrument provides that the lessor may sell the demised premises, or any part thereof, at any time during the term thereof, after first granting to the lessee an option to purchase the land "upon the same terms and conditions as then being offered to any other intending purchaser".

October 19, 1938, F. J. Norton, the trustee, conveyed the 52-acre tract to the Lakeside Park Association. Soon thereafter, Mr. P. Q. Robinson, the president of the company, proposed to the board of supervisors of the county of Lake to deed the land to that county and to donate to it the association's equity in the 52-acre tract if the county would assume the balance of

the indebtedness for the purchase price of the land, and maintain it as a perpetual public park. He said in relation to that proposition:

"I recapitulated a little of the history of the park; told them we were proposing to make a perpetual public park for the county under the name of the Lakeside Park, but the depression came along and hard times and we were unable to make the payments and in order to safeguard our rights and perpetuate the park we would donate our $3500 equity in the park if they would assume the indebtedness and take the park under their management as a perpetual park."

The board did not accept the proposition, but merely agreed to "take it under advisement". It appears that the board of supervisors never did accept the proposition. The only action which the board took in that regard was to adopt a resolution authorizing one of its members to consult with the district attorney with respect to the proposition. September 26, 1938, Glenn Keithly wrote a letter to Mr. Norton, saying that he had learned the property had been offered for sale to Lake county for the sum of $1,474.25, and that he elected to accept his option to purchase the property at that price. The lessee did not offer to fulfill the condition attached to that proposal for the county to agree to maintain the property as a public park. The offer of the appellant to purchase the land for the sum of $1,474.25 was therefore refused. November 7, 1939, the association served written notice on the lessee under section 791 of the Civil Code, demanding possession of the property for breach of the covenant unless the stipulated rent, in the sum of $34.40 to March 1, 1939, was paid within three days thereafter and also demanding possession unless the further sum of $103.40 was paid for rent due to the time of the expiration of the lease, July 1, 1940. The defendant failed and refused to pay or credit to the lessor on the note any part of the rent. March 6, 1939, the association paid the defendant the full amount of its indebtedness, including principal and interest, amounting to the sum of $1,521.84, which was accepted by him. Satisfaction of the obligation was then duly executed and recorded.

This suit for unlawful detainer was then commenced. The defendant filed an answer to the complaint denying the material allegations thereof, and he also filed a cross-complaint in which specific performance of his alleged option to buy the land for said sum of $1,474.25 was demanded, on the theory that an unconditional sale of the land for that amount had been offered to the county of Lake. The cause was tried by the court sitting without a jury. Findings were adopted by the court favorable to the plaintiff in every respect. Judgment was rendered against the defendant as previously stated. From that judgment this appeal was perfected.

[1] This suit for unlawful detainer was properly instituted, after notice was served as provided by law for failure to pay rent at the time and in the manner specified in the lease. Mariposa Commercial & Mining Company v. Peters, 215 Cal. 134, 8 P.2d 849; 15 Cal.Jur. 782, § 200. In the present case there is no doubt the lessee was in default of payment of the installment of rent which was due under the provisions of the lease for the year ending July 1, 1939.

The appellant, however, does not contend he was not in default in his payment of rent, nor does he assert the lessor failed to properly exercise the option to terminate the lease by serving notice thereof in the manner required by law. The appeal is prosecuted on the sole theory that the lessee had a right under his option to purchase the land for the sum of $1,474.25 for the reason that it had been unconditionally offered to the county of Lake for that price. The evidence is adequate to support the findings and judgment of the court that the lessor is entitled to possession of the property for failure on the part of the lessee to pay rent as provided by the terms of the lease.

The ground for reversal of the judgment urged by the appellant is that he is entitled to specific performance, under the provisions of the lease, for the purchase of the property for the sum of $1,474.25 independently of any condition to maintain the tract as a public park. This problem necessitates a construction of that provision in the lease which clearly reads that the lessor may sell the land, or any portion thereof, during the term of the lease, after first giving the lessee an opportunity to refuse to purchase it "upon the same terms and conditions * * * offered to any other intending purchaser". That issue was presented by the cross-complaint which was filed by the defendant.

[2] The rule is firmly established in California that neither a cross-complaint nor a counterclaim may be properly filed in a suit for unlawful detention of property, even though the alleged cause therein contained grows out of the subject-matter involved in the original suit. Schubert v. Lowe, 193 Cal. 291, 223 P. 550; Knight v. Black, 19 Cal.App. 518, 527, 126 P. 512; Rydell v. Beverly Hills Printing & Pub. Co., 88 Cal.App. 216, 262 P. 818; 15 Cal. Jur. 865, § 292. The reason for this rule is that the statute provides for the action of unlawful detainer as a summary proceeding, to secure possession of premises which are wrongfully withheld from the owner, and that the injecting of other issues extrinsic to the right of possession may defeat the very purpose of the statute.

[3] Since no motion to strike the cross-complaint from the record was made, and the issues presented therein were determined by the court without objection, we are not disposed to question that right on this appeal. The court found that the cross-defendants did not sell or offer to sell to the county of Lake the property in question for the sum of $1,474.25, within the meaning of the clause in the lease with respect to sales of property. Such a disposal of the property was not contemplated by the parties to that instrument. On the contrary the court determined that the lessor offered to give the property to the county on condition that it would assume the indebtedness and pay the balance of the agreed purchase price of the land, and that the county would perpetually maintain the property as a public park. The court also found that the cross-complainant never did agree to exercise its option to purchase the land upon the same terms or conditions for the reason that he did not consent to maintain a public park thereon. The court further found that the price for which the cross-complainant offered to purchase the property, to-wit, $1,474.25, was neither a fair nor an adequate value of the land. Specific performance was thereupon denied.

[4] We think the foregoing findings and judgment are adequately supported by the evidence. The option in the lease, upon which the cross-complainant relies for specific performance, clearly contemplates an absolute sale of the property, or some portion thereof, as distinguished from a gift or donation of a large proportion of the value of the land, upon condition that the grantee would maintain it perpetually as a public park. The moving consideration for that proposed conveyance to Lake county was to accomplish the very purpose for which the Lakeside Park Association was organized, namely, for the creation and maintenance of a recreation park for the benefit of the public. That was the specific condition upon which the offer to convey the land to Lake county was proffered. Moreover, the offer was not accepted by the board of supervisors. The county was not an "intending purchaser". There is no evidence that the board ever intended to accept that offer.

We are of the opinion the respective parties to the lease did not intend or contemplate that a conveyance of the property, under such circumstances, would constitute a sale which would entitle the lessee to purchase it upon the same terms. Certainly, in view of the express terms of the lease, it was not intended that the lessee would be permitted to purchase 52 acres of land costing $5,000 for the sum of only $1,474.25, free of the condition requiring it to be maintained as a perpetual public park, which was the chief object of the lessor in making that proposition to the board of supervisors.

[5-7] In determining the meaning of a clause contained in a lease, the same rules of construction apply which are controlling in construing other contracts. The entire instrument should be read together to determine the purpose and intention of the parties in that regard. 15 Cal.Jur. 625, § 31. In the present case it must be assumed the appellant knew that the incorporation of the park association and the acquiring of the land in question were accomplished solely for the purpose of maintaining a public recreation park. His own wife was a member of that association. The association had been in existence for several years. Numerous citizens in that small community were members of the company and were interested in that public enterprise. He must be presumed to have known the importance of attaching the condition of maintaining the park to the lessor's offer to convey the land to the county of Lake upon its assuming to pay only a small portion of the actual value of the land.

[8, 9] Moreover, it is a primary requisite to the enforcing of specific performance that the consideration therefor shall be adequate and the contract reasonable.

Haddock v. Knapp, 171 Cal. 59, 151 P. 1140; 23 Cal.Jur. 438, § 16. The inadequacy of consideration is held to be sufficient ground for denying specific performance. Clearly, the amount offered by the appellant for the land in question was inadequate. The evidence is undisputed that it cost $5,000. The association had already paid approximately $3,500 toward the purchase price. In the absence of evidence to the contrary, that furnishes prima facie proof in support of the findings of the court that $1,474.25 is so grossly inadequate as to warrant the court in refusing to grant specific performance.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.



43 Cal.App.2d 430

PEOPLE v. BROWN.

Cr. 2131.

District Court of Appeal, First District, Division 1, California.

March 12, 1941.

1. Criminal law ⇐1134(3)

Error, if any, in excluding evidence introduced to support codefendant's defense that he had committed crime in fear of his life could not be reviewed on defendant's appeal from conviction for first degree robbery and assault with intent to commit murder in so far as that evidence related to codefendant, where codefendant was acquitted. Pen.Code, § 26, subd. 8.

2. Criminal law ⇐1170(1)

Where counsel for defendant in an offer of proof stated that he desired to prove by substantial evidence that defendant had been suffering from a mental ailment causing periodic losses of consciousness, but counsel did not offer evidence that defendant was not conscious of his acts when crimes involved were admittedly committed, allegedly erroneous exclusion of that evidence which, if admitted, would have proved that when crimes were committed defendant was not conscious of what he was doing and was not therefore criminally responsible could not be urged as ground for reversal of conviction. Pen.Code, § 26, subd. 5.

3. Criminal law ⇐1036(3)

Counsel desiring to predicate an appeal on error in the exclusion of testimony must fully and clearly state the purpose of such offered testimony to the trial court.

4. Criminal law ⇐354
Homicide ⇐179

In prosecution for first degree robbery and assault with intent to commit murder, proffered testimony that defendant suffered from a mental ailment sometimes resulting in a loss of consciousness and akin to insanity was not admissible on guilt issue under statute, if ailment was such that defendant was insane or partially insane, or if evidence related to an alleged subnormal mental condition. Pen.Code, § 26, subd. 5, § 1026.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Kenneth H. Brown was convicted of first degree robbery and assault with intent to commit murder, and he appeals from the judgment and from an order denying his motion for a new trial.

Judgment and order affirmed.

Nathan C. Coghlan and J. B. Zimdars, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Appellant, Kenneth H. Brown, and his brother, Dwight W. Brown, were jointly charged with first degree robbery and assault with intent to commit murder. Kenneth was also charged with two prior convictions, which he admitted. Both defendants pleaded not guilty, and, in addition, Kenneth pleaded not guilty by reason of insanity. The jury acquitted Dwight Brown and convicted Kenneth of both offenses charged. Kenneth thereupon withdrew the insanity plea. He appeals from the judgment and from the order denying his motion for a new trial.

The charges upon which appellant was convicted grew out of the holdup of a liquor store in San Francisco by appellant and his brother. After the holdup, in which a gun was used, appellant and his brother at-

tempted to escape in their automobile, but were caught after a chase by a private citizen and the police. Dwight, who had no police record, admitted participation in the offense, took the stand in his own defense, and predicated his defense on the ground that when he entered the store with appellant he was under the impression that they were to buy liquor there; that both had been drinking; that there was no preconceived plan to commit a robbery; that he was dumfounded when his brother produced a pistol and told the proprietor, "This is a stick up"; that he had obeyed his brother's order to take the money from the cash register because he was afraid that his brother would shoot the proprietor or would shoot him.

Appellant, who did not take the stand, does not challenge the sufficiency of the evidence to sustain the judgment, but urges, as the sole ground for a reversal, that the trial court erroneously excluded evidence that appellant suffered from periods of unconsciousness by reason of a mental ailment. It is urged that this testimony, if admitted, would tend to prove that at the time the crimes were committed appellant was not conscious of what he was doing and, therefore, is not criminally responsible under section 26, subdivision 5, of the Penal Code. That section, in listing the persons incapable of committing crimes, includes in subdivision 5, "Persons who committed the act charged without being conscious thereof." It has been held that this section applies to somnambulists and persons suffering from fever or drugs. People v. Methever, 132 Cal. 326, 64 P. 481. Appellant urges that this subdivision should also be applicable to persons who suffer "unconsciousness" by reason of a mental ailment; that such "unconsciousness" is something different from insanity, and evidence thereof should be admitted under the plea of not guilty, and is not confined to the plea of not guilty by reason of insanity.

[1] At various stages during the trial, counsel for appellant tried unsuccessfully to get evidence into the record as to the past mental condition of appellant. A reading of the record demonstrates that these attempts were made on behalf of Dwight Brown to support his defense under Penal Code section 26, subdivision 8, that he had committed the crime in fear of his life. Any error in excluding that evidence, in so far as it relates to Dwight Brown, in view of his acquittal, cannot, of course, be reviewed on this appeal. Near the conclusion of the trial counsel made an offer of proof. In this offer counsel stated that he desired to prove "by substantial evidence, by intimate acquaintances, by the family of Kenneth Brown, that during a number of years he has been suffering from a mental ailment; that that mental ailment may be and may not be insanity,—that it is only akin to it; that there is a loss of consciousness, that that loss of consciousness is not entirely periodic, that there are cessations of evidence of that loss of consciousness, sometimes running over months of time, and then there is a recurrence of not only an utter absence of memory, but of any knowledge of what he is doing". Counsel went on to state that on the night in question Dwight was accompanying his brother because he knew he was an ex-convict and that he had suffered from lapses of memory, and that he had been delegated by the family to watch over appellant. After reciting some history of the life of appellant, counsel in his offer of proof then stated, "And to get to the precise point of this proof, that when he [Dwight] heard, as he stated here on the witness stand, words indicating that there was a holdup, he turned and was dumfounded and was put in fear, because of these things that he knew concerning his brother. He knew that the life of the complaining witness was in danger, and that possibly his own life was in danger, and that is why he obeyed the commands of Kenneth Brown upon the occasion in question, and not because he had any guilty intention.

"We offer to prove that, your Honor, as we have heretofore, but we wanted to make it clear so the record is there.

"The Court: Well, I have allowed the defendant Dwight to testify on that, but I don't see how I can go any further on this issue. I will have to deny the motion for proof by other witnesses as to what was said and so on.

"Mr. Coghlan: This offer, your Honor, was made under—

"The Court: Under section 26?

"Mr. Coghlan:—under section 26 of the Penal Code.

"The Court: Yes, I understand. I will have to deny that motion."

[2, 3] A fair reading of the offer of proof, and of the questions asked various members of the family of appellant to which objections were sustained, demon-

strates to a certainty, that what counsel was trying to prove was that defendant Dwight Brown knew of the past mental condition and acts of his brother, and was delegated by his family to watch over appellant, and was in fear of his life at the time of the holdup. The trial court permitted Dwight to testify to most of these facts. Whatever error may have occurred in excluding the other evidence on this point, so far as it relates to Dwight, is not involved on this appeal. Neither the offer of proof nor the questions asked of various witnesses to which objections were sustained disclosed that the proffered testimony was offered for the reason now suggested by counsel. At no time did counsel offer evidence that, at the time of crimes here involved were admittedly committed, Kenneth was not conscious of his acts. At most, all he offered to prove was that appellant, in the past, suffered from a mental ailment, without describing it, which, in the past, had rendered him "unconscious" of his acts; that he had committed various felonious acts in the past while in this condition; that Dwight knew this; that, "to get to the precise point" of the offered testimony, Dwight was in fear of his life when his brother, the appellant, ordered the proprietor of the store to put up her hands. There is no proper offer to prove that the appellant committed the crimes charged without being conscious of his acts. Even if it be assumed that, had proper testimony on this issue been offered, it would have been admissible on the guilt issue, we cannot hold, on the present state of the record, that any error was committed. If counsel desired to predicate an appeal upon error in the exclusion of evidence he was duty bound to fully and clearly state the purpose of such offered testimony to the trial court. This, he did not do. It would result in a miscarriage of justice to permit counsel to tell the trial court that testimony is offered for one purpose, and then, after the trial court has ruled, permit it to be urged on appeal that it was offered for an entirely different purpose.

[4] There is another complete answer to the contentions of appellant. The offer of proof demonstrates that the proffered testimony related to an alleged subnormal mental condition of the appellant. Thus, counsel stated that he desired to prove that, in the past, appellant suffered from a "mental ailment" which sometimes resulted in a loss of consciousness, and that this undescribed ailment may or may not be insanity—that it is "akin" to insanity. In the offer of proof, in addition to the facts already set forth in this opinion, in reciting the background of appellant, counsel stated: "This boy Kenneth Brown has been a problem for years. Originally he was a fine boy, worked when he was a young boy of 12, 14, 15, 16 years old, turning over his wages to his family. And that there arose between him and his father an antagonism not shared by the mother against him, which resulted with the father putting him in the Ione Institution through no charges whatever, through Judge Buck of San Mateo County. The mother and the father joined in it, but the mother under compulsion from the father. That he was not even an incorrigible from the standpoint of one of his parents. And he, of course, while he was there, spent sleepless nights, months and months of sleepless nights. And escaped, didn't remember how, found himself at liberty from that institution, and that from there he went from town to town, went to Los Angeles, went to Fresno, was gathered up by the authorities in California for something that he does not remember even yet, personally, excepting by hearsay, knows nothing about the doing of it. Was incarcerated in the Colorado prison and was there thrown into that portion of the prison which is used by those that are insane, where they put the insane patients. And that while there he gave evidence of violent manifestations, and that he was accused of something there at the prison that he has no knowledge of, didn't remember, and that he protested against his guilt when the charge was made against him, whatever it was, some act of violence; and that first they put him in what they call the 'hole', the place where they put incorrigibles, and then the Warden of the institution assigned him to this portion of the prison where the insane or suspected of being insane are kept in that prison." There were several other statements of the same general tenor. Nothing can be clearer that such proffered testimony related to the alleged diseased mental condition of the defendant. If the ailment was such that appellant was insane, then, of course, no evidence as to that fact could properly be introduced during the trial of the guilt issue under section 1026 of the Penal Code. But the rule goes even further than that. If the undescribed ailment resulted in what has sometimes been referred to as "partial insanity" such evi-

dence was likewise not admissible on the guilt issue. People v. Troche, 206 Cal. 35, 273 P. 767. If the offered evidence related to an alleged subnormal mental condition of appellant, it likewise was not admissible on the trial of the guilt issue. People v. Phillips, 102 Cal.App. 705, 283 P. 821; see, also, People v. Lazarus, 207 Cal. 507, 279 P. 145; People v. Leong Fook, 206 Cal. 64, 273 P. 779.

Whether, under the present law of this state governing the trial of criminal actions as it has been construed in the cases just cited, a defendant, at the trial of the general issue raised by his plea of not guilty, may be permitted, under subdivision 5 of section 26 of the Penal Code, as interpreted in People v. Methever, 132 Cal. 326, 64 P. 481, to introduce evidence for the purpose of showing that he committed the act charged without being conscious thereof, involves a point we are not called upon to consider or decide, for it is quite obvious that the testimony here sought to be introduced, at most, related to the alleged diseased mental condition of the defendant, and, therefore, was clearly inadmissible under section 1026 of the Penal Code.

The judgment and order appealed from are affirmed.

We concur: KNIGHT, J.; WARD, J.



43 Cal.App.2d 339

GALLO et al. v. SOUTHERN PAC. CO. et al.

Civ. 11250.

District Court of Appeal, First District, Division 2, California.

March 6, 1941.

Hearing Denied May 1, 1941.

1. Railroads ⇐350(28)

In action for death of motorist whose automobile was struck by train on heavily traveled railroad crossing which was usually protected by mechanical warning devices, including gates, contributory negligence of motorist who had used the crossing on many occasions and approached it during storm at speed of from 15 to 18 miles per hour and slowed down to about 10 miles per hour as he came to the tracks, at a time when no warning devices were in operation, and whose automobile was struck by train which was traveling at a speed of about 40 miles per hour, was for jury.

2. Railroads ⇐348(3, 5)

In action for death of motorist whose automobile was struck by train on heavily traveled railroad crossing which was usually protected by mechanical warning devices, including gates, evidence showing that because of storm crossing watchman failed to operate gates and signal devices and did not give ample warning to motorist of approach of train, and establishing that train was traveling at speed of 40 miles per hour at time of the collision, was sufficient to establish negligence of railroad so as to sustain judgment for the plaintiffs.

3. Appeal and error ⇐1064(1)

In action for death of motorist whose automobile was struck by train at railroad crossing, any error in giving instruction in which trial court read to jury Civil Code provisions relating to requirement for ringing of a bell or sounding of a whistle by a locomotive without qualification embracing issues of proximate cause and contributory negligence was without prejudice to defendants, where record disclosed that only slight, if any, stress was laid upon question of whether bell was rung or whistle blown. Civ.Code, § 486.

4. Railroads ⇐348(5), 351(2)

Evidence showing that train was proceeding over heavily traveled crossing within city limits during a severe storm at speed of at least 40 miles per hour at time the train struck automobile was sufficient to warrant giving of instruction regarding necessity for operating train at a speed which was reasonable in view of all circumstances, and to support a finding of negligence on part of railroad.

5. Railroads ⇐351(2)

In action for death of motorist whose automobile was struck by train at railroad crossing, giving of instruction that jury was not bound to decide in conformity to declarations of any number of witnesses, which did not produce conviction in minds of jurors, against a less number or against a presumption or other evidence satisfying minds of jurors, was not error, where the presumption that motorist when he started across the railroad track exercised ordinary care for his own safety was not as a matter of

law dispelled. Code Civ.Proc. § 2061, subd. 2.

6. Death ⇐18(3)

Wrongful death action could be maintained by parents of decedent who left surviving a widow, without evidence establishing that decedent actually gave parents monetary assistance.

7. Death ⇐88, 95(3)

Damages in death actions are limited to the "pecuniary loss" to the surviving heirs, but such loss includes the loss of the comfort, protection, and society of the decedent.

See Words and Phrases, Permanent Edition, for all other definitions of "Pecuniary Loss".

8. Death ⇐60

In action for wrongful death, refusal to allow defendants, on cross-examination of decedent's widow, to ask her whether she contemplated remarriage in the near future was not error.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Eileen Gallo and others against the Southern Pacific Company and others for death of a motorist resulting from a collision between an automobile and a train. From an adverse judgment, defendants appeal.

Affirmed.

Louis Oneal, Arthur G. Shoup, and Duncan Oneal, all of San Jose, for appellants.

Francis N. Foley, of San Mateo, and Robert Beale, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs are the widow and parents of Joseph J. Gallo, deceased. They brought this action seeking damages for the death of said deceased, which death was alleged to have been caused by the negligence of the defendants. Upon a trial by a jury, plaintiffs recovered judgment in the sum of $10,000. Defendants appeal from said judgment.

The death of said deceased occurred on the morning of December 10, 1937, when the automobile which he was driving was struck by a Southern Pacific train at the main Grand avenue crossing just south of the Southern Pacific station at South San Francisco. Deceased was driving his car in a general westerly direction and was struck by a northbound passenger train. At said main crossing, there are seven tracks running in a northerly and southerly direction. A single street car track runs along Grand avenue and crosses said seven tracks. Grand avenue does not cross the tracks at right angles but runs slightly south of west in the direction in which the deceased was proceeding. Grand avenue is over 80 feet in width where it crosses said tracks and the street car track is located to the south of the center thereof.

This crossing is heavily traveled and is what is commonly known as a guarded crossing. It is equipped with gates, bells and lights to give warning of the approach of trains. A gateman's tower is located on the west side of the crossing and to the south thereof. There are two gate standards and two gates on the west side of the crossing, one being located at the north side and the other being located at the south side of Grand avenue. There is but one gate standard and one gate on the east side of the crossing and it is located at the north side of Grand avenue. Near each gate standard is located a signal bell and a signal light to further warn persons of the approach of trains. There are also lights on the gates which operate when the gates are lowered. All of these warning devices are operated from the gateman's tower. The gates are operated by compressed air supplied by a hand pump. The signal bells and signal lights are electrically operated by means of switches. Apparently the defendant railroad kept a gateman in attendance at this crossing at all hours but, in any event, it is clear that for a long period of time before the accident, the defendant railroad kept a gateman in attendance throughout the morning hours. The time when the accident occurred was about 7:50 a. m. It is conceded by defendants that at the time of the accident no gate was lowered, no signal bell was rung and no signal light was lighted.

Some further description of the crossing is required before proceeding to a discussion of the questions presented on this appeal. The two main line tracks are approximately in the center, there being two tracks to the west and three tracks to the east of said mainline tracks. The northbound train was proceeding on the track which was the fourth track from the east side which was the side from which the deceased approached. It is conceded by

all that there were numerous freight cars located on the first and second tracks crossed by the deceased. There is some conflict as to the number and exact location of said freight cars, but there was ample evidence to show that there were long strings of cars on said tracks and that the northerly ends of said strings were in very close proximity to the southerly side of Grand avenue. The defendant engineer testified that these freight cars obstructed his view to the right and it seems clear that said freight cars likewise obstructed the view of the deceased to the left as he started to make the crossing.

At the time of the accident there was a very heavy wind and rain storm. On previous occasions, the gateman had found that it was impossible to lower all or at least some of the gates when there was a heavy wind. When the gateman who was on duty at the time of the accident went to work at 7 a. m. he was advised by the gateman who was being relieved that the latter had been able to operate the gates only part of the time. The gateman on duty then attempted to operate the gates and found that he could not lower the gate on the east side or the north gate on the west side. In other words the south gate on the west side was the only gate which he was able to lower. He made no report to anyone regarding his inability to operate said gates.

During this heavy storm and shortly before the accident the deceased had driven across the tracks to the east side for the purpose of taking his wife to her place of employment. He was returning from the east side at about 7:50 a. m. and driving in a westerly direction for the purpose of going to his place of employment when the accident occurred. He had made such trips in the morning and evening for many months prior to the accident and was familiar with the crossing and the warning devices used. A truck was driven in a westerly direction across the crossing about half a block ahead of deceased and a street car was being operated in a westerly direction to the rear of the deceased as he approached the crossing. The testimony shows that deceased approached the crossing in this storm at a speed of from 15 to 18 miles per hour and that he slowed down to about 10 miles per hour as he came to the tracks. As above stated, there were no warning devices in operation at the time. As deceased drove onto the tracks his car was struck by the northbound train, which was traveling at a speed of about 40 miles per hour, and he died almost instantly.

With respect to the actions of the gateman's tower, the testimony showed that he was in the second story of the gateman's tower, reached by a stairway on the outside, when he first noticed the approach of the train. He made no attempt to lower the gates, or any of them, and he did not turn the switches to put the signal bells and signal lights in operation. He did leave the tower to go on the ground carrying with him a stop sign and a flag. With respect to the warning bells and lights he was asked, "You walked right out of that tower without even taking the precaution of reaching up here and turning those on?" and he answered, "Yes, sir." There is a slight conflict in the testimony as to just when the gateman reached the ground and as to just what he did upon reaching ground. We believe, however, that the evidence clearly indicates that he reached the ground very shortly before the accident; that he took a position near the west side of the crossing and at a point to the south of the street car track; and that he faced west toward the heavy east-bound traffic and directed his attention thereto. It further appears that he held his stop-sign in front of his face toward the southwest in order to protect his face from the storm and that he held his flag motionless down at his side. As one witness described it "he was making no move" and "he stood like a statue". If we assume that the gateman arrived on the ground soon enough to give timely warning to the east-bound traffic by means of his stop-sign and flag and that he would have been visible on a clear day to west-bound traffic although he was at the opposite side of this wide crossing, it does not appear, when the circumstances are considered such as the weather, the vehicles and pedestrians on and near the crossing, the position taken by the gateman on the south side of the road and his failure to put his flag or his stop-sign in motion, that his actions would have been such to give any effective warning to west-bound traffic, more particularly in the light of the fact that all traffic at said crossing was accustomed to relying upon the gates and other mechanically operated warning devices.

[1] Defendants contend that the deceased was guilty of contributory negli-

gence as a matter of law, but we find no merit in this contention. The above summary of the evidence appears sufficient to demonstrate that the question of whether the deceased was guilty of contributory negligence was a question of fact for the jury's determination. Crawford v. Southern Pacific Company, 3 Cal.2d 427, 45 P.2d 183; Robbins v. Southern Pacific Company, 102 Cal.App. 744, 283 P. 850.

[2] Defendants made no claim that the evidence was insufficient to show negligence on the part of said defendants and it is apparent that there was ample evidence to show negligence in many particulars. They do contend, however, that the trial court committed prejudicial error in the giving of certain instructions relating to the issues of negligence and contributory negligence.

[3] Defendants first attack an instruction in which the trial court read to the jury the provisions of section 486 of the Civil Code relating to the requirement for the ringing of a bell or sounding of a whistle by a locomotive. It is claimed that the giving of such instruction without proper qualification embracing the issues of proximate cause and contributory negligence was error. Smellie v. Southern Pacific Company, 128 Cal.App. 567, 18 P.2d 97, 19 P.2d 982. We may assume, without deciding, that the giving of said instruction in the form in which it was given was error despite the fact that the issues of proximate cause and contributory negligence were thoroughly covered by other instructions. There remains, however, the question of whether the assumed error in giving said instruction was prejudicial. Lawrence v. Southern Pacific Company, 189 Cal. 434, 208 P. 966. A review of the record discloses that little, if any, stress was laid upon the question of whether defendants' locomotive did or did not ring a bell or sound a whistle on approaching the crossing. In their brief defendants state that the plaintiffs' opening statement to the jury was "a fair statement of plaintiffs' theory of the case and a fair statement of the facts of the case". Said statement outlined in detail plaintiffs' claims of negligence, but no mention was made therein of any claimed failure of the locomotive to ring a bell or sound a whistle. Again in defendants' brief defendants state that defendants' negligence "was predicated principally, if not entirely upon the failure of the crossing gates to be lowered". Upon the trial, there were witnesses on both sides whose testimony was to the effect that there was no failure of the defendants to comply with said section 486. A reading of the record including the evidence and all of the instructions given leads us to the conclusion that the error, if any, in the giving of said instruction was not prejudicial to the defendants under the circumstances.

[4] Defendants further contend that it was error to give an instruction regarding the necessity for operating a train "at a speed which is reasonable in view of all the circumstances" because of the claimed absence of any evidence which would warrant a finding of a negligent speed. We find no merit in this contention. There was the evidence of the witness Strong to show that the train was proceeding over a heavily traveled crossing within the city limits during a severe storm at a speed of "at least 40 miles per hour". Such evidence was sufficient to warrant the giving of said instruction and to support a finding of negligence.

Defendants further contend that the trial court committed error in the giving of several instructions relating to the rights and duties of the deceased in approaching and traversing the guarded crossing. It would serve no useful purpose to set forth all of said instructions. A reading of the entire charge to the jury convinces us that the jury was fully and fairly instructed and that there was no prejudicial error. We believe that all of the challenged instructions relating to the rights and duties of the deceased find support in the rules laid down in Crawford v. Southern Pacific Company, supra, and Robbins v. Southern Pacific Company, supra, and that the only justifiable criticism which might be directed at the charge as a whole is that some of the instructions, given at the request of defendants, were more favorable to the defendants than they were entitled to have them.

[5] Defendants further contend that "the presumption that the decedent used due care cannot be indulged in this case". Under this heading, defendants claim it was error to instruct the jury that "you are not bound to decide in conformity to the declarations of any number of witness-

es, which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds". See Code Civ. Proc., sec. 2061, par. 2. We find no error in the giving of said instruction. At the request of defendants, the trial court instructed the jury as follows: "You are instructed that the law presumes that when the decedent started across the railroad track, he exercised ordinary care for his own safety and such presumption is evidence in this case." This statement was followed by a statement that if the jury found that such presumption was contradicted by the testimony of plaintiffs or of plaintiffs' witnesses or that the circumstances of the case could not be reconciled with such presumption, then such presumption was dispelled. As defendants requested these last-mentioned instructions, they must have been of the opinion at that time that the question of whether the presumption was thus dispelled was a question of fact for the jury to determine from the evidence. As above indicated, we cannot say as a matter of law that said presumption was dispelled, and it was therefore proper to give the challenged instruction.

[6, 7] Defendants further contend that the trial court erred in denying their motion for a nonsuit and particularly as against plaintiffs James Gallo and Margaret Gallo, the parents of the deceased. From what has already been said, it is clear that defendants were not entitled to have their motion granted generally. As to the parents of the deceased, the motion was based particularly upon the ground that there was no evidence to show that the parents "were in any way dependent on the decedent, or were damaged to any extent by his death". In our opinion, said motion was properly denied as to said parents as well as to the widow. While there was no evidence to show that the decedent had been actually giving his parents monetary assistance such evidence was not essential. It is true that damages in death cases are limited to the "pecuniary loss" to the surviving heirs, but such loss includes the "loss of the comfort, protection and society of the deceased". Duclos v. Tashjian, 32 Cal.App.2d 444, 453, 90 P.2d 140, 145.

[8] Defendants further contend that the trial court committed prejudicial error in sustaining an objection to the following question asked on cross-examination of the widow: "Mrs. Gallo, have you any plan of contemplating remarriage in the near future?" We believe this contention to be likewise without merit. Defendants have not called to our attention any authority in this jurisdiction supporting their position and we know of none. The great weight of authority appears to support the trial court's ruling. 17 C.J. 1343, sec. 226 and cases cited.

Defendants finally contend that the trial court erred in denying their motion for a new trial. No new points are raised in support of this contention and it follows from what has been said that said motion was properly denied.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



43 Cal.App.2d 387

In re BRAIG'S ESTATE.

WITTENBERG et al. v. MUELLER et al.

Civ. 11639.

District Court of Appeal, First District, Division 2, California.

March 10, 1941.

Hearing Denied May 8, 1941.

1. Appeal and error ⇐927(7)

In determining propriety of order directing verdict for respondents, reviewing court was required to view the evidence in light most favorable to appellants.

2. Trial ⇐139(1)

Motion for directed verdict should be denied if there is any evidence in the record of sufficient substantiality to support a verdict in favor of the party against whom the motion is directed.

3. Evidence ⇐290

In view of difficulty of proving pedigree without aid of public records, the law has made provision for proof of pedigree under certain circumstances by evidence of common reputation in the family as shown by the acts and declarations of the members of the family. Code Civ.Proc. § 1852; § 1870, subds. 4, 11.

4. Evidence ⇐313

Evidence of common reputation in the family, as shown by acts and declarations of the members of the family, concerning pedigree, may constitute "substantial evidence" which will support a verdict in favor of one relying thereon. Code Civ.Proc. § 1852; § 1870, subds. 4, 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Evidence".

5. Descent and distribution ⇐71(7)

In proceeding to determine heirship, whether employer of decedent's mother, who married the employer at a time subsequent to decedent's birth, was decedent's father as contended by parties claiming to be decedent's paternal nieces and nephew, was for jury.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding in the matter of the estate of Harry Peter Braig, alias, deceased, wherein proceeding to determine heirship was brought by Bertha R. Wittenberg and others against Helene Mueller and others. From an adverse judgment, Bertha R. Wittenberg and others appeal.

Reversed.

Van A. Neher, James E. Colston, Richard C. O'Connor, and Charles F. Jonas, all of San Francisco, and W. A. Brandenburger and William A. White, both of Sacramento, for appellants.

Bradford, Cross & Prior, of Sacramento, for respondents.

SPENCE, Justice.

In a proceeding to determine heirship, the trial court directed a verdict against appellants and in favor of respondents and judgment was entered accordingly. Appellants appeal from said judgment.

The deceased was a former lieutenant on the San Francisco police force. He died in 1937, leaving neither wife nor issue. He was originally known as Harry Peter Breig and later changed the spelling of his last name to Braig. It was conceded by all that his mother was Helena Breig, formerly Helena Boehm. Respondents claimed that they were the maternal first cousins of the deceased. Appellants claimed that the deceased was the son of John Breig and Helena Breig and that appellants were the paternal nieces and nephew of the deceased. There appears to be no conflict in the evidence with respect to certain relationships, that is to say, the relationship of respondents to Helena Breig and the relationship of appellants to John Breig. It is further undisputed that John Breig and Helena Breig were husband and wife for many years and that they were divorced in 1882. The main subject in dispute is whether the deceased was the son of John Breig.

It is difficult to determine from the evidence the exact date of the birth of the deceased. The parties seem agreed that he was born around 1870, but no record, public or private, or other evidence was produced to establish definitely the exact date. If he was born in San Francisco, as claimed by appellants, no public record of the birth was available.

[1] In support of the claim that the deceased was the son of John Breig and Helena Breig, appellants produced numerous witnesses to give testimony concerning the history of the family and to establish the pedigree of the deceased through testimony of common reputation in the family as evidenced by the acts and declarations of the members of the family. Code Civ.Proc., secs. 1852 and 1870, subds. 4 and 11. In determining the propriety of the trial court's order directing a verdict in favor of respondents, we must view this evidence in the light most favorable to appellants and when so viewed, the following facts appear.

John Breig was a German immigrant who established himself in San Francisco as a soda water manufacturer in the early 1860's. His first wife was Caroline Breig, by whom he had three children; Edward Breig, Amelia Breig and Theresa Breig. Edward was the father of appellant Emma S. Durr. Amelia was the mother of appellants Bertha R. Whittenberg and George Grover Roemer. Both Edward and Amelia predeceased Harry Braig. Theresa predeceased Harry Braig, leaving no issue.

In the late 1860's, Caroline Breig became ill and John Breig engaged Helena Boehm, then a young German girl, as a domestic and nurse. Caroline Breig lived for a few years thereafter but she became progressively worse and was mentally unbalanced. During said illness of Caroline Breig and during said employment of Helena Boehm in the household, said Helena Boehm gave birth to Harry, the deceased. Helena Boehm was unable to nurse said child and

John Breig induced one of his relatives, who had given birth to a child at about the same time, to nurse the infant. Said relative did so over the objections of her own husband and there ensued domestic difficulties in that family as a result. John Breig offered to pay said relative for such nursing. She refused such payment but she did thereafter accept gifts, consisting of a brooch and earrings, given to her by John Breig in appreciation for what she had done. John Breig referred to said child as his child, gave it the name of Harry Breig and raised him as his own along with his other children. After Caroline had died, John Breig married Helena Boehm and the family lived together in San Francisco until 1882. At that time Helena Breig left the home of John Breig, taking her son Harry Breig, and thereafter she obtained a divorce from John Breig. There was evidence of declarations of relatives, since deceased, to the effect that Harry Breig was the son of John Breig and Helena Breig, born out of wedlock prior to their marriage. There was also abundant evidence to show that the other children of John Breig commonly referred to Harry as their brother or half-brother and that they commonly referred to him, in speaking to appellants, as appellants' "Uncle Harry". The testimony might be set forth at greater length and in greater detail but we deem it unnecessary to do so for the purpose of this discussion.

[2] Appellants contend that the trial court erred in directing a verdict in favor of respondents and in our opinion this contention must be sustained. The rules governing the trial court in passing upon a motion for a directed verdict are well settled (In re Estate of Flood, 217 Cal. 763, 21 P.2d 579; In re Estate of Lances, 216 Cal. 397, 15 P.2d 768), and if there is any evidence in the record of sufficient substantiality to support a verdict in favor of the party against whom the motion is directed, the motion should be denied.

[3-5] The difficulty of proving pedigree without the aid of public records has long been recognized. The law has therefore made provision for the proof of pedigree under certain circumstances by evidence of common reputation in the family as shown by the acts and declarations of the members of the family. Code Civ.Proc., secs. 1852 and 1870, subds. 4 and 11. Such evidence is often the only evidence which is available and it is held to be substantial evidence which will support a verdict in favor of one relying thereon. In re Estate of Flood, supra; In re Estate of Hartman, 157 Cal. 206, 107 P. 105, 36 L.R.A.,N.S., 530, 21 Ann.Cas. 1302; In re Estate of Heaton, 135 Cal. 385, 67 P. 321; In re Estate of Williams, 128 Cal. 552, 61 P. 670, 79 Am. St.Rep. 67; In re Estate of Barton, 16 Cal. App.2d 246, 60 P.2d 471; In re Estate of Clark, 13 Cal.App. 786, 110 P. 828. Our review of the record convinces us that there was substantial evidence as above indicated to support a verdict in favor of appellants and that it was therefore error to direct a verdict against them.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



43 Cal.App.2d 356

INGALLS v. BELL et al. (two cases).

Civ. 2566.

District Court of Appeal, Fourth District, California.

March 7, 1941.

Hearing Denied May 5, 1941.

1. Appeal and error ⇐809

Plaintiff's appeal from order granting defendants a new trial must be considered before defendants' appeal from judgment on verdict for plaintiff, and appeal from judgment would become important only if order granting new trial were reversed.

2. Principal and surety ⇐3

The statutes abolishing distinction between sureties and guarantors and defining rights and obligations of sureties were not applicable to rights acquired under contract of guaranty dated before enactment of such statutes. Civ.Code, §§ 2787, 2807, 2845.

3. Guaranty ⇐1

A "guaranty", as defined by statute in effect in 1933 as a promise to answer for the debt, default, or miscarriage of another, was an undertaking or promise of one person to take upon himself the fulfillment of the obligation of another, in case the other defaults in performance thereof. Civ.Code, § 2787.

See Words and Phrases, Permanent Edition, for all other definitions of "Guaranty".

4. Guaranty ⇦1

Under statute in effect in 1933, a guaranty was a collateral undertaking which could not exist without a main or substantive liability to which it was collateral, and although guaranty contract was collateral to contract of principal debtor, the two were distinct and independent. Civ.Code, § 2787.

5. Guaranty ⇦9

As long as agreement established intention of creating a contract of guaranty, no set words and form were required to constitute a "guaranty" as defined by statute in effect in 1933. Civ.Code, § 2787.

6. Principal and surety ⇦162(2)

Whether promise alleged to constitute a guaranty under statute in effect in 1933 was original or collateral was a fact question for jury, but if negotiations of the parties were incorporated into an unambiguous written contract, it was for the court. Civ.Code, § 2787.

7. Guaranty ⇦4

Under statutes in effect in 1933, contracts of "guaranty" and of "warranty" were similar, in that purpose of both was to save one of the contracting parties from loss which the parties contemplated might happen, but a contract of "warranty" was a primary obligation, whereas a "guaranty" was collateral. Civ.Code, § 2787.

See Words and Phrases, Permanent Edition, for all other definitions of "Warranty".

8. Principal and surety ⇦6

Under statutes in effect in 1933, both a "guarantor" and a "surety" were bound for another person, but a "surety" was usually bound with his principal by the same instrument executed at the same time and on the same consideration, whereas a "guarantor" was not. Civ.Code, §§ 2787, 2831.

See Words and Phrases, Permanent Edition, for all other definitions of "Guarantor" and "Surety".

9. Principal and surety ⇦6

Under statutes in effect in 1933, a "guaranty" always assumed the presence of a guarantor who was personally liable, so if there was no personal liability a contract of "suretyship" and not of "guaranty" resulted. Civ.Code, §§ 2787, 2831.

See Words and Phrases, Permanent Edition, for all other definitions of "Suretyship".

10. Pleading ⇦36(1)

Under statutes in effect in 1933, one whose pleadings admitted a contract to be one of guaranty could not later deny that fact and set up that contract was one of suretyship. Civ.Code, §§ 2787, 2831.

11. Guaranty ⇦4

Under statutes in effect in 1933, in a "guaranty" liability was fixed by principal debtor's failure to pay at maturity or when payment was guaranteed, irrespective of whether debtor could pay the debt, but in "indemnity" no liability accrued until after, by use of due and reasonable diligence, there had been failure to collect the debt from principal debtor or the one indemnified had actually suffered loss against which the contract protected him. Civ.Code, § 2787.

See Words and Phrases, Permanent Edition, for all other definitions of "Indemnity".

12. Guaranty ⇦4

Under statutes in effect in 1933, in case of either guaranty or indemnity, remedies against principal debtor must have been exhausted in order to authorize recovery, where parties so provided in their contract. Civ.Code, §§ 2807, 2823.

13. Guaranty ⇦45, 46(1), 70, 77(2)

Under statutes in effect in 1933, a guarantor was liable immediately upon default of principal, without demand or notice, and so creditor was not required to exhaust remedies against debtor, and creditor's mere delay or failure to proceed against principal debtor did not exonerate guarantor unless the contract provided that such action must be taken. Civ.Code, §§ 2807, 2823.

14. Subrogation ⇦7(1)

A guarantor is entitled to certain rights of subrogation as against the principal debtor and may enforce any remedy which creditor has against the principal debtor.

15. Guaranty ⇦77(1), 100

It is not a "condition precedent" to recovery upon a guaranty that creditor assign all his rights against debtor over to guarantor, and guarantor who pays the principal obligation is entitled to reimbursement.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

16. Guaranty ⇦97

Under statutes in effect in 1933, guarantor could not compel creditor to avail him-

self of remedies against the debtor unless he paid the obligation, in which case he could compel the creditor to act by a proceeding in equity. Civ.Code, §§ 2848, 2849.

17. Guaranty ⇐75

An action against a guarantor must be brought specially upon the contract of guaranty itself, and such action is not for collection of the principal debt, as such, but is independent of any action upon the principal obligation.

18. Guaranty ⇐85(1)

In action against a guarantor, complaint must allege execution of guaranty and that guarantor has not paid the obligation.

19. Pleading ⇐229

In actions against guarantor, amendments to pleadings are allowed in accordance with general rules.

20. Pleading ⇐36(3, 5)

In action against guarantor, all material allegations of the complaint, on a guaranty not denied by answer, are deemed admitted and are not put in issue, and all admissions in the answer are binding on defendant.

21. Principal and surety ⇐6

Where purchasers of royalty interest, in order to obtain seller's consent to assignment of such interest and modification of the purchase agreement, agreed that within 30 days after notice that assignee had violated the purchase contract, purchasers would pay to seller the balance remaining on account of purchase price, and guarantee faithful performance in every respect, and that purchasers should be subrogated to seller's interest in event of such payment, the agreement was an independent collateral contract for direct payment of money, constituting a "guaranty" and not a "suretyship" under statutes in effect in 1933, and seller's right to sue purchasers arose not as result of enforcing the purchase contract against assignee, but as result of guaranty, and hence tender of the assignment or exhaustion of remedies against assignee was not necessary before suing purchasers. Civ.Code, §§ 1439, 2787, 2807, 2823, 2831, 2845, 2846, 2848, 2849, 3307, 3386, 3392.

22. Jury ⇐14(13)

In action against purchasers of royalty interest in minerals, on their agreement guaranteeing performance of purchase contract by assignees of such contract, jury trial was authorized, as against contention that action was in the nature of specific performance. Code Civ.Proc. § 592.

23. New trial ⇐41(2)

Alleged error in permitting plaintiff to reopen case to prove demand was not ground for new trial, where defendants' counsel stated after case was reopened that he would not raise a question about the demand.

24. Appeal and error ⇐856(5)

It could not be urged on appeal that trial court was justified in granting new trial because it erred in admitting testimony to prove a point which counsel admitted.

25. Pleading ⇐35

An amendment of complaint to allege tender, in accordance with court's erroneous opinion that tender was necessary, was "surplusage" and might be disregarded as unnecessary to cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

Appeals from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Ruth P. Ingalls against H. H. Bell and another to recover on guaranty agreement. From a judgment on a verdict for plaintiff, defendants appeal, and from an order granting defendants a new trial, plaintiff appeals.

Order granting new trial reversed, and judgment affirmed.

Brittan & Mack, of Bakersfield, for plaintiff, appellant and respondent.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for defendants, respondents and appellants.

GRIFFIN, Justice.

[1] There are two appeals in this case. Defendants appeal from the judgment entered on the verdict of the jury and plaintiff appeals from an order granting defendants a new trial. Since each side is thus appealing, we will refer throughout this opinion to plaintiff and defendants in order to avoid confusion. The appeal from the order granting a new trial must be first considered, and the appeal from the judgment becomes important only in case the order granting a new trial is reversed. Jackson v. Dolan, 202 Cal. 468, 261 P. 706; San Jose Safe Deposit Bank of Savings v. Bank of Madera, 121 Cal. 543, 54 P. 85.

Plaintiff's complaint, stripped of unnecessary minutiae, alleges: (1) that on or about March 28, 1932, plaintiff was the owner of a six per cent royalty interest in the minerals of certain lands; (2) that on said day she and the other owners of similar royalty interests in the minerals entered into an agreement for the sale of their interests in the minerals to defendants for $106,000, payable in installments from the proceeds of the sale of oil, with certain minimum payment requirements; (3) that thereafter defendants became desirous of assigning their rights under the contract to Shamrock Petroleum Corporation (hereinafter referred to as Shamrock) and of securing certain modifications; (4) that on March 6, 1933, an agreement and assignment was accordingly made between plaintiff and her said co-owners on the one part and Shamrock on the other part, modifying the contract of sale in certain respects, including a reduction in the purchase price, and providing that the entire amount of the purchase price should be paid on or before March 6, 1936; (5) that in consideration thereof defendants at the same time executed and delivered to plaintiff a separate agreement guaranteeing the payment by Shamrock to plaintiff, a copy of which is attached to the complaint; (6) that the sum of $3,688.80 had become due plaintiff from Shamrock and remained unpaid; (7) that Shamrock had refused to pay; and (8) that she was still the owner of the royalty and offered to convey on the condition that the balance of the purchase price be paid to her. The prayer was for the full amount remaining unpaid.

The obligations of Shamrock but not defendants under the sales contract as modified may be briefly stated as follows: (a) royalty holders agree to sell leasehold rights, and reserve the right to forfeit on breach or default; (b) Shamrock agrees to pay the stated price in installments. These installments matured prior to March 6, 1936. The agreement of March 28, 1932, provided: "13. Upon the full payment of the purchase price above provided for, the sellers agree to execute and deliver to the buyers, a good and sufficient assignment conveying all of their right, title and interest in and to said leasehold interest unto the said buyers." Portions of the separate agreement of guaranty dated March 6, 1933, provided in part: "Whereas, on the 28th day of March, 1932, Ruth P. Ingalls agreed to sell * * * a six per cent (6%) interest * * * of all oil, gas and other hydrocarbon substances developed * * * and whereas on said day H. H. Bell and Archie Mayes agreed to buy the interest of said Ruth P. Ingalls for an agreed consideration of $6,000, which was payable out of the production of oil from said premises. And Whereas, H. H. Bell and Archie Mayes are unable to continue with said contract and they are desirous of permitting the Shamrock * * to purchase the same interests as were being purchased by the said H. H. Bell and Archie Mayes under and by virtue of said contract, but for a reduced price of $4,245.30, so far as Ruth P. Ingalls is concerned, and whereas, Ruth P. Ingalls is willing that said reduction be made providing that she have assurance on the part of H. H. Bell and Archie Mayes that she will receive the full purchase price of $4,245.30 for her interest in said property herein mentioned * * * That H. H. Bell and Archie Mayes and each of them do hereby agree that * * * Ruth P. Ingalls shall receive a total consideration equalling $4,245.30 for her interests in and to said land and premises * * * that if and in the event the said Shamrock * * * shall for any reason violate any of the terms and conditions of said contract, a notice of such violation shall be given H. H. Bell and Archie Mayes. Then within a period of thirty (30) days the said H. H. Bell and Archie Mayes individually, jointly and severally * * * shall pay to the said Ruth P. Ingalls the balance remaining on account of the purchase price of her interest in said property; and hereby guarantee the faithful performance thereof in every respect. * * * It is understood and agreed that in all events Ruth P. Ingalls is to receive and will be paid a total consideration of $4,245.30 for her interest in said property, and payment thereof by H. H. Bell and Archie Mayes is hereby guaranteed in said amount * * * that if and in the event the said Shamrock * * * for any reason fail or neglect to perform any act or thing in the time or manner therein prescribed or in the event there might be a waiver of strict performance on the part of said Shamrock * * * that nevertheless, H. H. Bell and Archie Mayes agree to be bound by this contract, and pay the balance remaining for the purchase of said property this day sold or agreed to be sold by her to the said Shamrock * * * that if and in the event the said H. H. Bell and Archie Mayes pay the amount agreed to be paid by the Shamrock * * * then and

in that event they shall be subrogated to the right, title and interest of the said Ruth P. Ingalls in and to said contract of purchase."

The answer of defendants admitted the due execution of the agreements; admitted, by failure to deny, the allegation that "* * * defendants have failed, neglected and refused to make any payments whatsoever under said agreement of March 6, 1933, or at all * * * there is now due, owing and unpaid on account of the purchase price of said contract on said property, the sum of Three thousand six hundred eighty-eight and 80/100 dollars ($3,688.80) as principal * * * That demand has been made on said defendants that they pay said sum, but they have neglected, failed and refused so to do * * *."

The complaint further alleges that Shamrock Petroleum Corporation, prior to the filing of the complaint, and after January 4, 1935, filed a petition for reorganization under the Bankruptcy Act of the United States, 11 U.S.C.A. § 1 et seq., and thereafter failed, neglected and refused to pay any sum or sums on said contract whatsoever.

The answer admits this fact but as an affirmative defense alleges that from March 6, 1933, to the time of the filing of the bankruptcy proceedings, plaintiff neglected "to enforce the obligation of Shamrock * * by legal proceedings or otherwise, or to forfeit or terminate the right or interest of Shamrock * * * to said property * * individually and collectively consented to and acquiesced in a course of persistent and continuous and uninterrupted violation of its obligations by Shamrock * * * and neglected to present any claim or demand whatever in said bankruptcy proceeding * * * and that by failing to present her said claim the plaintiff lost and waived her security as well as the interest or rights in the property which she was obligated to sell to these defendants", and is estopped from making any claim or demand against them.

A trial by jury was demanded by plaintiff. She offered in evidence the two contracts and read them to the jury. In view of the admissions in the answer no further material evidence was produced. Plaintiff rested. Defendant offered in evidence certain documentary evidence and rested. At plaintiff's request the case was reopened for the purpose of proving demand for payment. Considerable evidence was offered on the subject. Demand was clearly established. Plaintiff again rested. Defendants moved for a directed verdict, and argued that neither under the pleadings nor the evidence was it shown that an offer had been made by plaintiff to execute an assignment or make a tender of her leasehold interest before the action was instituted, and also challenged the right of a jury to pass upon the issues as presented. Plaintiff moved to amend the complaint by showing that she now "offers to convey to the person entitled thereto, upon the payment to said plaintiff of the sum hereinafter demanded in this complaint". This amendment, as well as another amendment, was allowed over strenuous objection. Plaintiff again moved to reopen the case for the purpose of putting on proof in support of the amendments. Defendants objected again and asked the court for a continuance to meet the new issues presented. This continuance was denied. Plaintiff was then allowed to testify that she had not, before the complaint was filed, made a tender of any assignment, but now offered to "turn it over" when the contract was paid. A dispute also arose as to whether plaintiff was at that time owner of the interest and was able to turn it over. Defendants offered to prove that plaintiff lost her ownership of the particular interest, which offer of proof was rejected. Defendants again moved, for the reasons stated, for a directed verdict, which was refused. The court then instructed the jury that if "for any reason said Shamrock * * * has failed to pay the plaintiff * * * any sum of money agreed to be paid by said corporation * * as a result of the contract * * * and if the jury further believe that the plaintiff * * * within a reasonable time after the failure of the Shamrock * * * to pay Ruth P. Ingalls, * * * demanded the payment thereof from the defendants Bell and Mayes, and if the jury further believe that * * * Bell and Mayes have failed to pay said sum or sums not paid by the Shamrock * * *, then your verdict should be for the plaintiff * * * for such sums found to be due".

Defendants first complain because plaintiff was allowed, over objection, to reopen her case to prove demands not pleaded when there had been no defense on the ground that demand had not been made; that after plaintiff had rested her case the second time and after defendants had moved the court to instruct the jury to return a verdict for defendants, plaintiff, over

the objection of defendants, was given permission to amend her complaint to allege an offer to convey upon the payment of the sum demanded in the complaint; that plaintiff was again allowed, over the objection of defendants, to reopen for further proof, and was permitted to prove that she had never conveyed her 6 per cent royalty interest; that by reason of such amendments and proof, the action became one for specific performance; that the court erroneously instructed the jury to the effect that plaintiff could recover from defendants without having tendered Shamrock a conveyance and without a demand on Shamrock for payment, thereby permitting the jury to pass on plaintiff's claim for the price without requiring the conveyance; that the liability of defendants under their contract of guaranty or suretyship, if any, was a liability to respond to the same extent as Shamrock was liable to respond to an action for specific performance, citing Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 10, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17.

It is further argued that this is not an action for damages, as found by the verdict, because plaintiff is asking for the whole purchase price, and has alleged no facts from which the damages accruing to her under Civil Code, section 3307, could be ascertained; that in fact, it is not alleged that she has been damaged at all; and that where a party asks payment of the purchase price, it is held that the action is one in the nature of specific performance, citing Smith v. Tristam, 130 Cal.App. 750, 20 P. 2d 770; Ehrhart v. Mahony, 170 Cal. 148, 148 P. 934; White v. Sage, 149 Cal. 613, 87 P. 193; that no party is entitled to specific performance unless he has performed, or can be compelled to perform, Civ.Code, sec. 3386; that specific performance cannot be enforced in favor of a party who has not fully and fairly performed all conditions precedent on his part, Civ.Code, sec. 3392; that where the title remains in the vendor, he has no cause of action for the purchase price (Cuthill v. Peabody, 19 Cal. App. 304, 308, 125 P. 926); that whether defendants were guarantors or sureties, they were liable only when their principal Shamrock became liable, and defaulted; that a guarantor is liable only on default of the principal, Civ.Code, sec. 2807; that a surety is responsible for performance by the debtor, Civ.Code, sec. 2831 [repealed in 1939]; 24 Am.Jur. sec. 73, p. 922; Brock v. A. G. Priester, Inc., 17 Cal.App.2d 328, 61 P.2d 1183; Anderson v. Shaffer, 98 Cal. App. 457, 462, 277 P. 185; that a party seeking to compel the payment of the purchase price that has matured must offer to convey in order to mature the right to put the other party in default. Civ.Code, sec. 1439; Fenn v. Pickwick Corp., 117 Cal. App. 236, 4 P.2d 215; McElwee v. Beckwith, 198 Cal. 341, 345, 244 P. 1084; Lewis Publishing Co. v. Henderson, 103 Cal.App. 425, 429, 284 P. 713; Kerr v. Reed, 187 Cal. 409, 411, 202 P. 142; Booth v. Chapman, 59 Cal. 149, 153; Boone v. Templeman, 158 Cal. 290, 297, 110 P. 947, 139 Am. St.Rep. 126; Sausalito Bay L. Co. v. Sausalito Imp. Co., 166 Cal. 302, 308, 136 P. 57; Hermosa Beach, etc., Co. v. Law Credit Co., 175 Cal. 493, at 495, 166 P. 22; Neher v. Kauffman, 197 Cal. 674, at 681, 242 P. 713; Benedict v. Calkins, 19 Cal.App.2d 416, 65 P.2d 831.

The principal argument is that it is clear from the contract that defendants became liable only on default of Shamrock; that if the whole of the purchase price had accrued, there could be no default by Shamrock until a conveyance was offered to Shamrock and a demand made on Shamrock for the payment of the balance; that it was not necessary to offer a conveyance to defendants, as they had assigned their right to a conveyance; nor could Shamrock be placed in default by any such tender.

In reply plaintiff contends that it was not necessary for the plaintiff to allege and prove a tender of an assignment before commencing or as a condition to maintaining her suit against the defendants on their agreement. Plaintiff recognizes the general rule regarding tender of a deed by a seller as a concurrent condition of the right to maintain a suit against the buyer for the balance of the purchase price, citing Glock v. Howard & Wilson Colony Co., supra; 25 Cal.Jur. p. 659, sec. 146; but argues that the rule is not applicable here; that one of the accepted and well-established exceptions to the rule is that a tender is not required where it would be a useless act, citing 25 Cal.Jur. p. 661, sec. 147; Hoppin v. Munsey, 185 Cal. 678, 685, 198 P. 398; Dean v. Hawes, 21 Cal.App. 350, 131 P. 885; Sausalito Bay L. Co. v. Sausalito Imp. Co., supra; 66 C.J. p. 998, sec. 726; that, if tender to Shamrock was necessary, it was excused under the uncontradicted evidence in this case; that Shamrock was

admittedly unable to pay; that in fact it was in bankruptcy reorganization during all of the latter period of the contract; that it had neglected to pay, in spite of considerable correspondence asking it to do so; that there was no attempt on the part of defendants to show Shamrock's ability to pay; that if they had sincerely believed that Shamrock could have responded to a tender they, after demand was served on them for payment, could have brought an action against Shamrock compelling it to pay Mrs. Ingalls upon receiving a deed or assignment, citing Civ.Code, sec. 2846; Kreling v. Kreling, 118 Cal. 413, 50 P. 546; 23 Cal.Jur. p. 1072, sec. 59 et seq; Duerr v. Sloan, 50 Cal.App. 512, 518, 195 P. 475; 23 Cal.Jur. p. 1039, sec. 34; Gaffigan v. Lawton, 1 Cal.2d 722, 37 P.2d 79; Pacific M. & T. Co. v. Massachusetts Bonding, etc., Co., 192 Cal. 278, 285, 219 P. 972; Blackwood v. McCallum, 187 Cal. 655, 659, 203 P. 758; that the rights of the defendants were not affected by the lack of tender; that plaintiff's right to sue Bell and Mayes arose not as the result of enforcing the contract of purchase against Shamrock, but as a result of the new agreement with the former buyers; that the language of the contract itself obviates tender because it provides that upon payment by defendants, they shall have, by subrogation, the right, title and interest of plaintiff in said Shamrock contract, citing Civ.Code, secs. 2848–2849; 23 Cal.Jur. p. 1078, sec. 64; Ryland v. Commercial, etc., Bank, 127 Cal. 525, 59 P. 989; Schlitz v. Thomas, 61 Cal. App. 635, 638, 216 P. 51; that therefore the right to an assignment, either under the terms of the contract with plaintiff or under the general rules of subrogation applicable, did not arise in any event until the defendants actually paid Mrs. Ingalls; that their demand for an assignment as a concurrent condition could have been ignored by plaintiff, and therefore plaintiff was not compelled to make a tender to them of a deed before starting suit; that it is not a case of mutual and dependent covenants, citing 25 Cal.Jur. p. 598, sec. 108; and that the rule of Glock v. Howard & Wilson Colony Co., supra, does not apply where the covenants are not concurrent, citing Cook v. Enright, 134 Cal. 1, 66 P. 3; Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 P. 420; 25 Cal.Jur. p. 659, sec. 146; 66 C.J. p. 760, sec. 345; Security-First National Bank v. Chapman, Cal.App., 106 P.2d 431; and Loeb v. Christie, 6 Cal.2d 416, 57 P.2d 1303.

[2] The legislature in 1939 abolished all distinction between sureties and guarantors, sec. 2787, Civ.Code and a surety who has assumed liability for payment to a creditor is liable immediately upon the default of the principal and without demand or notice, sec. 2807, Civ.Code, and a surety may now, under section 2845 of the Civil Code, require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue (and which would lighten his burden); and if in such case the creditor neglects to do so the surety is exonerated to the extent to which he is thereby prejudiced. However, these sections were not effective until 1939, and are not applicable to plaintiff's rights acquired under its contract of guaranty dated March 6, 1933. Bennett v. Superior Court, 5 Cal.App.2d 13, 42 P.2d 80.

A proper determination of the questions here presented resolves itself into the legal interpretation to be given the instrument according to the law then in effect and upon which the cause of action was based, i.e., whether it was a contract of guaranty or of suretyship.

[3-7] A guaranty, as defined by section 2787 of the Civil Code, then in effect, was "a promise to answer for the debt, default, or miscarriage of another person", which in effect was an undertaking or promise of one person to take upon himself the fulfillment of the obligation of another, in case such other person defaults in the performance thereof (Lightstone v. Laurencel, 4 Cal. 277), and was a collateral undertaking which could not exist without a main or substantive liability to which it was collateral (Kilbride v. Moss, 113 Cal. 432, 45 P. 812, 54 Am.St.Rep. 361), and although the contract of guaranty was collateral to the contract of the principal debtor the two were distinct and independent. Cooke v. Mesmer, 164 Cal. 332, 128 P. 917. As long as the agreement established the intention of creating a contract of guaranty, no set words and form were required. Whether the promise was original or collateral was a question of fact for the jury, or in case the negotiations of the parties were incorporated into an unambiguous written contract, it was for the court to determine. Harris v. Frank, 81 Cal. 280, 22 P. 856; 6 Cal.Jur. sec. 193, p. 328, et seq.; 13 Cal.Jur. p. 87, sec. 3. From the standpoint of legal significance, there was a great distinction between contracts of

guaranty and of warranty. They were similar in that the purpose of both was to save one of the contracting parties from loss which the parties contemplated might happen, but a contract of warranty was a primary obligation, whereas a guaranty was collateral.

[8-11] Cases often occurred in which it was difficult to determine in which category a given contract belonged. There were, however, certain characteristics which distinguished the two relations. Both a guarantor and a surety were bound for another person, but a surety was usually bound with his principal by the same instrument executed at the same time and on the same consideration, whereas a guarantor was not. Treweek v. Howard, 105 Cal. 434, 39 P. 20. A guaranty always assumed the presence of a guarantor who was personally liable, so if there was no personal liability a contract of suretyship and not of guaranty resulted. Sather Banking Co. v. Briggs Co., 138 Cal. 724, 72 P. 352. One who by his pleadings admitted a contract to be one of guaranty could not later deny that fact and set up that his contract was one of suretyship. Adams v. Wallace, 119 Cal. 67, 51 P. 14. There was, prior to the amendment of Civil Code sections 2787 et seq., a marked difference between a contract of guaranty and one of indemnity. In a guaranty of payment the liability was fixed by the failure of the principal debtor to pay at maturity or at the time when payment was guaranteed. It was immaterial whether the debtor could or could not pay the debt. Cunningham v. Norton, 5 Cal.Unrep. 35, 40 P. 491; Adams v. Wallace, supra.

[12-18] In an indemnity against loss as the result of the nonpayment of a debt, or for other loss, no liability accrued until after, by the use of due and reasonable diligence, there had been a failure to collect the debt from the principal debtor or the one indemnified had actually suffered loss against which the contract protected him. Ohio Electric Car Co. v. Le Sage, 182 Cal. 450, 188 P. 982. In either case, however, remedies against the principal debtor must, of course, have been exhausted where the parties so provided in their contract. Bouche v. Louttit, 104 Cal. 230 37 P. 902; Cooke v. Mesmer, supra. Under section 2807 of the Civil Code then in effect, a guarantor of payment or of performance was liable to the guarantee immediately upon the default of the principal and without demand or notice. So there was no duty resting on the creditor to exhaust the remedies against the debtor, and mere delay or failure on the part of the creditor to proceed against the principal debtor did not exonerate the guarantor unless the contract of guaranty provided that such action must be taken. Civ. Code, sec. 2823; San Francisco T. Seminary v. Monterey, etc., Co., 179 Cal. 166, 175 P. 693; Cooke v. Mesmer, supra; 13 Cal.Jur. sec. 22, p. 110. A guarantor of an obligation is entitled to certain rights of subrogation as against the principal debtor, and may enforce any remedy which the creditor has against the principal debtor (Clark v. Chapman, 98 Cal. 110, 32 P. 812, 33 P. 750), and it is not a condition precedent to recovery upon a guaranty that the creditor assign all his rights against the debtor over to the guarantor, and where the guarantor pays the principal obligation he is entitled to reimbursement. Roush v. Kirkman, 42 Cal.App. 115, 183 P. 353. A guarantor had no right to compel the creditor to avail himself of the remedies against the debtor unless he paid the obligation, in which case he could have compelled the creditor to act by a proceeding in equity. Whiting v. Clark, 17 Cal. 407; 13 Cal.Jur. sec. 30, p. 122; W. H. Marston Co. v. Kochritz, 109 Cal.App. 331, 293 P. 120. An action against a guarantor must be brought specially upon the contract of guaranty itself. San Francisco T. Seminary v. Monterey, etc., Co., supra. The action so brought is not for the collection of the principal debt, as such, and is in fact independent of any action upon the principal obligation. Adams v. Wallace, supra. The complaint must allege the execution of the guaranty and that the defendant has not paid the obligation. Roberts v. Treadwell, 50 Cal. 520.

[19, 20] Amendments to pleadings in this class of actions are allowed in accordance with general rules. Segaloff v. Furman, 209 Cal. 301, 287 P. 92. All material allegations of the complaint, on a guaranty not denied by answer, are deemed admitted and are not put in issue, and all admissions in the answer are binding on the defendant. Adams v. Wallace, supra.

[21] Under these established principles of law, plaintiff's right to sue Bell and Mayes arose not as the result of enforcing the contract of purchase against Shamrock, but as the result of a new agreement of guaranty with them. If she had brought

suit against Shamrock, and Shamrock had been asked to pay, then the rule of tender perhaps would have been applicable. Ross v. McDougal, 31 Cal.App.2d 114, 87 P.2d 709.

Guided by the general rules then in effect, we must conclude that the instrument in question was (1) an independent collateral contract for the direct payment of money; (2) it possessed all the elements of a contract of guaranty; and (3) it was not a contract of suretyship.

The evidence and pleadings clearly established the fact that notice of default and demand for payment was given, and under the cited cases no tender of the assignment or exhaustion of remedies against the principal at that time was necessary. California Bank v. Kenoyer, 2 Cal.App.2d 367, 37 P.2d 836; Rice Securities Co. v. Daggs, 63 Cal.App. 273, 218 P. 484; Union Collection Co. v. Rogers, 18 Cal.App. 205, 122 P. 970; Birkhofer v. Krumm, 4 Cal.App.2d 43, 40 P.2d 553; Somers v. United States Fidelity & Guaranty Co., 191 Cal. 542, 217 P. 746; Bank of America v. Granger, 115 Cal.App. 210, 1 P.2d 479; Security-First National Bank v. Chapman, supra; Wilcoxson v. Stitt, 65 Cal. 596, 4 P. 629, 52 Am.Rep. 310; Loeb v. Christie, 6 Cal.2d 416, 57 P.2d 1303; Newton v. Hull, 90 Cal. 487, 27 P. 429.

[22-25] A jury trial was authorized under section 592 of the Code of Civil Procedure. Platt v. Havens, 119 Cal. 244, 51 P. 342. Defendants contend that it was error for the court to permit the reopening of plaintiff's case to prove demand. If this were error, it did not constitute sufficient grounds for granting a new trial, because during the presentation of proof of demand after the case was reopened, defendants' counsel stated: "I will not raise a question about the demand, anyway." It cannot now be urged that the trial court was justified in granting a new trial because it erred in admitting testimony to prove a point which counsel admitted. Union Collection Co. v. Rogers, supra. The amendment of plaintiff's complaint to allege that she was the owner of the six per cent interest and was now offering to "turn it over" upon payment, was surplusage and may be disregarded. It was made in accordance with the court's opinion that tender was necessary, and may be similarly regarded as any other allegation which is not necessary to a plaintiff's cause of action. Kidwell v. General Petroleum Corp., 212 Cal. 720, 300 P. 1, 76 A.L.R. 830.

It becomes immediately apparent from the record that the sole reason for the trial court being led into granting a new trial was that "it was not alleged that a tender had been made nor was it proved that a tender was made * * * (See Newton v. Hull, 90 Cal. 487, 27 P. 429.)" From the interpretation that must be given this instrument and for the reasons expressed, the cited case is not applicable and the court erroneously granted the motion for a new trial. The issue as presented to the jury was determined under proper instructions. Under the undisputed evidence the defendants were unquestionably liable. The amount claimed as due was undisputed. The judgment rendered on the verdict was proper and should be affirmed.

Therefore, the order granting the motion for new trial is reversed and the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



43 Cal.App.2d 351

EL CAMINO LAND CORPORATION v. BOARD OF SUP'RS OF TEHAMA COUNTY et al., (HILL et al., Interveners).

Civ. 6535.

District Court of Appeal, Third District, California.

March 6, 1941.

Hearing Denied May 1, 1941.

1. Mandamus ⇐1

The remedy of mandamus being of equitable nature, presupposing a wrong to be redressed and a right to be restored, principles of equity are frequently resorted to in determining whether the writ should issue.

2. Mandamus ⇐7

The issuance of writ of mandamus is not altogether a matter of right, but involves consideration of its effect in promoting justice, so that granting or refusal thereof lies, to considerable extent, within sound judicial

discretion of court to which application is made.

3. Mandamus ⇐15, 16(1), 143(2)

The court is not bound to allow writ of mandamus merely because applicant therefor shows a clear legal right, for which mandamus is appropriate remedy, though applicant would otherwise be without remedy, but may deny writ, even under such circumstances, if public would be injuriously affected by its issuance, if it would operate inequitably on defendant, be nugatory or unavailing, or injuriously affect third persons' rights, or if there has been laches in seeking remedy.

4. Mandamus ⇐174

In proceeding for writ of mandamus to compel county board of supervisors to assess all of such lands within irrigation district in amount sufficient to pay all district's outstanding matured bonds and coupons, facts found by Superior Court *held* sufficient to invoke its legal discretion in favor of denying the writ. Gen.Laws 1937, Act 3854, § 39b.

Appeal from Superior Court, Tehama County; C. A. Paulsen, Judge.

Proceeding by the El Camino Land Corporation for a writ of mandamus to compel the Board of Supervisors of Tehama County to assess lands within such district in amount sufficient to pay all of its outstanding matured bonds and coupons, in which Clarence G. Hill and others intervened as plaintiffs. From a judgment denying the writ, petitioner appeals.

Affirmed.

A. L. Garvey, of San Francisco, and Curtiss E. Wetter, of Red Bluff, for appellant.

Claire Engle, of Red Bluff, for respondent Board of Sup'rs.

A. L. Cowell, of Stockton, amicus curiae for respondent.

L. C. Smith, of Redding, for intervening plaintiffs and respondents.

TUTTLE, Justice.

This is an appeal from a judgment denying to petitioner and appellant herein a writ of mandamus.

Petitioner is the owner of $275,000 par value out of a total of $423,000 par value of bonds issued by El Camino Irrigation District. It seeks by mandamus to compel respondent Board of Supervisors of Tehama County, California, to cause to be prepared an assessment roll of all assessable lands within said district situated within said county, and to levy an assessment thereon in an amount sufficient to pay and retire all matured bonds and coupons of said district then outstanding, as provided by section 39b of Act 3854, General Laws 1937, commonly known as the California Irrigation District Act. Intervening plaintiffs and respondents are owners and in possession of land within the exterior boundaries of said district.

The court found facts which show that it was the legal duty of respondent Board to levy the assessment, but further found certain facts of an equitable nature which precluded the issuance of the writ. The latter findings are as follows:

"It is true that in taking into account said bond issue and the interest accumulations thereon and the obligations of the land in said District to the holders of said securities by reason of said indebtedness that the reasonable market value of the land which would be required to bear the burden of a one hundred twenty-eight and twenty-six/100 dollar ($128.26) assessment per acre is as follows: Twenty-five per cent (25%) of the land within said El Camino Irrigation District has a value of twenty-five dollars ($25.00) per acre; ten per cent (10%) of the land within said District has a value of sixty dollars ($60.00) per acre; and approximately sixty-five per cent (65%) of the land within said District has a value of twenty dollars ($20.00) per acre, there being a nominal area thereof immediately adjacent to the California State Highway, a portion of which has a probable value for industrial purposes.

"It is true that there are seven thousand five hundred forty-six (7,546) acres of land situated within the exterior boundaries of the El Camino Irrigation District and that said District has acquired and is now the owner of all of said land except two thousand sixty-two and forty-eight/100 (2,062.48) acres thereof, and that the assessment sought to be levied by petitioner herein would require a levy on each acre of land left in private ownership and not held by the District in the sum of one hundred twenty-eight and twenty-six/100 dollars ($128.26).

"It is true that the revenues derived from the operation of the lands within said El Camino Irrigation District are wholly insufficient to pay said sum of one hundred twenty-eight and twenty-six/100 dollars ($128.-

26) per acre and that no part or portion of the lands within said District is able to bear the burden of such an assessment; and that a levy of one hundred twenty-eight and twenty-six/100 dollars ($128.26) per acre as requested and demanded by petitioner herein would yield no funds for the payment of bond interest and bond principal but would throw the affairs of said District into a more complicated state of chaos and confusion and would be fatal to the landholders in said District and said landholders owning lands would lose title thereto for non-payment of assessments without benefit to the bondholders or holders of matured interest coupons.

"It is true that it is not within the ability of the lands within the said District, the title to which is now vested in private ownership, to pay an assessment in excess of those heretofore levied by the Board of Directors of the El Camino Irrigation District and that to levy a rate in excess of those heretofore levied by the Board of Directors of the El Camino Irrigation District would be detrimental to the bondholders and landholders alike and would tend to and would destroy to a marked degree the possibility of securing revenue for the bondholders of the El Camino Irrigation District.

"It is true that to levy the assessment prayed for by petitioner would create a burden upon the lands situated within the El Camino Irrigation District so great and excessive that it would be neither practical nor possible for the landholders therein to pay the same and would yield no revenue to said District for the purpose of paying bond principal or bond interest and destroy its present meager ability to pay the cost of maintenance and operation of said District and thereby promote a collapse of the powers of said District to raise any sum by assessments upon the lands still remaining in private ownership causing said District to cease to function for lack of sufficient funds, destroying the security of creditors of said District and confiscating the equities of the landholders therein; and would result in gross inequities and serious damage; that the writ prayed for, if granted, would lead to chaos and confusion and would accomplish no useful purpose to the petitioner but only tend to destroy the District's ability to yield revenue to petitioner and lead to inequities detrimental to all parties and result in a public mischief and destroy the spirit of equity and said District could not discharge its trusts.

"It is true that at the time of the filing of petitioner's petition herein and for a long time prior thereto the El Camino Irrigation District, in fact, was insolvent and/or unable to pay its obligations in full as they matured and that it has no funds or source from which to obtain funds with which to pay its obligations,—past, present or future,—in full, or in an amount comparable to the obligations due.

"It is true that an assessment as required by petitioner would exceed the actual reasonable value of the lands upon which it would be levied from two to five times; and that it would be impractical and unreasonable to expect any material return therefrom, and the court finds it would result in no advantage to petitioner but would result only in disadvantages and impairment of equities of petitioner and intervenors and the El Camino Irrigation District."

It is not contended by appellant that the findings are not supported by the evidence. No attempt is made by it to show wherein such findings lack evidentiary support. Appellant contends, in effect, that the findings do not support the judgment; particularly, that the findings quoted are not a defense to proceeding, and that, having established a bare legal right to the writ, it was the duty of the trial court to grant the relief sought.

[1] "The remedy of mandamus being of an equitable nature, presupposing a wrong to be redressed and a right to be restored, principles of equity are frequently resorted to in determining whether the writ should issue." 16 Cal.Jur., p. 769, sec. 8.

[2] "The issuance of the writ is not altogether a matter of right, but involves consideration of its effect in promoting justice. The granting or refusing of the writ lies, therefore, to a considerable extent, within the sound judicial discretion of the court where the application is made. *Cases may therefore arise where the applicant for relief has an undoubted right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief.*" 16 Cal.Jur. p. 768, sec. 7.

[3] In 38 C.J., pages 549, 550, it is said: "Nevertheless, the court in the exercise of its discretion, may and should take into consideration a wide variety of circumstances in determining whether the writ should issue. It is elementary that the court is not

bound to allow the writ merely because the applicant shows a clear legal right for which mandamus would be an appropriate remedy, even though without mandamus the applicant for the writ would be without remedy. Even under these circumstances the court may deny the writ where by its issuance the public would be injuriously affected, or where it would operate inequitably upon defendant, or where it would be nugatory or unavailing, or would injuriously affect the rights of third persons, or where there has been laches in seeking the remedy."

In 18 R.C.L., pages 138, 139, section 53, it is stated: "This discretion will not be exercised in favor of applicants unless some just purpose may be answered by the writ, and it would be wholly improper for the court to lend its aid to the effectuation of a palpable injustice, or to grant the writ where the relator does not come with clean hands. . . . Under the guise of enforcing a public right the writ will not issue if in fact it will operate to the detriment rather than to the benefit of the general public, or cause great disorder and confusion in the fiscal affairs and duties of the officers of a public or quasi public corporation, or will be attended with manifest hardship and difficulties."

In the case of Clough v. Baber, 38 Cal. App.2d 50, 100 P.2d 519, 520, this court refused mandamus in a case where the legal duty of the officers of an irrigation district was admitted and conceded, upon the ground that the issuance of the writ would result in an injustice. We there said: "Mandamus, however, is an extraordinary remedy which is equitable in its nature. There is no absolute right to the writ. The necessity of issuing the writ must be clearly established. It will not issue in doubtful cases. It will not issue if the writ would result in grievous public or private wrong in conflict with the spirit of the statute, even though it be in compliance with the technical letter of the law. Duncan Townsite Co. v. Lane, 245 U.S. 308, 38 S.Ct. 99, 62 L.Ed. 309; Hutchison v. Reclamation Dist. [No. 1619], supra [81 Cal.App. 427, 254 P. 606]; High's Extraordinary Legal Remedies, 3rd Ed., [p.] 12 sec. 9; 16 Cal.Jur. 776, secs. 13, 14."

[4] We are of the opinion that under the law, as we have stated it, the facts found by the court were sufficient to invoke its legal discretion in favor of denying the writ. It is unnecessary to recapitulate or further comment upon such facts. They speak for themselves.

Other questions are raised, but we do not deem it necessary to discuss them.

No abuse of discretion appearing in the refusal of the writ, the judgment should be, and it is, hereby affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



43 Cal.App.2d 402

EMERY v. PACIFIC TELEPHONE & TELEGRAPH CO.

Civ. 6408.

District Court of Appeal, Third District, California.

March 10, 1941.

Hearing Denied May 8, 1941.

1. Electricity ⇐19(4)

In action by lineman employed by city electrical maintenance department against a telephone company for injuries sustained when lineman came in contact with a power line while working on pole which carried company's wires and city's electric power line, where company's answer contained denial that company owned and maintained pole jointly with city, a contract between city and company respecting maintenance of poles was admissible to answer denial and to prove joint ownership of pole and to establish relationship between lineman and company at time of accident.

2. Electricity ⇐15(2)

Where pole, upon which lineman employed by city electrical maintenance department was working when injured, was owned jointly by city and a telephone company, and under terms of contract between city and company respecting maintenance of poles each contracting party was bound to exercise due care for safety of employees of the other, an "invitor and invitee relationship" existed between lineman and company at time of accident, and hence company was bound to exercise ordinary care for lineman's safety while working upon pole.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitor and Invitee Relationship".

3. Witnesses ⇐374(1)

In action by lineman employed by city electrical maintenance department against a telephone company for injuries sustained when lineman came in contact with a power line while working on pole which carried company's wires and city's electric power line, where city employees were called as witnesses by company, a contract between company and city respecting maintenance of poles was admissible to prove prejudice by such witnesses, especially where it appeared from contract that city might be obligated to pay part of judgment obtained by lineman.

4. Trial ⇐48

If evidence is admissible for any purpose, it must be received even though it may be improper for another purpose.

5. Trial ⇐255(4)

Failure to request trial court to limit, as evidence for certain purposes only, a contract which was admitted in evidence, was a "waiver" of objection that contract should have been admitted in evidence only for certain purposes.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

6. Appeal and error ⇐204(1)

Complaint as to admission of evidence could not be made for first time on appeal.

7. Electricity ⇐19(5)

In action by lineman employed in city electrical maintenance department against a telephone company for injuries sustained when lineman came in contact with a power line while working on pole which carried company's wires and city's electric power line, where an invitor and invitee relationship existed between lineman and company at time of accident, evidence justified judgment for lineman on ground that pole was not reasonably safe for purpose for which intended.

8. Electricity ⇐18(3)

A lineman with one year's experience, who was engaged in work on a pole carrying city's electric power line and wires of a telephone company, was bound to choose safest and most efficient method for accomplishing work.

9. Negligence ⇐136(26)

Generally, existence or absence of contributory negligence is for jury.

10. Negligence ⇐136(9)

If but one conclusion can reasonably be reached from evidence respecting contributory negligence, question of contributory negligence is a "question of law" for trial court, but if one sensible and impartial person might decide that plaintiff exercised ordinary care, and another equally sensible and impartial person might decide that plaintiff did not exercise such care, question of contributory negligence must be left to jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

11. Master and servant ⇐231(1)

An employee had a right to assume that employer had provided employee with a reasonably safe place to work.

12. Master and servant ⇐231(1)

A servant has a right to rely upon master's inquiry respecting condition of things with which servant must work, and servant may assume that such things are fit and suitable for use which he is directed to make of them.

13. Master and servant ⇐217(7)

An employee is not bound to use any degree of care to discover defects in things with which employee must work, and employee will be held to have assumed risk of defects only when he knew thereof.

14. Master and servant ⇐234(4)
Negligence ⇐66(1)

An employee will be held to have known of defects in things with which employee must work when defects are so obvious that employee must have known thereof, or refused to open his eyes and see, or when employee was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect, and such principle is applicable to an invitee.

15. Electricity ⇐19(13)

In action by lineman employed in city electrical maintenance department against a telephone company for injuries sustained when lineman came in contact with a power line while working on pole carrying company's wires, an instruction that, if injuries were proximately caused by latent defects in a defective pole, lineman was not, in absence of knowledge as to defects, bound to conduct an investigation of his own as to existence of defects, was not objectionable as prohibiting jury from finding that lineman was contributorily negligent.

16. Appeal and error ⇐1064(1)

An instruction with respect to contributory negligence, that the law requires that plaintiff exercise for his own safety that degree of care which an ordinarily prudent person, with plaintiff's knowledge and experience, would have exercised under similar circumstances, was not prejudicial under evidence to defendant as sanctioning a lower standard of care by one than by another with more knowledge and experience.

17. Appeal and error ⇐217

Appellant's counsel, who claimed to have seen allegedly prejudicial acts by jurors, "waived" objection when he did not call matter to trial court's attention or ask that jury be instructed to disregard improperly obtained information.

See Words and Phrases, Permanent Edition, for all other definitions of "Waived".

Appeal from Superior Court, San Joaquin County; Andrew R. Schottky, Judge.

Action by Edwin D. Emery against the Pacific Telephone & Telegraph Company for personal injuries. From a judgment for plaintiff, defendant appeals.

Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, and Neumiller & Ditz, of Stockton, for appellant.

Gumpert & Mazzera, of Stockton, for respondent.

PER CURIAM.

This is an appeal by defendant Pacific Telephone and Telegraph Company from a judgment in a personal injury action in favor of plaintiff.

On the day of the injury, October 29, 1937, appellant, for the purpose of carrying on its business, maintained cables, wires and poles in the city of Lodi. The city of Lodi, a municipal corporation, was then engaged in the business of distributing electric power to consumers in its limits, and for that purpose owned, used and maintained power lines, poles and electrical equipment.

For the joint ownership of certain poles in the city of Lodi, appellant and the city had, in 1919, entered into a written agreement. In 1923 appellant, by purchase, became the owner of a one-half interest in certain poles in the city of Lodi, including the pole here in question. This pole was one of a string of several such poles and supported the electric power lines of the city and the communication lines of appellant.

The power line of the city on this string consisted of four copper wires, three of which were charged with 2300 volts, the fourth being a ground wire carrying no electric current. These lines were carried on wooden cross-arms near the top of the poles, while appellant's wires were attached to cross-arms a few feet above the middle of the pole and about 20 feet from the ground.

On the day preceding this accident the city, in order to install a new ground wire and to take up the sag in the power wires, had untied its wires and left the wires lying on the top of the cross-arms.

On the day in question employees of the city electrical department, including plaintiff, were sent to complete this work and to "tie in" or secure these wires to the insulators. In the regular progress of this work plaintiff reached the pole in question. This pole was a 40-foot western cedar 34 feet above the surface of the ground and six feet below the ground, imbedded in concrete. The cross-arm supporting the power wires was within six inches of the top. A few feet below this cross-arm was a street light, supported by an iron bracket, and a third arm, known as a buck arm. Below these attachments was the cross-arm carrying the lines of appellant.

Plaintiff was equipped with spurs or hooks fastened to each foot to assist in climbing the poles. He also had about his waist a leather safety belt, leather and rubber gloves, and tools and parts necessary in his work. When he reached the top of the pole he adjusted his safety belt, donned his rubber gloves and proceeded to tie in the most northerly wire by reaching over the nearer wire. This is known to linemen as "working from above" to distinguish that method from one where the lineman reaches above and places and attaches the wire.

Plaintiff testified that in shifting his weight in order to reach or lift the wire, the pole began to sway, causing his weight to shift, bringing an additional weight onto his hooks, which gave way. As he started to slip he attempted to strike his hooks into the pole, get back into a vertical position and to throw his arms above his head in an

effort to miss the wires if he should fall. That is all he remembers, but apparently he came in contact with one of the power wires, causing him to lose consciousness and inflicting the injuries here complained of.

Appellant urges upon this appeal the court erred in admitting in evidence the contract between the city and appellant, and particularly Paragraph D of Article Third in that the definition of defective poles therein did not establish a standard for maintenance or replacement, but was applicable only to poles in which one of the contracting parties might desire to acquire a part interest.

It is also contended plaintiff was guilty of contributory negligence, that the court erred in its instructions to the jury, and that the jury were guilty of prejudicial misconduct.

It must be conceded that the agreement was not attempting to fix a standard of safety—the purpose was to fix a basis for the acceptance or replacement of poles in place at the time the joint ownership agreement went into effect.

Article First of the agreement applies to the joint maintenance of the poles. It provides that the poles shall be constructed, erected and maintained in accordance with "specifications for joint use of poles by Telephone, Electric Light and Power Companies" a copy of which is incorporated in the contract as an exhibit. Paragraph B of Article First provides that if at any time repairs, reconstructions, renewals or removal of any pole or poles owned jointly by the parties shall be deemed necessary, the expense of such repairs or removal shall be jointly borne, and if the parties cannot agree as to the necessity for such repairs, etc., a provision is made for arbitration.

Article Third is in part as follows: "The purchase or exchange of joint ownership in existing poles or pole lines, which may be agreed upon between the parties hereto, shall be arranged on the following basis: * * *"

Paragraph D defines defective poles and provides they shall be replaced at joint expense. Defective poles are defined as follows:

"One. Less than the requisite circumference of sound wood at the ground line.

"Two. More than the allowable size of hollow heart.

"Three. Badly rotted poles above ground, woodpecker holes, cracks or other defects."

This paragraph also contains a schedule for minimum circumference of sound wood, which specifies for a 40-foot pole, 44 inches at the ground, and for a 40-foot pole, a shell of sound wood of at least three inches thick.

This contract was offered in evidence and read in full to the jury by respondent. An objection was made first as to authority of the officials of the city to bind the municipality. That objection was overruled and no point is made of that ruling. An objection to its admissibility was then urged that it was irrelevant to any issue in the case. That objection was overruled and that ruling is now under attack. It was proper evidence for certain purposes at least.

[1, 2] Appellant in its answer denied that it jointly, with the city of Lodi, owned and maintained the pole in question. The agreement was properly admitted to answer that denial. And not only was the contract admissible to prove joint ownership but it was also competent to establish the relationship between plaintiff and defendant at the time of the accident. Under its terms each of the contracting parties was bound to exercise due care for the safety and protection of the employees of the other, and at the time of the accident the relation of invitor and invitee existed between plaintiff and defendant, and therefore defendant was legally bound to exercise ordinary and reasonable care for the safety of plaintiff as its invitee while working upon the pole jointly owned by it and the city of Lodi. Hanna v. Central States Electric Co. et al., 210 Iowa 864, 232 N.W. 421.

[3] Also, inasmuch as certain officials and employees of the city of Lodi were called as witnesses on behalf of defendant, the contract was properly admitted to prove bias or prejudice, for it appeared from the contract that the city might be obligated to pay one-half of any judgment obtained by plaintiff. The only way this bias could be shown was by the agreement itself.

[4] As often said, if evidence is admissible for any purpose it must be received, even though it may be improper for another purpose. Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d

850; Smith v. Dean, 25 Cal.App.2d 671, 78 P.2d 448.

[5, 6] No specific objection to the introduction of this contract was made nor a request to the court to limit it as evidence for a particular purpose only, and failure to so request the court to limit its effect must be deemed a waiver of the objection, and complaint cannot be made for the first time on appeal. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371.

The evidence discloses that plaintiff was an employee of the city of Lodi, and assigned as a lineman in its electrical maintenance department, and that he was engaged in his employment when he climbed the pole in question. The testimony is uncontradicted that while engaged in tying a wire the pole abnormally swayed, throwing him off balance, causing his climbing hook to slip, whereby he fell, and came in contact with a high voltage wire. It is also in evidence the pole was rotted at the base and lacked sufficient sound wood to support it. The conclusion of the jury was that if defendant and the city of Lodi had exercised ordinary care and supervision to maintain this pole in a safe condition the accident would not have happened.

[7] Whether or not the provisions in the contract were intended as a standard of soundness as to the poles in regard to their purchase only or whether the two contracting parties had in mind the safety of their employees is not of initial importance here. We have been cited to no statement of counsel for plaintiff wherein he argued that a violation of the standards set forth in the agreement constituted negligence as to plaintiff. It is not claimed that the agreement was admissible to show a violation of a duty to plaintiff and thereby to establish negligence on the part of defendant. At most it showed a standard of defectiveness when it came to acquiring title in the poles. The jury could, and as far as the record discloses, came to their conclusions upon other and sufficient evidence that the pole was not reasonably safe for the purpose it was intended.

[8-10] It is also urged that plaintiff was guilty of contributory negligence in that he selected a dangerous and hazardous method to do his work. It must be conceded that there was no safe way to do this hazardous work, surrounded by high voltage wires on a wet and foggy day 30 feet above the street. He was a lineman of at least one year's experience and it devolved upon him to choose the safest and most efficient method to accomplish his task. The evidence is not that he came in contact with a charged wire by reason of his work or because of thoughtlessness. It does not appear that a rubber "snake", a heavy rubber tube which could be placed over hot wires with which he might come in contact,—would have saved him. His injury was caused by his spur or hook slipping because of the swaying pole, and no criticism is made of his use or adjustment of his hooks. The jury and the trial court heard all the witnesses who told how the work should or should not have been done, and the jury found the plaintiff was not guilty of contributory negligence, which finding was accepted as true by the court upon the motion for a new trial.

"* * * That the existence or absence of contributory negligence is in general a matter primarily for the jury there can be no doubt. * * * 'If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury.'"

That statement is from the opinion of the Supreme Court in the case of Jacobson v. Oakland Meat & Packing Co., 161 Cal. 425, 119 P. 653, 654, Ann.Cas.1913B, 1194.

Appellant complains of two instructions. The court gave the following: "If you believe that plaintiff Emery's injuries, if any, were solely and proximately caused by any latent defects in an unsound and defective pole, if it was such a pole, and if it was jointly owned, used and maintained by the City of Lodi, and the Pacific Telephone and Telegraph Company, in the absence of any knowledge on the part of Emery as to such latent defect, if any, or of any facts which would in the exercise of ordinary care put him upon inquiry, then I instruct you that the law did not require Emery to conduct an investigation on his own account as to the existence of latent defects, if any, in the pole which was provided for the doing of his assigned work."

Appellant claims that under this instruction the jury were prohibited from finding respondent contributorily negligent even though they believed from the evidence that an ordinarily prudent person under the

same circumstances would have inspected and tested the pole before climbing it.

[11] The court was here discussing latent defects, of which plaintiff had no knowledge or knew of no fact that would put him upon inquiry. Plaintiff, as an employee of the city of Lodi had a right to assume his employer had provided him a reasonably safe place to work. He also knew the city maintained an inspection department and made regular inspections of its poles and equipment.

In Price v. Northern Electric Ry. Co., 168 Cal. 173, 142 P. 91, 94, it is said: "In the absence of actual knowledge to the contrary, or circumstances under which he would be held to be required to have such knowledge, he had the right to assume, when directed to assist in removing the scaffolding, that the bent had been so braced that it would not fall when the scaffolding was removed."

[12-14] In Starr v. Kreuzberger, 129 Cal. 123, 61 P. 787, 789, 79 Am.St.Rep. 92, this rule of law is stated: " 'The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire, and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them.' Mr. Justice Temple, in the Silveira Case [Silveira v. Iversen, 128 Cal. 187, 60 P. 687], said: 'The employe is not required to use any degree of care or diligence to discover defects. He will be held to have assumed the risk only when he knew, and will be held to have known when the defect was so obvious that he must have known, or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect.' "

[15] This principle is as applicable to an invitee, as was plaintiff, as to that of an employee.

Another instruction is urged by appellant as erroneous. It was dealing with the degree of care required of respondent as affecting the allegation of contributory negligence. The court instructed the jury that the law required of plaintiff that he exercise for his own safety that degree of care which an ordinarily prudent person, with his knowledge and experience would have exercised under similar circumstances.

In Giraudi v. Electric Improvement Co., 107 Cal. 120, 40 P. 108, 111, 28 L.R.A. 596, 48 Am.St.Rep. 114, the court, in considering the refusal to give an instruction with reference to contributory negligence, said: "The instruction asked had reference only to the alleged contributory negligence of plaintiff. As to that it has been said: 'As there are different classes in society, with widely different degrees of intelligence, the plaintiff was not required to exercise more care than is usual under similar circumstances among careful and prudent persons of the class to which he belongs.' " Shearman and Redfield on Negligence, sec. 87.

[16] Plaintiff testified he had experience in handling high voltage wires and fully appreciated their dangerous qualities, and that he should take every precaution to protect himself. Even if it might be argued that in some instances the instruction would sanction a lower standard of care by one than by another with more knowledge and experience, in the instant case that condition from the evidence did not exist and appellant could not have been prejudiced by the instruction even if subject to criticism.

Finally it is claimed certain of the jury were guilty of prejudicial misconduct. On next to the last day of the trial the jury were taken to view the scene of the accident and the pole. They were accompanied by the judge and respective counsel. While at the scene, one of the jurors, in the presence of counsel, made certain measurements of the pole by means of a small caliper. Another juror inserted his hand in a cavity in the side of the pole.

[17] Counsel for appellant, who assert they saw these acts by the particular jurors, made no objection, did not call the matter to the attention of the court, nor ask any instruction to the jury to disregard such information so obtained. By their failure to act they have waived any objection they might have. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109.

After carefully reading the rather lengthy record and studying the authorities by respective counsel we can find no errors of sufficient seriousness to justify a reversal. The judgment is affirmed.

FAGEOL TRUCK & COACH CO. v. PACIFIC INDEMNITY CO. et al. *

Civ. 10969.

District Court of Appeal, First District, Division 1, California.

March 5, 1941.

Hearing Granted May 1, 1941.

1. Insurance ⇐580(1)

In the absence of agreement between vendor and vendee with respect to insurance, neither the vendor nor the vendee has any interest in the insurance procured by the other.

2. Insurance ⇐124

An "insurance policy" is not insurance of a specific thing without regard to ownership, but is a special agreement of indemnity with a person insuring against such loss or damage as the insured may sustain, and therefore in the absence of agreement the insurance is not a substitute for the property, and a policy of insurance does not pass with title to property.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurance Policy".

3. Insurance ⇐581

Under an "open" or "loss payable" clause as distinguished from a "union" or "standard" clause, the party named in such clause does not become an "insured" under the policy, but is merely an appointee of the fund, and the policy is regarded merely as additional security for the payment of the obligation outstanding between the insured and the party named in loss payable clause.

See Words and Phrases, Permanent Edition, for all other definitions of "Insured".

4. Insurance ⇐582

Where obligee, having the option, upon breach of contract of terminating the contract, by repossessing the property, or of suing upon the debt, elected to terminate the contract, the obligee not only lost his right to sue for the debt, but by terminating the contract also lost his right to resort to the collateral given as additional security for the payment of the debt, such as rights under "loss payable" rider.

5. Insurance ⇐582

Where buyer of truck, who was not required by conditional sales contract to carry collision or upset insurance, carried such insurance for his own protection and seller's only interest therein was such as accrued under "loss payable" rider, seller, exercising option to terminate sales contract and repossessing truck before commencing action on policy, thereby extinguished his right to recover on insurance policy, since under the policy seller was not an "insured", but as to him the insurance was merely "additional security" for payment of purchase price.

See Words and Phrases, Permanent Edition, for all other definitions of "Additional Security".

6. Insurance ⇐582

Under a simple "loss payable" rider attached to insurance policy, the creditor named therein is not deemed to be the "insured" under the policy, but becomes appointee of the fund and is entitled to the proceeds of the policy only as his interest may appear.

7. Insurance ⇐581, 582

Notwithstanding conditional sales contract does not create a lien as security for payment of a debt and title remains in the seller or passes to the buyer accordingly as conditions of sales contract are broken or fulfilled, the doctrine that insurance proceeds payable under a simple "loss payable" rider attached to policy are merely "additional security" for payment of the debt applies whether the transaction is in the form of a mortgage or conditional sale, so that seller's right to recover on policy depends upon continuance of his right under contract to sue for the purchase price.

8. Sales ⇐477(5)

Extension of time for the payment of an installment of purchase price due under conditional sales contract did not extend time for payment of another installment subsequently to become due, so as to render unlawful the seller's repossession of property upon default in payment of second installment.

9. Insurance ⇐504

Where seller by repossessing truck, sold under conditional sales contract, had lost right to recover on collision insurance policy, in which his only interest accrued under simple "loss payable" rider, seller's right to recover under "single interest collision coverage endorsement" attached to policy issued by different company, and which named seller as insured, was not barred by

* Subsequent opinion 117 P.2d 661.

policy bearing loss payable rider, notwithstanding provision of "single interest endorsement" that it constituted "excess insurance" and requiring that "specific insurance" in the name of or for benefit of insured must be first exhausted before resort could be had to the "excess insurance" policy.

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Action by the Fageol Truck & Coach Company against the Pacific Indemnity Company and Detroit Fire and Marine Insurance Company to recover a collision loss under two policies of insurance issued respectively by the defendants and covering a truck sold by plaintiff under a conditional sales contract to third person. From a judgment for plaintiff against the defendants separately for the full amount of the loss, the Detroit Fire and Marine Insurance Company appeals.

Judgment reversed and remanded, with directions.

White, Wakefield, Leighton & White, Dunn, White & Aiken, and Carlos G. White, all of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

KNIGHT, Justice.

The plaintiff, Fageol Truck & Coach Co., brought this action to recover a collision loss claimed to be due under two policies of insurance issued respectively by the defendants Pacific Indemnity Company and Detroit Fire and Marine Insurance Company, covering a truck sold by plaintiff under a conditional sales contract to D. M. Thomas, doing business under the name of Empire System. Plaintiff was given judgment against each defendant, separately, for $3,146.81, the full amount of the loss; but the judgment against Pacific Indemnity Company was conditioned that no part thereof was collectible until plaintiff had satisfactorily established that it was unable to satisfy its judgment against Detroit Fire and Marine Insurance Company. The defendants took separate appeals, which are presented on separate records. However, the main legal problems involved in each appeal are interrelated and arise out of the same facts.

The conditional sales contract was executed on November 28, 1932, and the truck was delivered during the latter part of the following month. Both transactions took place at Fageol's branch plant in Seattle. The purchase price was $9,871.76 and a $2,000 down payment was made prior to delivery. An additional payment of $500 fell due on December 21, 1932, and the balance was divided into eighteen equal installment payments of $410 each. The first fell due on January 10, 1933, and the others monthly thereafter, except that no payments were required to be made during the months of February and March, 1933. The contract provided that title to the truck was reserved in the seller until the purchase price was fully paid, and the seller was given the right of repossession in case of default in any of the payments. It also provided that the purchaser should carry insurance against specific risks, such as fire and theft, etc. (collision and upset were omitted); that the amount of insurance should not be less than the unpaid balance of the purchase price, and that the insurance should be carried with a company satisfactory to the seller, with loss, if any, payable to the seller or the purchaser or both, as their interests might appear.

The Pacific Indemnity Company was Fageol's regular insurer, and on the day of the execution of the sales contract, Pacific, at Fageol's request, issued its policy naming Thomas as the insured, with loss payable to Thomas and Fageol as their interests might appear. However, that policy insured only against such risks as fire and theft; consequently an endorsement was attached thereto designated as "Single Interest Collision Coverage Endorsement", or "VSI", insuring Fageol alone against the perils of collision or upset. Thomas was not protected by said endorsement, Fageol alone being named therein as the assured, and the loss if any made payable to Fageol. The endorsement expressly provided that the insurance should be considered as "excess insurance" and that in case any "specific" insurance existed in the name of or for the benefit of the assured, the insurance provided for by the endorsement should not apply or contribute to the loss until such specific insurance should have been exhausted. Furthermore it provided that the loss occasioned by collision or upset was payable only if at the time of the collision or upset the truck was in the possession of the purchaser, the purchaser had defaulted in payments thereon, and the assured had repossessed the truck.

Thomas was aware that he was not protected by the "VSI" endorsement or otherwise under the Pacific policy against the risks of collision or upset; consequently he sought through his brokers in Seattle to obtain a policy giving him coverage against those particular risks; but he was advised that he could secure the same only by taking out a combination policy covering also loss by fire and theft; and on December 20, 1932, the Detroit company issued and delivered to him such a policy, naming him as the assured. That part of the policy pertaining to loss by collision or upset was of a type known as "$250 deductible", that is, it provided that in the event of loss the insurer would pay only that part in excess of $250. It also provided that no recovery should be had under the policy "if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected". Annexed to the policy by way of an endorsement was a "loss payable clause" which read: "Loss, if any, subject to all the terms and conditions of this policy, is payable to Fageol Truck & Coach Company;" and the policy itself contained provisions which read: "Name of Assured. Don M. Thomas d/b/as Empire System * * * loss, if any, payable, as interest may appear, to Assured and (See Endorsements Attached)."

Shortly after the issuance of the Detroit policy, Fageol's Seattle office strongly advised the main office in Oakland to cancel its policy with Pacific and accept in lieu thereof the Detroit policy; but the main office refused so to do; and on January 18, 1933, the truck was damaged in collision.

At the time of the collision the truck was in the possession of the purchaser en route from Spokane to Seattle, and at that time also the purchaser was in default in one of his payments under the sales contract. A thirty-day extension had been granted him on the $500 payment, but he had failed to meet the January 10th installment of $410. On the day the collision happened Thomas requested Fageol to have the truck brought in to its Seattle plant and repaired, but he was advised to get in touch with his insurance company, which he did, and as a result a representative of the Detroit company requested Fageol to bring in the truck, and furnish Detroit with an estimate of the repair costs. Such estimate was submitted on January 25, 1933, and was approved by a Detroit representative, and on January 27, 1933, Fageol started to rebuild the truck. Meanwhile correspondence continued between Fageol's Seattle office and the main office in Oakland in an effort to induce the main office to cancel its Pacific policy and accept in lieu thereof the Detroit policy, which the main office still declined to do. Apparently one of the reasons for such refusal was because of the existence of the $250 deductible clause in the Detroit policy, and the fact that there was a premium due thereon of $243.10. As a result of the discussion which had arisen over the matter of insurance, Fageol on January 31, 1933, through its main office, ordered the repair work stopped. Also at the same time it indicated to its Seattle branch that it intended to repossess the truck; and on February 20, 1933, it exercised its right in this behalf by serving notice on Thomas that because of his default in making the January 10th payment his interest in said truck and the conditional sales contract was terminated. Pacific was notified accordingly.

L. A. Lundstrom, president and manager of Fageol, maintained his offices at the main plant in Oakland, and all of the transactions and correspondence relating to the matter of the insurance were carried on with him. On March 6, 1933, which as will be noted was subsequent to the repossession of the truck, a representative of Pacific called on Lundstrom and after some preliminary discussion relating to the confusion about the insurance stated in substance that in order that the repair work might proceed Pacific was willing to assume the payment of the premium of $243.10 to Detroit, and, also to pay Fageol the $250 deductible under the Detroit policy, adding that his company would handle the matter with Detroit. Lundstrom replied that if the two companies "got together" it was agreeable to him, but that he wanted it definitely understood that he was "going to look to the Pacific Indemnity Company for full recovery" under the policy which it had issued to Fageol. The truth of the matter was that two days prior to this conference and on March 4, 1933, the Seattle representative of Pacific had furnished Thomas with the necessary money to pay the premium on the Detroit policy, and on the following day, March 5th, Thomas paid the same in full to Detroit. In connection with this transaction the evidence shows that De-

troit had threatened to cancel its policy as of March 4, 1933, unless the premium was paid, and therefore Pacific gave Thomas the money to pay the same, pursuant to an understanding with Thomas that the Detroit policy should shortly thereafter be cancelled by him and that the returned unearned premium should be repaid to Pacific. Shortly after the conference with Lundstrom on March 6th the rebuilding of the truck was resumed, and at Thomas' request he was furnished an estimate of the costs of the repair job so that he could file proof of loss with Detroit. This he did on March 14, 1933.

In said proof of loss Thomas made no mention of the existence of the Pacific policy; but about that time a Detroit adjuster in checking the repair bill heard that there was other insurance on the truck, and the matter was then referred to Detroit's attorney. After some difficulty he learned of the existence of Pacific's policy, but was informed that Pacific would contribute nothing toward the payment of the loss. Said attorney also learned from Fageol's representative that a letter had been written by someone connected with Fageol terminating the Thomas contract, but that there was a question about the authority of the Fageol employee to write the letter; and the attorney was given to understand that plans were being worked out whereby Thomas would be allowed to retain the truck. In fact neither said attorney nor Detroit knew that Fageol had repossessed the truck until long thereafter; and in the absence of such knowledge said attorney proceeded to obtain a settlement of the loss. To that end and in June, 1933, he obtained drafts for the payment of the loss to be delivered to Thomas and Fageol; and he prepared a form of receipt for them to sign, which he forwarded to them for that purpose. Some several months elapsed, but the receipts were never signed or returned. Meanwhile, in May, 1933, Fageol sold the rebuilt truck to a third party; and on July 14, 1933, Thomas surrendered his policy to Detroit for cancellation and Detroit returned the unearned premium thereon. Several months afterwards the present action was filed.

From the foregoing it is apparent that the real controversy here is between the two insurance companies, that is as to which of the two is liable to Fageol for the payment of the loss it sustained as the result of the collision; and while the determination of that question would seem to be of little concern to Fageol, it has taken the definite position on these appeals that Detroit is primarily liable for the full amount of the loss, and that Pacific's liability is merely secondary, and that therefore the judgment should be affirmed in the form in which it was rendered. We are unable to sustain this view.

The vital issue upon which the decision in the case turns is whether the repossession of the truck by Fageol on February 20, 1933, terminated any right it may have had to recover any of the insurance called for by the policy taken out by Thomas with Detroit. If it did, then necessarily Fageol's loss is collectible only under the VSI endorsement to the policy it took out with Pacific. It is our conclusion that the contentions made by Detroit in this behalf are fully supported by the authorities and the facts.

[1-4] It is held generally that in the absence of agreement as to the matter of insurance, neither the vendor nor the vendee has any interest in the insurance procured by the other; and although it is frequently said that the property is insured, the fact is that an insurance policy is not insurance of the specific thing without regard to ownership, but is a special agreement of indemnity with the person insuring against such loss or damage as he may sustain; and therefore, in the absence of agreement the insurance is not a substitute for the property and the policy does not pass with title thereto. Alexander v. Security First Nat. Bank, 7 Cal.2d 718, 62 P.2d 735. Furthermore, it is held that under an "open" or "loss payable" clause, as distinguished from a "union" or "standard" clause the party named in the clause does not become an "insured" under the policy; he is simply an appointee of the fund (Holbrook v. Baloise Fire Ins. Co., 117 Cal. 561, 49 P. 555; Hayward Lumber, etc., Co. v. Lyders, 139 Cal.App. 517, 34 P.2d 805), and the policy is regarded merely as additional security for the payment of the obligation outstanding between the insured and the party named in the loss payable clause. Reynolds v. London, etc., Ins. Co., 128 Cal. 16, 60 P. 467, 79 Am.St.Rep. 17; 124 A.L.R. 1034, note. And the law is well settled that the right of an obligee to resort to additional security depends necessarily on his right to sue and recover upon the debt; and that where a breach occurs and the obligee is given the option of terminating the con-

tract by taking or repossessing the property, or of suing upon the debt, and he elects to terminate the contract, he not only loses his right to sue for the debt, but by terminating his contract he loses his right to resort to the collateral given as additional security for the payment of the debt. Reynolds v. London, etc., Ins. Co., supra; Murphy v. Hellman Commercial, etc., Bank, 43 Cal. App. 579, 185 P. 485; Frankel v. Rosenfield, 95 Cal.App. 647, 273 P. 122.

[5] In the present case Thomas was not required by the conditional sales contract to take out collision or upset insurance, but he did so for his own protection; and he alone was named in the policy as the insured; the only interest Fageol acquired in that policy or to the proceeds payable thereunder was by reason of the "loss payable" endorsement. Therefore as to Fageol the policy served merely as additional security for the payment of the debt due from Thomas under the conditional sales contract; and Fageol concedes that long before the commencement of this action, exercising the option granted by the conditional sales contract, it elected to extinguish the debt and repossess the truck. In this regard the notice it served on Thomas stated: "* * * we are repossessing the above mentioned truck, and are cancelling the balance owing us by you on said contract." And subsequently Fageol resold the truck as its own. Therefore, under the authorities cited, by extinguishing the debt, Fageol likewise extinguished its right to resort to the collateral given as additional security for the payment of the debt.

[6] In support of its contention that repossession of the truck did not terminate its right to collect under the Detroit policy, Fageol relies principally upon the case of Brown v. Northwestern Mutual Fire Ass'n, 176 Wash. 693, 30 P.2d 640. But factually that case is essentially different from the present one, mainly for the reason that it was not founded on a simple type of "loss payable" clause such as we have here attached by way of rider. That case involved the proceeds of a fire insurance policy which the vendees were required to take out for the benefit of the vendors under a conditional sales contract for the sale of real property; and the clause in question was couched in such language that when considered in the light of the peculiar facts of that case the court was warranted in holding as it did that the vendors "were just as much insured" under the policy as the vendees; hence that the vendors were entitled to the benefits of the policy. As shown by earlier decisions, however, notably Inland Finance Co. v. Home Ins. Co., 134 Wash. 485, 236 P. 73, 48 A.L.R. 121, the state of Washington fully recognizes and adheres to the doctrine prevailing in practically all jurisdictions (see note 124 A.L.R. 1034) that under a simple "loss payable" rider such as we have here the creditor named therein is not deemed to be the "insured" under the policy, but becomes merely an appointee of the fund and is entitled to the proceeds of the policy only as his interest may appear. There is nothing to be found in the decision in Brown v. Northwestern Mutual Fire Ass'n., supra, indicating an intention to repudiate the above universal doctrine.

[7] It is further contended that the doctrine declaring that insurance proceeds payable under a simple "loss payable" rider shall be considered merely as additional security for the payment of debt applies only in cases of mortgages, because there the relationship of debtor and creditor exists; and in support of such contention Fageol quotes Washington cases to the effect that conditional sales contracts "do not create a lien as security for the payment of a debt, nor do they ordinarily create the relationship of debtor and creditor between the contracting parties"; that "title remains in the vendor or passes from him to the vendee accordingly as the conditions of the sale contract are broken or fulfilled * * *." Barbour v. Hodge, 99 Wash. 578, 170 P. 115, 119; Holt Mfg. Co. v. Jassaud, 132 Wash. 667, 233 P. 35, 38 A.L.R. 1312; Lahn & Simons v. Matzen Woolen Mills, 147 Wash. 560, 266 P. 697. But no authority has been cited from any jurisdiction which holds that the additional security doctrine governing in the case of mortgages does not apply to conditional sales contracts, nor have any sound reasons been advanced why said doctrine should not apply alike to both. Manifestly in both situations there is an existing debt which in the case of a mortgage the mortgagor agrees to pay and in the case of a conditional sales contract the vendee agrees to pay, either by the terms of the instrument itself or by a separate writing. It is true that in a conditional sale "title" does not pass but is retained by the seller as a security, while in the case of a mortgage "title" passes and the seller retains only a "lien" as security. But, funda-

mentally, in both transactions security for the indebtedness is the important feature of the transaction. The economic function of the two types of instruments is identical. Under such circumstances important rights and duties of the parties should not be made to depend on the mere form of the transaction. In Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 657, 20 P.2d 940, 945, the court in discussing deeds of trust and mortgages, after pointing out that under a deed of trust "title" passes to the trustee, while in a mortgage only a "lien" is created, stated: "Considering all these cases, we do not feel justified in holding, merely because 'title' passes by a deed of trust, while only a 'lien' is created by a mortgage, that, in reference to the necessity of exhausting the security before enforcing the obligation secured, deeds of trust and mortgages are so different that in one case the security must be exhausted before suit on the personal obligation, while, in the other, no such necessity exists. Fundamentally, it cannot be doubted that in both situations the security for an indebtedness is the important and essential thing in the whole transaction. The economic function of the two instruments would seem to be identical. Where there is one and the same object to be accomplished, important rights and duties of the parties should not be made to depend on the more or less accidental form of the security." For the same reasons there is ample justification for holding that the doctrine that insurance proceeds payable under a simple "loss payable" rider shall be considered as additional security for the payment of the debt should apply whether the transaction is in the form of a mortgage or conditional sale.

[8] In view of the conclusion reached on the vital issue above discussed, it is unnecessary to inquire into the remaining points raised by the respective appeals, except the one urged by Pacific in furtherance of its appeal, to the effect that the repossession of the truck by Fageol was unlawful, and that therefore there can be no recovery against Pacific. In this connection it is conceded that Fageol actually repossessed the truck and afterwards sold it as its own property; but Pacific asserts that the extension of time granted by Fageol to Thomas to make the $500 payment operated to extend also the time to pay the installment upon which the repossession purports to have been based. Assuming that Pacific is in a position to raise this point, the record shows that it is without merit. It clearly appears therefrom that except as to the $500 payment Fageol at all times insisted upon prompt payment, and did nothing to lull Thomas into the belief that prompt performance would not be insisted upon. In fact there is no evidence in the record that Thomas ever believed that plaintiff would not require prompt performance.

[9] For the reasons hereinabove set forth, it is ordered that the judgment be reversed with directions to the trial court to revise its conclusions of law to conform to the views hereinabove expressed; that thereupon judgment be entered in favor of the defendant Detroit Fire and Marine Insurance Company, and an unconditional judgment be entered against the Pacific Indemnity Company in favor of Fageol Truck & Coach Co. for the full amount of the collision loss sustained by it. It is further ordered that on appeal No. 10969 Detroit Fire and Marine Insurance Company recover its costs against Fageol Truck & Coach Co., and that on appeal No. 10976, 110 P.2d 1090, Fageol Truck & Coach Co. recover its costs against Pacific Indemnity Company.

We concur: PETERS, P. J.; WARD, J.



FAGEOL TRUCK & COACH CO. v. PACIFIC INDEMNITY CO. et al.*

Civ. 10976.

District Court of Appeal, First District, Division 1, California.

March 5, 1941.

Hearing Granted May 3, 1941.

Insurance ⇐504

Where seller by repossessing truck sold under conditional sales contract had lost right to recover on collision insurance policy in which his only interest accrued under simple "loss payable" rider, seller's right to recover under "single interest collision coverage endorsement" attached to policy issued by different company, and which named seller alone as insured, was not barred by policy bearing loss payable rider, notwithstanding provision of "single interest

* Subsequent opinion 117 P.2d 669.

endorsement" that it constituted "excess insurance" and requiring that "specific insurance" in the name of or for benefit of insured must be first exhausted before resort could be had to the "excess insurance" policy.

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Action by Fageol Truck & Coach Company against the Pacific Indemnity Company and others to recover a collision loss claimed to be due under two policies of insurance issued, respectively, by the named defendant and another insurance company and covering a truck sold by plaintiff under conditional sales contract to third person. From a judgment for plaintiff against each defendant separately for full amount of the loss, the named defendant appeals.

Judgment reversed and remanded, with directions.

Bronson, Bronson & McKinnon and Kirke LaShelle, all of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

KNIGHT, Justice.

This is a companion appeal to Fageol Truck & Coach Co. (a corporation), Plaintiff and Respondent, v. Pacific Indemnity Company (a corporation), and Detroit Fire and Marine Insurance Company (a corporation), Defendants, Detroit Fire and Marine Insurance Company (a corporation), Appellant, 110 P.2d 1085, this day decided. For the reasons and upon the grounds stated in the opinion filed therein it is ordered that the judgment be reversed with directions to the trial court to revise its conclusions of law to conform to the views expressed in said opinion; that thereupon judgment be entered in favor of the defendant Detroit Fire and Marine Insurance Company, and an unconditional judgment be entered against the Pacific Indemnity Company in favor of Fageol Truck & Coach Co. for the full amount of the collision loss sustained by it. It is further ordered that on the present appeal Fageol Truck & Coach Co. recover its costs against Pacific Indemnity Company.

We concur: PETERS, P. J.; WARD, J.

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FERGUSON v. NAKAHARA et al.

CUSACK v. NAKAHARA et al.

Civ. 2548, 2549.

District Court of Appeal, Fourth District, California.

March 12, 1941.

1. Appeal and error ⇐996, 1002

In determining appellants' contention that jury's verdicts are contrary to evidence and that contributory negligence, barring respondents' recovery for personal injuries, property damage and wrongful death, appears as matter of law, evidence must be reviewed under rule that if there is any real and substantial conflict in evidence or reasonable inferences therefrom, appellate court will not set aside jury's fact findings.

2. Automobiles ⇐245(79)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, questions whether it was practical and safe for decedent to drive automobile into and along center lane of highway and whether such lane was clearly visible ahead of him and clear of traffic for safe distance were fact issues, on which reasonable men might differ, so that question of decedent's contributory negligence was for jury. Vehicle Code, § 526, St.1935, p. 181.

3. Automobiles ⇐245(15)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, whether defendant truck driver pulled truck sharply to left into center lane of highway behind another truck and directly in front of approaching automobile and should have returned to right lane behind such other truck and thereby avoided collision were fact issues, on which reasonable men might differ, so that question of truck driver's negligence was for jury. Vehicle Code, § 526, St.1935, p. 181.

4. Automobiles ⇐226(2)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, decedent's negligence, if believed by jurors, was only one element of contributory negligence and of no significance unless they also believed from preponderance of evidence that such negligence proximately caused or contributed to injuries and death.

5. Negligence ⇐136(9)

When evidence on question of contributory negligence is conflicting and reasonable men might differ as to proper inferences or conclusions therefrom, issue as to whether such negligence was proximate cause of injuries complained of is for jury to determine.

6. Trial ⇐237(3)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, instruction that if jury found that greater weight of all evidence was in favor of contributory negligence as proved fact, or if evidence on issues was evenly balanced or preponderated against such negligence, it was not proved, and jury should find that plaintiff was not guilty of contributory negligence, was erroneous as imposing on defendants impossibility of proving contributory negligence, except possibly by criminal rule of beyond reasonable doubt and to moral certainty. Code Civ.Proc. § 2061.

7. Negligence ⇐135

A party having affirmative of issue of contributory negligence in civil action is not required to prove such negligence beyond reasonable doubt and to moral certainty. Code Civ.Proc. § 2061.

8. Trial ⇐296(8)

In determining whether jury may have been misled by erroneous instruction as to evidence required to prove contributory negligence, it must be construed in connection with other instructions on subjects of burden of proof and weight of evidence.

9. Trial ⇐295(1)

All instructions of trial court must be considered and construed as a whole to determine whether they contain reversible error.

10. Trial ⇐296(1)

The omission of essential element of cause in single instruction, correctly declaring law so far as it goes, is ordinarily cured by correctly giving such element in another instruction.

11. Trial ⇐296(1)

Prejudicial error in instruction, containing materially incorrect statement of essential principle of law, is not ordinarily cured by correct declaration of same principle in another instruction.

12. Appeal and error ⇐1064(1)

The giving of instructions which are contradictory in essential elements may warrant reversal of judgment on jury's verdict because it is impossible to determine which charge controlled jury's determination.

13. Appeal and error ⇐1064(1)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, the giving of erroneous instruction that if greater weight of evidence was in favor of contributory negligence as proved fact or evidence on issues was evenly balanced or preponderated against such negligence, it was not proved, and jury should find that plaintiff was not guilty of contributory negligence, *held* prejudicial error as in direct conflict with other more general and correct instructions on burden of proof and weight of evidence.

14. Automobiles ⇐246(25)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, defendants, relying on provisions of statute governing operation of vehicles on three-lane highways to establish defense of decedent's contributory negligence in driving in center lane of highway, were entitled to instruction that violation of such statute constituted negligence as matter of law, not merely that such violation constituted some evidence of negligence. Vehicle Code, § 526, St.1935, p. 181.

15. Automobiles ⇐147

The violation of a section of Vehicle Code generally constitutes negligence as matter of law, not merely some evidence of negligence. Vehicle Code, § 1 et seq., St.1935, p. 93 et seq.

16. Trial ⇐296(4)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, error in giving instruction that violation of any provision of Motor Vehicle Code constitutes some evidence of negligence, instead of instruction that such violation constitutes negligence as matter of law, was not corrected by giving of instruction that such owner and decedent were guilty of contributory negligence barring recovery, if decedent failed to use care of reasonably prudent person in not keeping appropriate lookout or not operating and controlling automobile with ordinary care.

17. Appeal and error ⇐1064(1)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, giving of erroneous instruction that violation of any provision of Motor Vehicle

Code constitutes some evidence of negligence, instead of instruction that such violation constitutes negligence as matter of law, in connection with instruction quoting provisions of code section governing operation of vehicles on three-lane highways, was prejudicial to defendants as permitting jurors to exercise their independent judgments as to whether decedent's violation of such section constituted negligence imputable to plaintiffs. Vehicle Code, § 526, St.1935, p. 181.

18. Appeal and error ⇐1064(1)

In actions for injuries to owner, and death of driver, of automobile colliding with truck, where evidence was not only conflicting, but quite evenly balanced on issues of defendants' negligence and contributory negligence of plaintiff owner and decedent, giving of erroneous instructions on such issues was prejudicial to defendants, so as to require reversal of judgments on verdicts for plaintiffs.

Appeals from Superior Court, Kern County; W. L. Bradshaw, Judge.

Two actions, consolidated for trial, by F. C. Ferguson and Lettie Cusack, respectively, against George Nakahara and others for personal injuries to plaintiff Ferguson, damage to his automobile, and wrongful death of plaintiff Cusack's husband, William Cusack. Judgments for plaintiffs, and defendants appeal.

Reversed and remanded for new trial.

Borton, Petrini, Conron & Borton, of Bakersfield, for appellants.

Brittan & Mack, of Bakersfield, for respondents.

MORAN, Justice pro tem.

Defendants have appealed from judgments rendered against them in these two actions, consolidated for trial and now considered together on appeal as they present identical issues.

Both actions arise out of a collision between a Ford sedan driven by William Cusack and owned by F. C. Ferguson who was riding therein at the time, and a GMC truck driven by George Nakahara and owned by Harry Nagai Produce Company. Ferguson was injured and his Ford damaged. William Cusack was killed.

Ferguson filed suit against the driver and the owner of the truck to recover damages for alleged personal injuries sustained and damage suffered to his automobile.

Lettie Cusack, the widow of William Cusack, instituted the second action to recover damages for the alleged wrongful death of her husband. The two cases were tried together before a jury and resulted in verdicts in favor of both plaintiffs.

[1] The first of three grounds relied upon by appellants for a reversal of the judgments is that the verdicts are contrary to the evidence and that contributory negligence appears as a matter of law without substantial conflict in the evidence. In determining this contention of appellants it is necessary that we review the evidence under the rule that if there is any real and substantial conflict in the evidence or reasonable inferences that may be drawn therefrom, the appellate court will not set aside the findings of fact made by the jury in the lower court.

Viewing the evidence most favorable to the respondents the following facts appear: The collision of the Ford and the GMC truck occurred at about 9:30 p. m., June 26, 1938, in the center lane of U. S. highway No. 99, about a mile north of Lebec, in the county of Kern. The paved portion of the highway at that point, and for some distance on either side thereof, was straight and extended in a northerly and southerly direction. The pavement was thirty feet in width and marked with white lines into three traffic lanes, each ten feet in width, with an asphalt shoulder eight feet in width on each side.

The deceased, William Cusack, was driving the Ford sedan in a northerly direction at a speed of from forty-five to fifty miles an hour. He passed a vehicle driven by Glenn Burd, proceeding in the same direction, and then returned to the east traffic lane behind an unidentified vehicle which was also traveling north in the easterly lane. Cusack next drove the Ford to his left and partially within the center lane so that its left wheels were about two feet west of the white line dividing the east and center traffic lanes. The Ford continued in this position, following the unidentified vehicle, without any alteration of its course or change of speed until shortly before the collision of the Ford with the GMC truck, when it was turned back slightly to the east.

As the Ford was proceeding north, defendant Nakahara was driving the GMC

truck in a southerly direction behind a one and one-half ton Reo Speedwagon which was being driven by August Gnese and was loaded with boxes of figs weighing between four and five tons and stacked to a height of eight feet from the ground. A semi-truck and trailer was directly in front of the Reo and was proceeding in the same direction. Gnese blinked the lights of the Reo and the driver of the semi-truck and trailer then blinked its lights as a signal that the Reo might pass. Gnese then drove into the center lane of traffic to pass the semi-truck and trailer and seeing the Ford sedan approaching from the south at a distance of two hundred fifty feet, "or probably farther", applied his brakes and immediately turned to his right; the driver of the semi-truck and trailer pulled his truck slightly to his right and Gnese drove back into the west lane behind the semi-truck and trailer. Nakahara, traveling about fifty feet behind the Reo and at a speed of about twenty-five miles an hour, and gaining on the Reo, when about one hundred feet north of the point of collision, pulled the GMC truck into the middle lane behind the Reo, which obstructed his view of northbound traffic, and, as the Reo slowed down and turned into the west traffic lane, Nakahara, then twenty-five feet back of it and without applying his brakes, attempted to go around the Reo to its left. The collision of the Ford and the GMC truck immediately followed, the left front fender and wheel of the Ford coming into contact with the left front corner of the bed of the GMC truck, at a point about fourteen inches west of the white line dividing the east and center traffic lanes. The Ford was badly damaged and William Cusack and Carl Cross, who was also riding in the Ford, were killed, and the plaintiff Ferguson, who was asleep at the time, was seriously injured.

The eyewitnesses to the collision were Burd, Gnese and Nakahara. Burd and Gnese testified at the trial, but as Nakahara was not present, his deposition, previously taken, was read into the evidence. The testimony of these witnesses was conflicting in many respects with the testimony of the others and the testimony of each of them contains conflicting and contradictory statements within itself. As it would serve no useful purpose and would unduly extend the length of this decision, we will not discuss these conflicts.

It is admitted by the parties that any negligence or contributory negligence on the part of Cusack would be imputed to Ferguson and to Mrs. Cusack.

Appellants contend that Cusack violated the provisions of subdivision a of section 526 of the Vehicle Code, St.1935, p. 181, by driving the Ford partially within both the east and center lanes of travel when it was not safe for him to do so and at a time when there were no other vehicles to his right in the easterly lane; that he also violated the provisions of subdivision b of this section by driving the Ford into the center lane in overtaking and passing another vehicle where the roadway ahead was clearly visible but the center lane was not clear of traffic within a safe distance, and that these acts on his part constituted negligence as a matter of law, citing the cases of Reeves v. La Pinta, 25 Cal.App.2d 680, 78 P.2d 465, and Mazgedian v. Swift & Co., 22 Cal.App.2d 570, 71 P.2d 833.

Section 526 of the Vehicle Code, in effect at the time of the accident, governing the driving of vehicles upon a three-lane highway, provided:

"Whenever any roadway has been divided into three or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

"(a) A vehicle shall be driven as nearly as practical (practicable) entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

"(b) Upon a roadway which is divided into three lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway ahead is clearly visible and such center lane is clear of traffic within a safe distance, * * *."

[2, 3] The members of the jury may have believed from the evidence that Cusack drove the Ford into the center lane at a distance of more than two hundred and fifty feet south of the Reo, with the intention of passing the unidentified vehicle proceeding north in the east lane ahead of him, at about the same time the Reo entered it, or that Gnese started to drive the Reo back into the west lane at the same time, or at approximately the same time that Cusack entered the center lane, thereby conceding the right-of-way to him, and that Nakahara turned the GMC truck sharply to his left into the center lane directly in front of the Ford, to avoid a collision with the

rear end of the Reo which had slowed down and turned to its right, and that Cusack could not have seen and had no way of knowing that the GMC truck was following the Reo so closely, until almost the moment the collision occurred.

The questions as to whether it was practical and safe for Cusack to drive the Ford into the center lane and then pursue the line of travel that he followed; whether the center lane was clearly visible ahead of him and clear of traffic for a safe distance, and whether Nakahara pulled his truck sharply to his left into the center lane back of the Reo and directly in front of the Ford, or whether he should have returned to the west lane of travel behind the Reo and thereby have avoided the collision, were all of fact for the jury, and, we believe, were issues of facts on which reasonable men might differ.

[4, 5] Furthermore, if the members of the jury believed that Cusack was negligent in the operation of the Ford, such negligence was only one element of contributory negligence and was of no significance in these cases unless the members of the jury also believed, from a preponderance of the evidence, that such negligence proximately caused or proximately contributed to the injuries of Ferguson and the death of Cusack. When the evidence is conflicting and reasonable men might differ as to the inferences or conclusions which ought to be drawn from it, the issue of proximate cause is also one for the jury to determine. Ketchum v. Pattee, 37 Cal.App.2d 122, 98 P.2d 1051; Rivera v. Hasenjaeger, 29 Cal. App.2d 431, 432, 85 P.2d 167.

As we have heretofore indicated, the question of negligence on the part of the defendant Nakahara, and the question of contributory negligence on the part of Cusack, were matters for the determination of the jury and were properly submitted to it.

[6-8] The second contention of appellants is that the court erred in giving an instruction offered by plaintiffs, purporting to deal with the burden of proof upon the issues of negligence and contributory negligence. The instruction complained of appears in the last sentence of the following instruction given by the court: "In determining the issue of negligence and of contributory negligence the court instructs you that the burden of proving negligence is upon the party asserting such negligence; but in determining whether there has been such negligence you will consider all of the evidence bearing upon that subject regardless of which party introduced the same. That is to say, if you find the greater weight of all the evidence is in favor of the negligence of the defendants, you should accept that as a proved fact in the case; while of the evidence on that issue is, in your judgment, evenly balanced or preponderates against such negligence, it is not proved, and you should find that the defendants were not negligent. *If you find that the greater weight of all the evidence is in favor of the contributory negligence as a proved fact, or if the evidence on the issues, is, in your judgment, evenly balanced, or preponderates against such contributory negligence it is not proved, and you should find that the plaintiff was not guilty of contributory negligence.*" (Emphasis ours.)

The last sentence of this instruction, specifically referring to contributory negligence, most obviously, was bungled, in that it instructed the jurors that if they should find that the greater weight of all the evidence was in favor of the contributory negligence as a proved fact, then, notwithstanding that weight of the evidence they must find that the plaintiff was not guilty of contributory negligence.

Standing alone, this erroneous instruction imposed upon the appellants the impossibility of ever proving contributory negligence, except possibly by the criminal rule of beyond reasonable doubt and to a moral certainty, which would place upon them an undue burden that is not required of a party having the affirmative of such issue in a civil action. Sec. 2061, Code Civ. Proc.; Cooper v. Spring Valley Water Co., 16 Cal.App. 17, 116 P. 298; Berry v. Maywood Mutual Water Co., 11 Cal.App.2d 479, 53 P.2d 1032. In determining whether the jury may have been misled by this erroneous instruction, it must be construed in connection with the other instructions given by the court, touching upon the subjects of burden of proof and weight of the evidence. In the first instruction given in regard thereto, the court defined burden of proof in general terms correctly, but did not direct the jury's attention to the subjects of negligence and contributory negligence. Then, after giving the instruction above quoted, the court defined proximate cause and next advised the jury as follows: "In order, therefore, to find a verdict for the plaintiff, you must not only find from a preponder-

ance of all the evidence that the defendants were negligent, but also that such negligence was the proximate cause of the injury to the plaintiff, and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence contributing proximately thereto." In another instruction the court stated: "You are instructed that contributory negligence as used in these instructions is such negligence on the part of the plaintiffs as contributed to the accident complained of. If the deceased William Cusack failed to use the care of a reasonably prudent person under the same or similar circumstances, either in driving too fast or in not seeing the things of the traffic that he should have seen, or failed to operate and control his automobile with ordinary care, then the plaintiffs Lettie Cusack and F. C. Ferguson are guilty of contributory negligence, and if such negligence contributed even in the slightest degree to the injuries complained of plaintiffs cannot recover in this action."

[9-12] All instructions of the court are to be considered and construed as a whole to determine whether they contain reversible error. "If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury." Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675, 678. See, also, Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143.

[13] It is evident from a reading and consideration of all the instructions given by the court in these cases that the erroneous instruction is in direct conflict with the other more general and correct instructions upon the subjects of burden of proof and weight of the evidence, especially those referring to contributory negligence, and we are convinced that this conflict cannot be disregarded as it may have had a controlling influence upon the minds of the jurors.

[14, 15] Appellants also contend that the court committed prejudicial error in instructing the jury, at the request of respondents, that: "The violation of any provision of the Motor Vehicle Code, except as you are otherwise instructed in these instructions, also constitutes some evidence of negligence."

Respondents offered an instruction quoting the provisions of section 526 of the Vehicle Code, and another quoting section 531 of the same code. Both of these instructions were given by the court, but neither of them nor any other instruction given, contained a statement that a violation of these sections, or either of them, constituted negligence as a matter of law.

Appellants relied upon the provisions of section 526 of the Vehicle Code to establish their defense of contributory negligence, and even though the provisions of that section applied alike to them and to respondents, they were entitled to an instruction that a violation thereof constituted negligence as a matter of law, rather than that such a violation was merely some evidence of negligence. It has long been established that the violation of a section of the Vehicle Code St.1935, p. 93, (with a few express exceptions not applicable here) constitutes negligence as a matter of law and not merely some evidence of negligence. Reeves v. La Pinta, supra; Mazgedian v. Swift & Co., supra.

[16, 17] Although the court further instructed the jury that if William Cusack failed to use the care of a reasonably prudent person in not keeping an appropriate lookout or in not operating and controlling his car with ordinary care, then the plaintiffs were guilty of contributory negligence and if such negligence contributed to their injuries they could not recover, did not correct the error created by the giving of the faulty instruction. The effect of the giving of this erroneous instruction in connection with the instruction quoting the provisions of section 526 of the Vehicle Code, was to permit the jurors to exercise their independent judgments as to whether or not a violation of this section, if they found that Cusack violated any of the provisions thereof, constituted negligence on his part, imputable to respondents, when appellants were entitled to a specific and definite instruction that a violation of the section constituted negligence as a matter of law, without any further proof.

[18] The evidence in these cases was not only conflicting but was quite evenly balanced upon the issues of negligence and contributory negligence. Appellants were entitled to have had the cases presented on correct and proper instructions. The giving of the two erroneous instructions must be held to have been prejudicial.

The judgments are reversed and both causes are remanded for new trial.

We concur: BARNARD, P. J.; MARKS, J.



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SILVER SWAN LIQUOR CORPORATION v. ADAMS.

No. 1392.

Appellate Department, Superior Court, City and County of San Francisco, California.

Feb. 5, 1941.

1. Automobiles ⇐235
Infants ⇐89

A nonresident minor motorist, on whom personal service was made in Canada by duly qualified officer, was properly served with process under provision in Vehicle Code relating to service of process on nonresident motorist. Vehicle Code, § 404, St. 1935, p. 154; Civ.Code, § 33.

2. Automobiles ⇐235
Infants ⇐89

The statutory designation of Director of Motor Vehicles as attorney upon whom process may be served in action against nonresident motorist is binding on minor nonresident motorist using highways of state, notwithstanding the general rule that delegation of power attempted by minor himself is void. Vehicle Code, § 404, St.1935, p. 154; Civ.Code, § 33.

Action by the Silver Swan Liquor Corporation against John R. Adams, for damages allegedly sustained by the plaintiff as result of the negligent operation of an automobile by the defendant. From an order granting defendants motion to quash service of process on the defendant, the plaintiff appeals.

Order reversed.

Shipper & Benard, of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, for respondent.

McWILLIAMS, Judge.

Plaintiff and appellant filed suit against defendant for damages alleged to have been sustained by plaintiff as a result of the negligent operation by defendant of an automobile which he was driving. As counsel for respondent correctly states: "The sole question before this court is whether or not service can be effected under Sec. 404 of the California Vehicle Code, St. 1935, p. 154, where the defendant, a non-resident of California, was (1) a minor at the time of the collision, and (2) without the United States at the time service was attempted."

The requirements of that section of the Vehicle Code appear to have been fully complied with by personal service on the defendant at Quebec, Canada, by a fully qualified officer. Nevertheless, defendant's motion to quash upon the ground that the service made did not comply with Section 404(e) of the Code was granted by the lower court.

[1, 2] Respondent urges in support of the ruling of that court that the service having been made outside the territorial boundaries of the United States was void. In support of this position defendant's counsel cite the New York case of Scott v. Dickerson, 169 Misc. 1047, 8 N.Y.S.2d 656, 657. That case obviously is not in point. The statute there involved provided for service on the nonresident by an attorney "qualified to practice in the state" where such service was made. Hence the New York court held in effect that by clear implication service in a foreign jurisdiction was not authorized under the language of the statute. Our Vehicle Code provides, it will be noted, for service "in the State or jurisdiction where the defendant is found."

Respondent also contends in support of the ruling of the lower court that service on a nonresident motorist under the section involved is invalid when the defendant is a minor. In support of this contention respondent cites Section 33 of the California

Civil Code. That section provides that a minor cannot give a delegation of power. In answer to respondent's contention appellant cites the New York case of Gesell v. Wells, 229 App.Div. 11, 240 N.Y.S. 628, 631 which was affirmed by the Court of Appeals, 254 N.Y. 604, 173 N.E. 885. The New York Supreme Court held that the provision for service on a nonresident was enacted under the police power of the state and that the provision was one reasonably calculated to promote care and accountability on the part of all who used the highways of that state for the operation of dangerous machines, such as motor vehicles. As the court further said:

"Surely they are not less dangerous in the hands of minors. It is inconceivable that there should have been any legislative intent to exclude minors. But it is urged that the statute in question is based upon an implied agreement which, in the case of an infant, may be repudiated at his election. It would be strange if a police regulation of the state could be thus evaded."

Respondent attempts to distinguish this case on the ground that in New York a minor's delegation of power is voidable, whereas in California it is void. It is true that such is the general rule in this state when the minor himself attempts to delegate power as by the appointment of an attorney in fact. But the situation here presented does not involve a voluntary appointment by a minor. The law has made the appointment and the defendant by using the highways of the state has, under the express terms of Sub. (b) of Sec. 404 of the Vehicle Code, signified his acquiescence in such appointment. Surely the minor may not thereafter be permitted to deny the validity of the appointment. It would be as reasonable to contend that when a court appointed a guardian ad litem for a minor when he was sued the minor could thereafter repudiate the appointment.

The order of the lower court is reversed.

We concur: GRIFFIN, P. J.; FOLEY, J.



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